



[2018] JMSC Crim.1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCC 125/15

BETWEEN THE ASSETS RECOVERY AGENCY APPLICANT
AND RALPH GREGG DEFENDANT

IN OPEN COURT

Miss Alethia Whyte for the Applicant

Mr. Ewan Thompson for the Defendant

HEARD: 28th and 30th June 2017 and 28th February, 2018

Application for Pecuniary Penalty Order – The Proceeds of Crime Act – Sections 5, 6, 7, 8 and 11

COR: V. HARRIS, J

Introduction and Background

[1] This is an application by the Assets Recovery Agency ('ARA') for a pecuniary penalty order ('PPO') to be made against the defendant Mr. Ralph Gregg in accordance with section 5 of the Proceeds of Crime Act ('POCA').

[2] Mr. Gregg is a Jamaican national and a Canadian citizen. He has been residing in Canada since 1992. However, he maintains familial ties, as well as, real and personal properties in Jamaica. It appears from the evidence presented that he

visits the Island from time to time, especially during, what he describes as, the “winter months” for short periods of time.

- [3] He was convicted in the then Resident Magistrate’s Court for the parish of Westmoreland (now Westmoreland Parish Court) on the 23rd of April 2013 for the offences of possession of and dealing in cocaine. Following his conviction the ARA was successful in its application for a committal order under section 52 of POCA. As a result, Mr. Gregg was committed to the Circuit Court for the parish of Westmoreland on the 2nd of September 2013. On the 12th of June 2014 my learned brother D. Fraser J who was presiding in that court transferred the matter to the Home Circuit Court in the parish of Kingston.
- [4] The matter came before me on the 28th of June 2017 and was heard over two days (28th and 30th of June 2017). All written submissions from the parties were finally in on the 13th of October 2017. Given the nature of the matter, I took time to consider.

The Legislative Framework

- [5] The court is empowered by section 5 of POCA to grant a PPO. Section 5 of POCA provides in part:

“5. - (1) Subject to section (9), the Court shall upon the application of the Agency or the Director of Public Prosecutions, act in accordance with subsection (2) if the Court is satisfied that a defendant is –

(a) convicted of any offence in proceedings before the Court; or

(b) committed to the Court pursuant to section 52 (committal from Resident Magistrate’s Court with a view to making forfeiture order or pecuniary penalty order).

(2) The Court shall

(a) determine whether or not the defendant has a criminal lifestyle and has benefitted from his general criminal conduct;

(b) if the Court determines that the defendant does not have a criminal lifestyle, determine whether or not the defendant has benefitted from his particular criminal conduct; and

(c) identify any property used in or in connection with the offence concerned and make an order that that property be forfeited to the Crown.

(3) Where pursuant to subsection (2) the Court determines that the defendant has benefitted from criminal conduct, the Court shall identify the property that represents the defendant's benefit from criminal conduct, and

(a) make an order that the property be forfeited to the Crown; or

(b) order the defendant to pay to the Crown an amount (hereinafter referred to as the recoverable amount) equal to the value of his benefits, assessed in accordance with the provisions of this section and sections 6, 7, 8 and 11."

[6] "Recoverable amount" is defined in section 2 of POCA as the amount payable under a PPO. Simply put this is the value of the benefits that a defendant derives directly or indirectly from his/her general criminal conduct.

[7] Section 5(7) of POCA instructs that the court in making the relevant determination under sections 5(2)(a) and 5(3) shall do so on a balance of probabilities.

[8] Section 6(1) sets out the criteria that the court must utilise to determine the question whether a defendant has a criminal lifestyle. This provision states:

"6. – (1) A defendant shall be regarded as having a criminal lifestyle if the offence concerned –

(a) is specified in the Second Schedule;

(b) constitutes conduct forming part of a course of criminal activity, from which the defendant obtains a benefit; or

(c) is committed over a period of at least one month and the defendant has benefitted from the conduct which constitutes the offence."

"Offence concerned" is the offence that the defendant has been convicted of.

[9] Where it is found that a defendant has a criminal lifestyle, section 8 of POCA sets out a number of assumptions that the court is entitled to make to answer the

question whether that defendant has benefitted from his general criminal conduct. The relevant provisions are:

“8. – (1) Subject to subsection (3) where the Court determines under section 5 that a defendant has a criminal lifestyle, the Court shall make the assumptions listed in subsection (2) for the purpose of –

(a) determining whether the defendant has benefitted from his general criminal conduct; and

(b) identifying his benefit from that conduct.

(2) The assumptions referred to in subsection (1) are that –

(a) any property transferred to the defendant at any time after the relevant day was obtained by him –

(i) as a result of his general criminal conduct; and

(ii) at the earliest time from which the defendant appears to have held it;

(b) any property held by the defendant at any time after the date of conviction was obtained by him-

(i) as a result of his general criminal conduct; and

(ii) at the earliest time from which the defendant appears to have held it;

(c) any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct; and

(d) for the purpose of valuing any property obtained, or assumed to have been obtained, by the defendant, he obtained the property free of any other interests in it.”

[10] However, section 8(3) provides that the court shall not apply these assumptions where “the assumption is shown to be incorrect or there would be a serious risk of injustice if the assumption were made.”

[11] Where there has been no previous forfeiture order or PPO made against a defendant in relation to benefit from general conduct section 8(5) defines the “relevant day” as the first day of the period of ten years ending with the day when proceedings for the offence concerned were started against a defendant or if

there are two or more offences and proceedings were started on different days, the earliest of those days.

[12] However, section 2(10) of POCA places a restriction on how far back the relevant day can go. That section states:

“(10) Nothing in section 5 (making of order), 6 (criminal lifestyle), 7 (conduct and benefit), 8 (assumptions for determining benefit from general criminal conduct), 9 (effect of forfeiture order), 10 (voidable transfers), 20 (reconsiderations of case where no order is made), 21(reconsideration of benefit where no order was made), 22 (reconsideration of benefit after order is made) or 30 (court’s power on appeal) refers to conduct occurring, offences committed or property transferred or obtained, before the 30th May, 2007.”

[13] Section 7 makes provision for benefit that is obtained from criminal conduct:

“7. – (1) A person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct.

(2) For the purpose of making a pecuniary penalty order, a person who obtains a non-pecuniary advantage as a result of or in connection with conduct shall be deemed to have obtained as a result of or in connection with conduct, a sum of money equal to the value of the non-pecuniary advantage.

(3) References to property or non-pecuniary advantage obtained in connection with conduct include references to property or a non-pecuniary advantage obtained both in that and some other connection.

(4) If a person benefits from conduct, his benefit is –

(a) for the purposes of making a forfeiture order, the property obtained as a result of or in connection with the conduct;

(b) for the purposes of making a pecuniary penalty order, the value of the benefit obtained as a result of or in connection with the conduct.”

[14] Benefit, as defined by section 2, includes “any property, service or advantage.”

[15] How the value of property should be determined is set out in section 11(3):

“11. – (1) The provisions of this section shall apply with respect to determining the value of property for the purposes of a pecuniary penalty order.

...

(3) Subject to subsection (4), for the purpose of deciding the value at any time of property then held by a person –

(a) the value of the property is the market value of the property at that time; or

(b) if at that time another party holds an interest in the property, the value of the property in relation to the person is the market value of the person's interest at that time, ignoring any lien or encumbrance on the property."

The case put forward by the ARA

[16] The ARA has advanced that in keeping with section 6(1)(a) of POCA Mr. Gregg is to be regarded as having a criminal lifestyle because he was convicted of the offence of dealing in cocaine which is an offence that is specified in the Second Schedule.

[17] It was also put forward that Mr. Gregg has benefitted from his general criminal conduct. The first benefit that the ARA has identified is the value of the cocaine that he was convicted for. The evidence as to the market value of the cocaine (pursuant to section 11(3)(a) of POCA) came from Detective Inspector St. Barnard Harrison, whom the ARA commended to the court, as being a seasoned and experienced narcotics police officer. Inspector Harrison gave evidence that the market value of a kilogram of cocaine in 2011 (this was the time that the Mr. Gregg was found to be in possession of the narcotic) was between JMD\$600,000.00 to JMD\$700,000.00.

[18] It was submitted that the weight of the cocaine that Mr. Gregg was convicted of amounted to 0.963 kilogram (based on the contents of the Forensic Certificate which was exhibited as RG/RM05 in the Statement of Information ('SOI') of Ms Patricia Golding) and at an average price of JMD\$650,000.00 was valued at JMD\$625,950.00. This, the ARA said, represents a benefit received by Mr.

Gregg from his general criminal conduct and that it should be included in the calculation of the recoverable amount.

[19] The ARA has submitted that since it has been established that Mr. Gregg has a criminal lifestyle, the court is to assess the benefits he has derived from such a lifestyle, in accordance with the assumptions found at section 8(2) of POCA ('the section 8(2) assumptions').

[20] In order to prove the benefit that Mr. Gregg received from his criminal lifestyle the ARA is relying on the SOI of Ms Patricia Golding which was filed on the 30th of June 2015, the supplemental SOI of Mr. Sheldon Stephenson filed on the 18th of May 2016 (in response to the affidavit filed by Mr. Gregg) and the second supplemental SOI of Mr. Sheldon Stephenson filed on the 25th of November 2016. These documents are marked as Exhibits 1, 2 and 3 respectively. They contain detailed financial records belonging to Mr. Gregg.

[21] These two forensic examiners (Ms Golding and Mr. Stephenson) also gave evidence at the hearing and they amplified, clarified and corrected certain areas of their respective statements.

[22] The ARA is asking the court to apply the section 8(2) assumptions to the following properties which were transferred to Mr. Gregg after the relevant day and to find that they were obtained by him as a result of his general criminal conduct. The accounts listed below are held solely in his name:

- i. JMD\$2,000.00 in the Bank of Nova Scotia Jamaica Ltd ('BNS') savings account 815787 opened on the 18th of June 2010;
- ii. JMD\$500.00 in Jamaica National Building Society Ltd ('JNBS') (now JN-Bank) savings account 1089277 opened on 09th of September 2009;
- iii. JMD\$2,407,200.00 in National Commercial Bank Jamaica Ltd ('NCB') savings account 614280794 opened on the 26th of November 2008;

- iv. JMD\$2,607,820.50 in NCB loan account 611042620 opened on the 15th of May 2009;
- v. JMD\$1,629,474.03 in Westmoreland Co-operative Credit Union Ltd (WCCU) (now C&WJ Co-operative Credit Union Ltd) shares account opened on the 08th of May 2002;
- vi. JMD\$2,553.14 in WCCU Golden Anchor Account opened on the 08th of May 2002;
- vii. JMD\$5,709.86 in WCCU Golden Harvest Account opened on the 26th of November 2008;

[23] The section 8(2) assumptions, the ARA submitted, are also to be applied to the following bank accounts that were jointly held by Mr. Gregg and Ms Marcha Parker, who is the mother of one of his children:

- i. USD\$806.00 in BNS savings account 928272572 which was opened on the 01st of March 2001;
- ii. JMD\$1,472,582.97 in Scotia Gain account 803676 which was opened on the 14th of April 2004;

[24] Remittances in the amount of USD\$53,143.73 were collected/received by Mr. Gregg between the 12th of March 2009 and the 11th of January 2011, after the relevant day. Remittances totalling USD\$696.89 were also sent on four occasions by Mr. Gregg to persons after the relevant day. The ARA is inviting the court to find firstly, that the remittances that he received were obtained by him as a result of his general criminal conduct; and secondly, that the remittances that he sent were expenditures incurred by him that were met from property he obtained as a result of his general criminal conduct in accordance with the section 8(2) assumptions.

[25] As it concerns property that was held by Mr. Gregg after the date of conviction (the 23rd of April 2013), the ARA has invited the court to consider that on the 13th

of May 2009, Mr. Gregg acquired a Honda Accord motor vehicle at a cost of JMD\$3,900,000.00. A part of the purchase price (JMD\$3,120,000.00) was funded by a loan from NCB. However, the section 8(2) assumptions, the ARA posited, are to be applied to the remaining portion of JMD\$780,000.00.

[26] The ARA has indicated that the payments of JMD\$794,500.00 and JMD\$1,722,585.39 which were made towards the JNBS loans and a NCB credit card respectively after the relevant day are also to be assumed to have been met from property obtained by Mr. Gregg as a result of his general criminal conduct.

[27] It has been advanced that Mr. Gregg, who bears the evidential burden of proof of rebutting the assumptions on a balance of probabilities, has failed to do so. The ARA has suggested that while it is Mr. Gregg's evidence that he earns his income legitimately as a carpenter in Canada, an essential consideration for the court, in terms of his credibility, is that he denied being involved in any kind of drug dealing although he pleaded guilty to and was convicted of the offence of dealing in cocaine.

[28] The ARA has asked the court to carefully consider the evidence that Mr. Gregg gave and to find that it is riddled with untruthfulness and therefore unreliable. The following aspects of Mr. Gregg's evidence were highlighted:

- i. That he filed no income tax returns in Jamaica because he said he was living and working in Canada since 1992. He also indicated that he only visited Jamaica during the winter months or if he was helping out his cousins in their businesses. However, the ARA pointed out that the only evidence of his earnings in Canada came from two income tax and benefit returns for the years 2013 and 2014 which reported incomes of CAD\$10,713.95 and CAD\$36,709.94 respectively. However, in his evidence he indicated that he earned between CAD\$70,000.00 to CAD\$100,000.00 per annum but brought no documentary evidence to support this. Additionally, the ARA submitted that the returns for 2013 and 2014 were irrelevant, and Mr. Gregg did

not provide any documentary proof of his earnings for the relevant periods which would have been prior to 2010;

- ii. The court was asked to reject the explanation Mr. Gregg gave for the absence of income tax returns prior to 2010. He stated that he did not file income tax returns in Canada for the years 2010, 2011 and 2012 because he was in Jamaica awaiting the trial of his matter (I find this explanation to be reasonable and I have accepted it). Mr. Gregg testified that he had in fact filed returns prior to 2010 in Canada, but that he was unable to produce them because he would need to find the accountant(s) who had done them and he (Mr. Gregg) was not living at the same address and he was not able to locate his accountant(s);
- iii. Mr. Gregg indicated that he worked for a company in Canada as a carpenter. However, he did not provide a job letter or any other documentary evidence of this. The income tax returns he exhibited did not show that he worked for a company;
- iv. Mr. Gregg, the ARA said, by admitting that he did side jobs (from which he earned as much as CAD\$20,000.00 to CAD\$30,000.00) and which he failed to report in his income tax returns, is evidence from which the court can find that Mr. Gregg made false declarations to the Canadian revenue agency and this goes to the issue of his credibility and trustworthiness as a witness;
- v. Mr. Gregg indicated in a BNS application form (exhibit RG/BN01) that was completed on the 14th of April 2004 that he worked full-time at West Star Supplies. On a another BNS application form for a credit card which was dated the 01st of October 2005 (exhibit RG/BN02) he stated that he had been employed to West Star Supplies on a full-time basis since 1991. This evidence, the ARA advanced, was in “stark contrast” to the evidence Mr. Gregg gave at paragraph 13 of his affidavit filed on the 17th of March 2016 that he never worked a full

year in Jamaica and that he worked full-time as a carpenter in Canada after he went to reside there in 1992;

- vi. Letters from Mr. Gregg's cousin Nickie Gregg (RG/BN03 and RG/BN04) exhibited in the SOI of Ms Patricia Golding dated the 10th of January 2008 and the 30th of April 2009 to BNS and NCB respectively, stated that Mr. Gregg had been employed to West Star Supplies for five (5) years prior to the dates of the letters. This, the ARA stated, contradicts the assertion made by Mr. Gregg that would have been working full-time in Canada during the periods stated in both letters to BNS and NCB. It was also suggested that he misled the banks and also got his cousin to do so on his behalf;
- vii. In the application to BNS for a credit card dated the 01st of October 2005 (RG/BN02) Mr. Gregg indicated that he had no dependents. However, he gave evidence that he had two children, one born in 1995 and the other in 2002 and that they were both maintained by him since they were born. The ARA stated that this was an "outright lie" that Mr. Gregg told; and
- viii. In the two exhibited income tax and benefit returns form from Canada, Mr. Gregg indicated that he did not hold foreign property in excess of CAD\$100,000.00. However, the ARA argued that he admitted under cross-examination that he still owned the Honda motor car and real estate at Bullstrode District, Grange Hill in Westmoreland in 2013 and 2014, which the ARA contends were "foreign property" that were cumulatively valued in excess of CAD\$100,000.00. This evidence, the ARA said, clearly showed that Mr. Gregg was not a truthful or reliable witness. The ARA further submitted that on a totality of the evidence, Mr. Gregg is a person who is willing to lie to protect his interests and that he was similarly lying to the court in an attempt to avoid a PPO being made against him.

Mr. Gregg's Case

- [29]** Mr. Gregg gave evidence via affidavit (which was filed on the 17th of March 2016), as well as, oral evidence and he was extensively cross-examined by learned counsel Ms Whyte.
- [30]** His case is that he has been living in Canada since 1992 and works as a carpenter. He was employed to a company and he also did "off the books" job (meaning he did not report these earnings to the Canadian revenue agency). Mr. Gregg testified that on average he earned CAD\$70,000.00 to CAD\$100,000.00 yearly.
- [31]** He denies being involved in narcotics trafficking and indicated that the premises at Bullstrode where the cocaine was found was not his private residence but was used by other members of his family. He said that he and his mother would stay at the premises whenever they visited from Canada.
- [32]** Mr. Gregg denied that the cocaine found at the house was his. He stated that he was visiting from Canada and discovered that the drugs were left there and "steps were being taken to get it out of the house, but the police came before it was removed." He pointed out that this was the reason he had initially pleaded not guilty but later, on the advice of his attorney, he changed his plea.
- [33]** He denied that the value of the cocaine for which he was convicted was between JMD\$600,000.00 to JMD\$700,000.00 per kilogram, since he has never bought or sold drugs. Mr. Gregg maintained that he earns his income honestly as a carpenter.
- [34]** He stated that he does not file income tax returns in Jamaica because he had been living in Canada since 1992 and whenever he works in Jamaica it was only for short periods during the winter months when he would help out his cousins Haniff and Nickie Gregg with their businesses (Tool World and West Star Supplies) by working as a salesman. Although Mr. Gregg stated that he was paid

for doing this, he denied earning JMD\$11,904,000.00 during the period 2004 to 2009. He said that he was living and working in Canada at this time.

- [35] Two income tax returns for the years 2013 and 2014 were filed by Mr. Gregg for income he earned in Canada for those years. He stated that he returned to Canada from Jamaica in April 2013 and commenced working in June 2013 and that this was what accounted for his reduced earnings for that year (CAD\$10,713.98). In 2014 he reported earnings of CAD\$36,709.94. In addition to these sums, Mr. Gregg stated that he would earn CAD\$20,000.00 to CAD\$30,000.00 “off the books” from side jobs annually.
- [36] During cross-examination, Mr. Gregg testified that he did not file any income tax returns in Canada for the years 2010, 2011 and 2012 because he was in Jamaica and was not able to leave the country due to the charges that were pending against him. I have accepted this explanation.
- [37] He also gave evidence that he filed income tax returns in Canada prior to 2010. However, he indicated that he was unable to produce them because, as he said, “Every year I changed my accountant so for those years I would have to find my accountant to retrieve the tax returns from him and I couldn’t find him.”
- [38] The full reason he gave for his inability to produce income tax returns from Canada prior to the year 2010 was because he (Mr. Gregg) had changed his address and he was not able to locate his accountant(s) to get copies of the returns that were filed on his behalf with the Canadian revenue agency from them.
- [39] He testified that the assets that were purchased by him here, whether by himself or jointly with Ms Parker (the Honda motor car and property located at lot 72 Negril Estate, Westmoreland), were acquired for the most part from loans which came from various financial institutions in Jamaica. He also gave evidence that the repayment of these loans were made from legitimate income that he earned as a carpenter in Canada.

- [40]** Concerning the remittances he received via Western Union, Mr. Gregg stated that almost all of them were sent from Canada by either family members or from persons who owed him money for legitimate jobs that he had done for them. These persons were not connected to drug dealing and were law abiding citizens, he stated.
- [41]** Mr. Gregg testified that almost all of the accounts he opened with the various financial institutions in Jamaica were to facilitate him obtaining loans to purchase the Honda motor car and the property at Negril Estate. He indicated that the two cheques totalling CAD\$8,000.00 which were deposited to the NCB account 614280794 came from his mother and were used to assist him with the purchasing of the motor car.
- [42]** He also gave evidence that he paid the monthly instalment on the loan he obtained to purchase the motor car by sending money from Canada to his cousins in Jamaica who in turn made deposits to the NCB account. The car loan, Mr. Gregg stated, was paid by Ms Parker and him. His mother also assisted him if this became necessary.
- [43]** Mr. Gregg pointed out that his loan account with NCB (for the motor car) fell into arrears on a number of occasions. He stated (and proved by documentary evidence) that he had to enter into an agreement with the bank to cap the loan, sell the motor vehicle and pay a monthly instalment of JMD\$80,000.00 to liquidate the balance of the loan.
- [44]** In relation to the Negril Estate property, which Mr. Gregg testified was purchased by him and Ms Parker, he pointed out that it took them over four years to acquire this property and in order to complete the purchase they had to borrow money from two financial institutions. This property, he said, was sold in June 2012 because he was in Jamaica, could not work and was unable to pay his bills. The banks, he said, was calling him every day. They decided to sell the property in order to “clear up the bank.”

[45] The upshot of Mr. Gregg's evidence is that all the assets he has acquired and all the expenditures that he made (loan and credit cards repayments, as well as, the deposit/balance paid towards the Honda motor car) was done with money that he earned legitimately.

[46] He has also asked the court to take note of the fact that he has no bank accounts which contained large amounts of cash which could be said to be disproportionate to his income. It is Mr. Gregg's position that if he had benefitted from drug trafficking or criminal conduct he would not have required the loans that he obtained.

Submissions

[47] I wish to state at this juncture that I thank counsel for the applicant and defendant for their detailed and helpful submissions. I wish to make it clear that while I do not intend to repeat them verbatim, this does not mean that I have not taken into account all that has been put forward. The parties are to be assured that I have carefully considered the submissions on both the evidence and the law. I will refer to them as needed during the course of my analysis of the law and evidence.

The ARA's submissions on the relevant case law

[48] Learned counsel Ms Alethia Whyte, on behalf of The ARA, has relied on a number of authorities. I will address first those that provide guidance on how the court is to treat with the section 8(2) assumptions.

[49] In **R v Dickens**¹ a decision of the England and Wales Court of Appeal, it was stated that the court should not apply the assumptions if they are proved to be incorrect. This burden of proving that the assumptions are incorrect rests with the defendant on a balance of probabilities.

¹ [1990] EWCA Crim 4

[50] The judgment of the court in **Dickens** was delivered by the Chief Justice of England, Lord Lane. He stated in clear terms what the object and purpose of the Drug Trafficking Offences Act 1986 of England and Wales (the predecessor to their Proceeds of Crime Act) were. At paragraph 11 of the judgment, the learned Chief Justice pointed out that:

“11. It is plain that the object of the Act is to ensure, so far as possible, that the convicted drug trafficker is parted from the proceeds of any drug trafficking which he has carried out. The provisions are intentionally Draconian. Since the amount of those proceeds and the size of his realisable assets at the time of conviction are likely to be peculiarly within the defendant’s knowledge, it is not surprising perhaps if evidential burdens are cast upon him of a kind which are, to say the least, unusual in the area of the criminal law and this, despite the fact that the confiscation order and the penalties for failing to comply with it may be rigorous.”

[51] Lord Lane continues at paragraphs 18, 19 and 20 of the judgment:

“18. The words “appearing to the court” in our judgment mean that if there is prima facie evidence that any property has been held by the defendant since his conviction or was transferred to him since the beginning of the relevant period, the judge may make the assumption that it was a payment or reward in connection with his drug trafficking.

19. Likewise with expenditure, once there is prima facie evidence of expenditure by the defendant since the beginning of the relevant period, the judge can assume that it was met out of payments received by him from drug trafficking.

20. Those assumptions can be displaced if they are “shown to be incorrect in the defendant’s case.” In other words, if after the matter has been fully heard the defendant shows on a balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied upon as evidence that that item of property or expenditure was part of the defendant’s proceeds of drug trafficking.”

[52] Similarly in **R v Wilkes**² a decision of the Court of Appeal of England and Wales which was delivered by Mr. Justice Gross, the learned judge at paragraph 26 of the judgment summarising the skeleton arguments that were presented by the Crown noted:

² [2003] EWCA Crim 848

“17. The purpose of the assumptions that the offender’s source of income is the proceeds of crime is to shift the burden to the appellant to show (on balance) that it was not from criminal conduct. The Prosecutor does not have to point to a single criminal offence during the relevant period where the appellant has acquired or secured property; the trigger to enable the court to make the assumption is whether the offences are qualifying offences within the statutory definition...”

18. There is no requirement that any item of income should be referable to any particular piece of criminality, to require such an exercise would defeat the purpose of the statutory assumptions in sections 72AA(4)(b). The safeguard for the appellant is that the assumption can be displaced by him on a balance of probabilities by showing that his expenditure was supported by income from legitimate sources...”

[53] The ARA addressed the importance of providing documentary evidence by a defendant who wishes to rebut the section 8(2) assumptions by citing the case of **R v Agombar**³. Paragraph 7 of the judgment of Lord Justice Leveson was submitted as being instructive:

“7. As a more general point, Mr. Pownall argued that the burden on the Appellant should be more readily satisfied in relation to property held for a considerable time (or traceable back into property which had been held for a considerable time) to reflect the difficulty which any appellant would have in proving the legitimate source of funding. Such submission, however, ignores the reality that modern life generates a paper trail which can usually be ascertained very many years later. Employment details and tax returns will remain available as will records of a business however exiguous. Substantial winnings are capable of a degree of verification and even inheritance, however informal, is capable of some degree of proof. Although there may be assets where, for good reasons, documentary or other contemporaneous proof is not available, it is for the court to assess what is available and to reach such conclusions as it believes appropriate.”

[54] At paragraph 9 the learned Law Lord noted:

“9. ...There was, however, very little by way of written records to back up what he said and it is sufficient to record that the Recorder concluded:

“Mr Agombar has failed to satisfy me that any significant part of his income or any monies going through his accounts or into any capital assets during the relevant period does not come from his criminal lifestyle. Also from [his] evidence, I have formed the view that the assets which form the subject matter of these proceedings form what I am going to describe as a best estimate of the assets upon which Mr. Agombar might call. I strongly suggest that there

³ [2009] EWCA Crim 903

are other hidden assets in this case about which we have not been told.”

[55] **Mahmood v R**⁴, the ARA submitted, was another decision in which the need for sufficient evidence to be presented by a defendant to rebut the assumptions was emphasised. At paragraph 14 of the judgment which was delivered by Mr. Justice Cranston, the England and Wales Court of Appeal stated:

“14. ...He had produced nothing in any way of hard facts or documentation to support any legitimate earnings and no witnesses. It was fair to assume that the appellant had been supporting himself and his family on the proceeds of crime and thus, as we have described, calculated expenditure at a subsistence level for the previous 6 years.”

[56] The ARA submitted that this principle was further enunciated in a number of cases such as **R v Singh**⁵, **R v DePrince**⁶, **R v Jones**⁷ and **R v Virk**⁸.

[57] The evidence that Mr. Gregg gave that he earned income from “off the books” or side jobs which he failed to report to the revenue agency in Canada, is indicative, according to the ARA, that he made false declarations and was guilty of tax evasion. In approaching the manner in which the court is to treat with this evidence the ARA has recommended the approach taken by the England and Wales Court of Appeal in **R v O’Shea**⁹. At paragraph 10 of the judgment Davis LJ stated:

“10. ..., the appellant’s involvement on his own pleas of guilt, not only in the tax evasion but also in the deliberate false representation to the Revenue about his cash assets, can give cause for concern as to how open and frank he is prepared to be...That, it has to be said, is suggestive of a man whose principal concern is to preserve his own financial position as best he can, even it comes at the expense of revealing the whole truth.”

[58] The ARA agreed that the court should not apply the assumptions if there would be a serious risk of injustice if they were made. However, they argued that once there is evidence of a benefit, even if a defendant does not have any assets, the

⁴ [2013] EWCA Crim 325

⁵ [2008] EWCA Crim 243

⁶ [2004] EWCA Crim 524

⁷ [2006] EWCA Crim 933

⁸ [2016] EWCA Crim 81

⁹ [2015] EWCA Crim 139

court is obliged to make a PPO. In support of this submission, the ARA relies on the authority of **R v Jones and others**¹⁰. Counsel Ms Whyte has very helpfully summarised the facts of the case. It was determined that the defendants had benefitted from their criminal conduct. However, the judge at first instance decided not to make a confiscation order because they had no assets. The judge was of the view that there would be a serious risk of injustice by making the confiscation order (equivalent to a PPO) in these circumstances. The Crown appealed and argued that once there was evidence of benefit, the judge was obliged to make an order requiring the defendants to pay the recoverable amount.

[59] The appeal was allowed. The ARA submitted that paragraphs 9 to 15 of the judgment of Lord Justice Latham are helpful. Given the pellucid manner in which the court provided guidance as to approach that is to be adopted in determining a matter of this nature, these paragraphs are set out below:

“9. In order to understand the complaint by the prosecution it is necessary just shortly to indicate the structure of the Act. Section 6 requires the court, if certain preconditions are met, which they were in this case, to proceed to make certain determinations. In first instance it must decide whether the Defendant has what is called a “criminal life-style”. If it so decides, it must by section 6 (4) decide whether he has benefitted from his general criminal conduct. If it concludes that he has not a criminal life-style, it must decide whether he has benefited from the particular criminal conduct.

10. Having made the appropriate determination the court must then proceed, pursuant to subsection (5) to determine the recoverable amount which is defined in section 7 of the Act; it must then make a confiscation order requiring him to pay that amount.

11. A combination of those subsections and sections 7, 8 and 9 essentially require the court to determine benefit, and then determine what is called the “available amount”. The recoverable amount is essentially the lower of the benefit, so determined or the available amount so determined. Accordingly it is apparent from the structure of the Act that Parliament intended that in every case where the court has concluded that there is a benefit, it must make an order.

12. In determining benefit, section 10 applies and entitles the court to make certain assumptions in cases where a person is held to have had a criminal

¹⁰ [2006] EWCA Crim 2061

life-style. Criminal life-style is defined in Schedule 2 to the Act; and all these defendants fall into the category of those who are to be held to have a criminal life-style. It follows that the assumptions in section 10 are to be applied to them where the court determines the benefit.

13. It is only when considering the appropriateness of applying those assumptions that section 10(6) bites. It is there in order to ensure that the assumptions made under section 10 are not so unrealistic or so unjust in relation to a particular Defendant that they should not be made. It provides a means of moderating the ultimate calculation of benefit.

14. Section 10(6)(a) is clear in its terms. As far as s 10(6)(b) is concerned, the question will arise, in relation to any case, as to what will be considered unjust in relation to any case, as to what will be considered unjust in the circumstances. The prosecution submit that whatever meaning one gives to the phrase "serious risk of injustice" that cannot include the fact that an order will create hardship. Support for that can be gleaned from, Blackstone's Criminal Practice 2006, paragraph E-217 at p 2129:

*"The risk of injustice must arise from the operation of the assumptions in the calculations of benefit and not from eventual hardship in the making of a confiscation order (**Dore** [1997] 2 Cr App Rep (S) 152; **Ahmed** [2005] 1 WLR 122. What is contemplated is some unjust contradiction in the process of assumption (eg double counting of income and expenditure), or between an assumption and an agreed factual basis for sentence (See **Lunnon** [2005] 1 Cr App Rep (S) 111; **Lazarus** [2005] Crim LR 64)."*

With that we agree. The purpose of the exercise is to ensure that there is ultimately a sensible calculation of benefit. It is not a discretionary exercise by the judge to determine whether or not it is fair to make an order against a particular Defendant."

Submissions on the law made on behalf of Mr. Gregg

[60] Learned counsel Mr. Ewan Thompson submitted that it does not automatically follow that because a defendant is convicted of a scheduled offence under POCA that this *ipso facto* means that the court is to make a PPO against him. He stated that before this is done the court needs to ask and answer three questions:

- (1) Has the defendant benefitted from the relevant criminal conduct? If the answer to that question is no, the enquiry ends. If the answer is yes, then the court needs to address the second and third questions;

(2) What is the value of the benefit that the defendant has obtained?; and

(3) What sum is recoverable from the defendant?

Mr. Thompson also posited that these three questions are distinct and the answer for one does not determine the answer for the others. He relied on the cases of **R v Johnson**¹¹ and **R v May**¹² in support of this submission.

[61] He agreed that based on the provisions of POCA and the relevant case law that if there is prima facie evidence that any property was held by Mr. Gregg since his conviction or transferred to him since the relevant day (ending at the date when the proceedings were instituted against him), the court could make the assumption that it was payment or reward in connection with his drug dealing/trafficking or general criminal conduct.

[62] Similarly, it was opined by Mr. Thompson, that if there was prima facie evidence of expenditure by Mr. Gregg since the relevant day, the court could make the assumption that those expenditures were met from the proceeds of crime (whether specific to the offence that he has been convicted of or as a result of his general criminal conduct).

[63] However, the court could not rely on the assumptions if Mr. Gregg was able to establish on a balance of the probabilities in relation to each item of property or expenditure that the assumptions were incorrect in his case. For this submission Mr. Thompson also relied on the cases of **R v Dickens**¹³, **R v May**¹⁴ and **R v DePrince**¹⁵.

[64] It was also advanced on behalf of Mr. Gregg that while a defendant is required to show that the assumptions in his case are incorrect, if he fails to do this, the court must still not apply the assumptions where there would be a serious risk of

¹¹ [1991] 2 QB 249 (see pages 252 to 255)

¹² [2008] 1 AC 1028

¹³ *supra*, paragraph [49]

¹⁴ *supra*, paragraph [60]

¹⁵ *supra*, paragraph [56]

injustice if they were made. Mr. Thompson indicated that the words “serious injustice” in the context of the law means “any real as opposed to a fanciful risk of injustice”. The court, he further stated, at the end of the PPO process has a responsibility to ensure that this does not create a serious injustice to a defendant. The authority of **R v Benjafield, Leal, Rezvi and Milford**¹⁶ was cited in support of this submission. Lord Steyn in **Benjafield v R**¹⁷ at paragraph 4 of the judgment stated:

“4. The procedure devised by Parliament is a fair and proportionate response to the need to protect the public interest in that under the 1994 Act [the Drug Trafficking Act 1994], as under the 1988 Act [The Criminal Justice Act 1988 as amended by the Proceeds of Crime Act 1995], the judge must be astute to avoid injustice. If there is or might be a serious or real risk of injustice he must not make a confiscation order.”

[65] The purpose and intention of POCA, Mr. Thompson asserted, is to “*disgorge offenders of ill-gotten gains derived from the commission of a set of prescribed offences, and by doing so, deter, dissuade and hinder the targeted conduct.*”¹⁸ It was never the intention of Parliament to deprive persons of property that were obtained from legitimate sources or means, he added. I agree.

Application and Analysis

[66] By now, it is well known and accepted that the “*engine that drives POCA is taking the benefit from criminals. The legislation provides a gateway to take the benefit from a defendant by permitting the court to determine whether the defendant is a career criminal and therefore has benefitted from his criminal lifestyle or whether he is not a career criminal and has benefitted from the particular crime for which he has been convicted. The statute is directed primarily to identifying benefit from criminal activity or property derived directly or indirectly from criminal activity.*”¹⁹

¹⁶ [2002] EWCA Crim 86

¹⁷ [2002] UKHL 2 (24th January, 2002)

¹⁸ (unreported) Supreme Court, Jamaica, Claim No. 2003HCV1290, judgment delivered 18 March 2011, per Campbell J.

¹⁹ Bryan Sykes, Puisne Judge, Supreme Court of Judicature of Jamaica in an article entitled, “Proceeds of Crime is about Benefit and Money Laundering, not Profit” presented on May 26, 2017 at a seminar for judges of the Court of Appeal and Supreme Court, paragraphs [1] and [3].

[67] Lord Bingham in **Jennings v Crown Prosecuting Service**²⁰ at paragraph 13 of the judgment stated:

“13. ...It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent...”

[68] I agree with and adopt the positions taken by Sykes J (as he then was) and Bingham LJ as it concerns the object of the legislation. I also bear in mind that POCA is draconian in nature. This is the intention of Parliament. However it is not without checks and balances to protect the interest of the public.²¹

[69] The application for a PPO, as is being made in this case, is centred on benefit that is conviction-based. It is noted that the meaning of benefit which is defined as including “any property, service or advantage”²², is in my view, meant to be quite wide and captures just about everything that someone could obtain from any kind of criminal activity.

[70] In **R v May**²³ the House of Lords, in a decision delivered by Lord Bingham considered the meaning of benefit. At paragraphs 9 and 48 it is stated:

“9. ...Where, however, a criminal has benefitted financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained.

...

48. (1) ...The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

[71] Bingham LJ at paragraph 48(6) of the judgment offers guidance on the approach to be taken by a court in determining when a defendant obtains property and a pecuniary advantage:

“48. (6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as

²⁰ [2008] 1 AC 1046

²¹ see the discussion at paragraphs [50] *et seq* and [64] *et seq*

²² see section 2 (1) POCA

²³ *supra*, paragraph [60]

where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.”

- [72] I remind myself, that in the context of this case, what I am conducting is a conviction-based benefit hearing (which is essentially post-conviction) in accordance with the relevant provisions of POCA.²⁴ It is independent of any sentence which was imposed on Mr. Gregg. I bear in mind that all questions that are to be determined during the course of this hearing are to be decided based on the civil standard of proof (a balance of probabilities).²⁵
- [73] I am also guided by sections 6 and 8 of POCA²⁶ which set out in great detail the factors that I am to use to determine whether Mr. Gregg has a criminal lifestyle; and the assumptions that are to be made to resolve the issue of whether he has benefitted from his general criminal conduct. These assumptions are to be made unless it would be unjust or incorrect to do so.
- [74] Mr. Gregg, I observe, bears the evidential burden of proof on a balance of probabilities to show that that each property he obtained or expenditure that he made, after the relevant day or at any time after the date of his conviction, came from legitimate sources. If this is accomplished the court is to refrain from making the section 8(2) assumptions as it would be incorrect to do so. Similarly, where there would be a serious risk of injustice, if the assumptions are made, the court shall not do so. I note, however, that the phrase “serious risk of injustice” does not include circumstances where a defendant has been adjudged to have benefitted from his general criminal conduct (or from the particular offence for which he was convicted) but has no assets.²⁷

²⁴ see paragraphs [5] to [15] above.

²⁵ section 5 (7) of POCA

²⁶ see paragraphs [8] and [9] above

²⁷ see the discussion at paragraphs [58] and [59] above.

[75] In the case at bar, Mr. Gregg was convicted of the offence of possession of and dealing in cocaine in the Parish Court for the parish of Westmoreland. He was then committed to the Supreme Court by a Parish Court judge under s 52 after a successful application by the ARA. Therefore, it now incumbent on me to determine:

- i. whether Mr. Gregg has a criminal lifestyle and has benefitted from his general criminal conduct; or
- ii. if he does not have a criminal lifestyle, whether he has benefitted from his particular criminal conduct.
- iii. if I should find that Mr. Gregg has benefitted, then I am to identify the property that represents his benefit from criminal conduct and order that he pays to the Crown an amount that is equal to the value of his benefit (the recoverable amount).

[76] General criminal conduct, as defined by section 2(1) of POCA means, “all the defendant’s conduct occurring after the appointed day.”

[77] Particular criminal conduct is defined as, “all of the defendant’s conduct occurring after the appointed day which constitutes the offence concerned; offences of which the defendant was convicted, in the same proceedings as those in which he was convicted of the offence concerned; or offences which the court will be taking into consideration in sentencing the defendant for the offence concerned.”²⁸

[78] Section 7(1) of POCA provides that, “a person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct.” I ask myself the question, what does this provision mean? I turn to the case of **Allpress and others v R**²⁹ which has provided an answer to this question.

²⁸ see section 2 (1) of POCA

²⁹ [2009] EWCA Crim 8

[79] In **Allpress**, there were five separate appeals involving Sylvia Allpress, Deborah Symeou, Miguel Casal, Paul Winter Morris and Stephen Martin. However, I will set out the facts and decision of the England and Wales Court of Appeal in the appeal involving Ms Allpress, which in my view, demonstrates how that court determined what is meant by the provision, “a person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct”.

[80] Miss Allpress pleaded guilty to assisting another to retain the benefit of drug trafficking contrary to section 50 (1) (a) of the Drug Trafficking Act 1994 [UK] (which is also an offence in Jamaica by virtue of section 92 of POCA). She was made the subject of a confiscation order. She acted as a courier for a drug trafficker who smuggled cocaine and cannabis into the UK. She made two trips to Paris carrying substantial sums of money for the drug trafficker and was paid 800 pounds plus expenses for each trip. The judge made a confiscation order for the amounts she carried for the drug trafficker as a courier. On appeal, the order was varied to exclude the amounts she took as a courier because it was held that this was not the value of the benefit that she had obtained within the meaning of UK’s POCA. The amount of the confiscation order was reduced from 154,301.99 pounds to 3,600 pounds representing the value of the benefit that she obtained.

[81] Therefore, as I understand the principle, a person benefits from an offence or from his/her general conduct if he/she obtains property as a result of or in connection with either the commission of the offence or general criminal conduct. That person’s benefit is the value of the property obtained by him/her.

Application of the Law to the Facts

[82] The first question that must be determined by the court is whether or not Mr. Gregg has a criminal lifestyle.³⁰ He was convicted for the offence of dealing in cocaine. This is an offence that is specified in the Second Schedule of POCA. Section 6(1)(a) states that, “a defendant **shall** be regarded as having a criminal lifestyle if the offence concerned is specified in the Section Schedule” (emphasis

³⁰ section 5(2)(a) of POCA

added). The language of the section is mandatory in its terms. I therefore find that Mr. Gregg has a criminal lifestyle and answer the first question in the affirmative.

[83] The second question that must be answered is whether Mr. Gregg has benefitted from his general criminal conduct³¹. To make this determination I turn now to consider the section 8(2) assumptions unless it can be shown that the making of these assumptions will cause “a serious risk of injustice” or if Mr. Gregg shows “that in respect of each item of property and expenditure the assumptions are in his case incorrect.”³²

[84] I make the following observations:

- i. no previous forfeiture or PPO has been made against Mr. Gregg;
- ii. the proceedings for the offences of possession of and dealing in cocaine were commenced on the day that Mr. Gregg was charged which was the 24th of January 2011. The relevant day would therefore have been the 24th of January 2001 except for the provision of section 2(10) of POCA which places a restriction on how far back the court can go in making this determination. As a result, the relevant day is the 30th of May 2007;
- iii. I will look at any property that was transferred to or obtained by, as well as, expenditures that were made by Mr. Gregg since the 30th of May 2007 to assess whether these were benefits that he obtained as a result of his general criminal conduct by applying the section 8(2) assumptions. This is the process by which ‘benefit’ is identified;
- iv. if Mr. Gregg is able to prove that the assumptions are incorrect in his case then the PPO will not be made. Similarly, if making the assumptions will result in an injustice, the order will not be made.

³¹ *Ibid*

³² per Lane CJ in R v Dickens (see paragraphs [49] to [51] above)

However, if either of this is not the case, I will go on to determine the value of his benefit and order that he pays to the Crown an amount that is equal to the value of his benefits which is the recoverable amount;

Findings

- [85]** I am well aware that the outcome of this case will depend largely on whether the court finds that the assumptions under section 8 of POCA are to be applied. I am also attentive to the circumstances in which they are not to be applied.
- [86]** Mr. Gregg's case is that all the properties that he obtained and all the expenditures that he made after the relevant day came from his legitimate earnings as a carpenter in Canada or a salesman in Jamaica (when he worked with his cousins for short periods of time during his visits to Jamaica). He has asserted that he was never involved in any kind of drug dealing.³³
- [87]** I have noted, however, that Mr. Gregg has provided absolutely no documentary evidence of the income that he earned in Canada prior to 2010. Of some significance, Mr. Gregg testified that he also worked for a company. However, he has not sought to provide the court with a job letter or even a salary slip from this company. One or both of these documents would have provided some verification that he was engaged in lawful employment. He also gave evidence that he earned about CAD\$70,000.00 to CAD\$100,000.00 per annum as a carpenter, of which some CAD\$20,000.00 to CAD\$30,000.00 would be unreported income. I interpret this aspect of his evidence to mean that his reported income would be, at its lowest, in the region of CAD\$40,000.00 and at its highest CAD\$70,000.00. However, he has provided absolutely no documentary proof of this.
- [88]** The income tax returns he submitted are for the years 2013 and 2014. They offer very little aid to the court. The court would have been better assisted if Mr. Gregg

³³ see paragraphs [29] to [47] above which sets out the details of the case Mr. Gregg presented.

had exhibited income tax returns for the years prior to 2010. However, I have noticed that his reported income, as seen in these two documents, and in particular the returns exhibited for 2014, is significantly less than what he said his annual income would be. Given the absence of documentary evidence, I doubt very much that Mr. Gregg earned the income that he said he did prior to 2010.

[89] Of some cause for concern, is the explanation that he has given for the absence of his income tax returns that he allegedly filed with the Canadian revenue agency before 2010. Mr. Gregg testified that he has relocated and was unable to find the accountant(s) who prepared and filed the returns on his behalf.

[90] This naturally begs the questions: Would not the Canadian revenue agency have those returns in their database? Could not Mr. Gregg have obtained copies of the relevant returns from the agency (if they in fact exist) to show his earnings for the years before 2010? I certainly think so. I adopt the approach of Leveson LJ in **Agombar**³⁴ and find that this explanation “*ignores the reality that modern life generates a paper trail which can usually be ascertained very many years later. Employment details and tax returns will remain available...*”(emphasis supplied). I reject, therefore, his explanation for the failure to provide documentary confirmation of his employment and income prior to 2010.

[91] On this point, applying the principles enunciated in **Agombar**³⁵, **Mahmood**³⁶, **Virk**³⁷ and **Jones**³⁸ I am constrained to agree with learned counsel Ms Whyte that, “the absence of these returns is not excusable especially in light of the importance of documentary evidence in discharging the Defendant’s burden of proof.” Mr. Gregg has, therefore, not presented any proof of legitimate earnings in Canada prior to 2010. As was stated by the learned Recorder in **Agombar**³⁹ (whose words I adopt and apply in this case), Mr. Gregg “*has failed to satisfy me*

³⁴ *supra* at paragraphs [53] to [54]

³⁵ *supra* at paragraphs [53] to [54]

³⁶ *supra* at paragraph [55]

³⁷ *supra* at paragraph [56]

³⁸ *Ibid*

³⁹ *supra* at paragraphs [53] and [54]

that any significant part of his income or any monies going through his accounts [and I add, towards the acquisition of the Honda motor car, payments to his credit card, remittances sent and received] during the relevant period does not come from his criminal lifestyle.”

[92] Concerning Mr. Gregg’s credibility in general, I was extremely concerned about several inconsistencies that arose on his case. On the BNS application form dated the 14th of April 2004 (Exhibit RG/BN01) Mr. Gregg stated that he was employed full-time (rather than seasonally as he indicated in his evidence) at West Star Supplies. In the BNS application form for a credit card dated the 01st of October 2005 (exhibit RG/BN02) he also stated that he was employed full-time to West Star Supplies since 1991. The information on these two forms conflicts with the evidence he gave that he has never worked full-time or for a full year in Jamaica after he went to reside in Canada. He stated that this was because he was working in Canada prior to 2010.

[93] There were also letters provided by Nickie Gregg (his cousin) which were addressed to BNS and NCB dated the 10th of January 2008 and the 30th of April 2009 respectively which stated that Mr. Gregg had been employed to West Star Supplies for the past five years. So in both letters he would have been employed to West Star Supplies on a full-time basis since 2003 and 2004 respectively. This is, of course, in addition to his employment with the same entity since 1991. What is clear is that the information he gave to these two institutions concerning his “full-time employment” with West Star Supplies is starkly different on each application form.

[94] That Mr. Gregg was able to work full-time in Jamaica and Canada at the same time over many years is nothing short of remarkable. This aspect of the evidence calls into serious question Mr. Gregg’s credibility and reliability as it relates to his alleged employment and sources of legitimate income.

[95] On the BNS application form for a credit card dated the 01st of October, 2005 (Exhibit RG/BN02), Mr. Gregg stated that he had no dependants. However, in his

oral evidence, he told the court that he had two sons, one who was born in 1995 and the other in 2002. He went on further to state that he has maintained both of them since their births. It is to be noted that at the time that this application form was filled out, both of Mr. Gregg's sons would have been minors and dependent on him for support.

[96] Mr. Gregg, in my opinion, was being less than honest when he stated that he had no dependents on this application form. I ask myself the question, if he is prepared to mislead BNS, by being untruthful about the existence of his own children, in order to obtain a credit card, how can I, on a balance, believe his evidence on the really important issues in this case?

[97] Mr. Gregg also testified that he did not report the income he earned "off the books" as a carpenter to the Canadian revenue agency. Additionally, although he owned real and personal properties in Jamaica in 2013 and 2014 (premises at Bullstrode and a Honda motor car) he failed to disclose this to the revenue agency on his income tax returns for those years. It has also not escaped my attention that Mr. Gregg stated that when he worked for his cousins in Jamaica as a salesman he would also receive a salary. Yet he has also not filed any income tax returns in Jamaica.

[98] My approach to the issue of his failure to disclose certain material facts to the Canadian revenue agency (the income he earned "off the books" and the real and personal properties he owned in Jamaica in 2013 and 2014) is guided by the learning in **O'Shea**⁴⁰. I find, as Davis LJ did in that case that, given Mr. Gregg's "*deliberate and false representation to the Revenue about his cash assets, [as well as the "foreign property" that he held outside of Canada in Jamaica] can give cause for concern as to how open and frank he has been prepared to be...[this] is suggestive of a man whose principal concern is to preserve his own financial position as best he can, even if it comes at the expense of revealing the whole truth.*"

⁴⁰ *supra* at paragraph [57]

[99] Mr. Gregg is also insistent that he is not involved in drug dealing of any kind (this assertion being made nonetheless in the face of his convictions to the contrary). He stated that he discovered the cocaine in the house at Bullstrode when he stayed there while on a visit from Canada. However, what I found to be quite curious is what he deposed about the effort that was made to get rid of the cocaine. He said, “steps were being made to get it [the cocaine] out of the house, but the police came before it was removed.” In my own view, any steps to remove illegal drugs from premises by a law abiding citizen ought to, by necessity, involve law enforcement officials in order to ensure that it does not get into the hands of nefarious individuals. Mr. Gregg also had the option of getting rid of the cocaine himself. He could have, for example, flushed it down the sewer. I have rejected, in its entirety, this aspect of Mr. Gregg’s evidence.

[100] I have taken into account Mr. Gregg’s submissions that the relevant assets that he has acquired in Jamaica were purchased mainly from bank loans which he had challenges repaying. This, he says, is clearly demonstrative of the fact that he does not have access to large amounts of cash (which would be expected if he was a drug dealer, I presume) and neither has he “amassed great wealth”. My observation is that the loan accounts fell into arrears during the period that he was before the court here. In light of the evidence that he would help his cousins in their businesses, and that he worked “full-time” at West Star Supplies, why was he, as he said, “not working and unable to pay his bills?” This evidence supports my view that Mr. Gregg was never employed to West Star Supplies. His inability to satisfy his financial obligations, during this period, also tends to show that these expenses were previously met from the proceeds of crime.

[101] I do not agree with Mr. Gregg’s assertion that if he was a drug dealer he would not need to borrow money from financial institutions. Applying my common sense and experience to the evidence, it is not unheard of that this approach has been adopted by persons engaged in criminal activities. It is well known, in my own view, that the accessing of loans and mortgages provides an avenue for the laundering of the proceeds of crime. I found it quite odd that he maintained so

many accounts. I also found it curious that he accessed five small business loans with JNBS but has not shown that he established or operated any businesses in Jamaica. I am left to question what could have been the real purpose for these loans.

[102] Mr. Gregg has also stated that it has not been shown that he has “amassed serious wealth” (the argument taken to its logical conclusion, I presume, is that if he was involved in drug dealing he would have done so). Firstly, there is no requirement for the ARA to show that he has, or that it could only succeed in its application if this was done. Secondly, it is simple common sense that the ability of a person involved in criminal activities to “amass serious wealth” depends on a number of variables. I can think of factors such as the nature of the criminal activities, the extent or scale of those activities, the length of time that the person has been engaged in those activities, the role he/she plays in the syndicate (for example, a courier as distinct from its head) and so forth. Of some importance too will be the financial savvy of the criminal. Is that person prudent in his/her financial affairs or a spendthrift? All of these features will influence his/her accumulation of wealth.

[103] What the evidence discloses is that Mr. Gregg owned, at some point, two real properties (I note that there were several deposits of over USD\$13,000.00 which were made without the assistance of a loan towards the acquisition of the Negril Estate property (this would have been before the relevant day and therefore could not be included in the benefit calculation)), a motor car and during the relevant period over JMD\$10,000,000.00 passed through his various accounts. He also received remittances of over JMD\$5,000,000.00 and made payments of over JMD\$2,000,000.00 towards the JNBS loan and NCB credit card, all without proof of what legitimate sources these funds came from. I certainly do not agree, in these circumstances, that Mr. Gregg has not “amassed serious wealth” (a term that is quite relative and subjective, in my own opinion). I am well aware that experience has shown that some persons who engage in criminal activities also

take steps to secrete their assets, as well as, the income they earn from these activities.

[104] With the absence of any documentary proof of his income prior to 2013 (both here and in Canada) I am unable to say that the various deposits that were made to Mr. Gregg's accounts, as well as, the funds that were used to repay his credit card and loans came from legitimate earnings. It is also fair, to me, to assume that Mr. Gregg has been supporting himself from the proceeds of crime.

[105] Having carefully considered the evidence in its totality, as well as, the submissions and the law, I have found that Mr. Gregg evidence, on the germane issues of his employment and legitimate income is at best unreliable and untruthful. I have therefore concluded that he has not rebutted the section 8(2) assumptions that I am entitled to make, having found that he has a criminal lifestyle.⁴¹

[106] In light of the evidence presented by the ARA, I am convinced, on a balance of the probabilities that he has benefitted from his general criminal conduct. I will now proceed to identify the benefits that he has obtained and determine their value in order to make the PPO. I have found no evidence and/or circumstances in this case that could lead me to conclude that there would be "a serious risk of injustice" if I were to make the order.

Benefits obtained by Mr. Gregg

Market value of the cocaine

[107] I turn firstly, to the value of the cocaine. I apply the provisions of section 11(3) of POCA which sets out how the court is to determine the value of property for the purposes of a PPO which is the "market value of the property at that time"⁴² (in this case it would be the 24th of January 2011). I am also guided by the decision

⁴¹ see paragraph [9] above for those assumptions

⁴² see also paragraph [15] above

of the House of Lords in **R v Islam**.⁴³ In **Islam** the House of Lords had to determine whether “*for the purpose of calculating a defendant’s benefit, as distinct from the available amount, in confiscation proceedings under the Proceeds of Crime Act 2002, must goods of an illegal nature obtained by him [the defendant] be treated as having no value?*”

[108] In a majority decision, the court answered this question in the negative. Lord Hope of Craighead at paragraph 18 of the judgment stated that:

“18. ...At that stage [the stage of assessing a defendant’s benefit in relation to illegal drugs] the nature of the goods and the market in which they were ordinarily bought and sold would determine the market to which it was proper to go to discover the amount that a willing buyer would pay to a willing seller for them...”

[109] I accept the evidence that was given Detective Inspector Harrison. I find that he is amply qualified to state the market value of the 0.963 kilogram of cocaine that Mr. Gregg had in his possession on the 24th of January 2011. I say so because of his vast experience as a narcotics police officer, especially in the areas of conducting undercover operations, surveillances, working with informants, being involved in 50 seizures of narcotic drugs (including cocaine), as well as, his training in identifying the different types of cocaine by their manufacturing emblems, his understanding of how narcotic drugs syndicates work and the market prices that they offer for cocaine.

[110] I accept that the market value of one kilogram of cocaine at that time was between JMD\$600,000.00 and JMD\$700,000.00. Therefore, applying an average price of JMD\$650,000.00 the market value of the cocaine that was held by Mr. Gregg is JMD\$625,950.00.

⁴³ [2009] UKHL 30

Property transferred to Mr. Gregg after the relevant day

[111] Secondly, I turn to the bank accounts that were held solely by Mr. Gregg. I have accepted the evidence concerning Mr. Gregg's financial records that were filed in the ARA's SOI. It is noted that Mr. Gregg has not challenged the accuracy of these records.

- i. **BNS savings account 815787** – this account was opened on the 18th of June 2010 with a deposit of JMD\$5,774.96. This was the only deposit to the account. This deposit comprised of JMD\$2,000.00 in cash and JMD\$3774.96 which was transferred from BNS savings account 803676. In order to avoid double counting (which would cause an injustice to Mr. Gregg) the only sum that is included in the benefit calculation from this account is JMD\$2,000.00 on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct;
- ii. **JNBS savings account 10892777** – this account was opened on the 09th of September 2009 with a cash deposit of JMD\$500.00. JMD\$788,200.00 was deposited to the account between the 09th of September 2009 and the 13th of October 2011 which represents proceeds from five small business loans and will not be taken into account under this heading. However, the cash deposit of JMD\$500.00 will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct;
- iii. **NCB savings account 614280794** – this account was opened on the 26th of November 2008 with a deposit of JMD\$3,000.00. The deposits of JMD\$2,407,200.00 made between the 26th of November 2008 and the 27th of May 2011 were primarily for the payment of a car loan and included two Canadian cheques in the amount of CAD\$8,000.00. The

account was closed on the 27th of May 2011. The total deposits of JMD\$2,407,200.00 will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct;

- iv. **NCB loan account 611042620** – JMD\$2,323,083.84 was deposited to this account between the 18th of June 2009 and the 05th of October 2011. JMD\$556,000.00 was in cash deposits and JMD\$1,767,083.84 was transferred from NBC savings account 614280794. Deposits totalling JMD\$2,051,820.50 was made to this account after October 2011. I agree with the ARA that the deposit of JMD\$1,767,083.84 that came from NCB savings account 614280794 should not be taken into account because this sum has already been calculated as a part of the benefit obtained by Mr. Gregg (see iii. above). However, the cash deposits of JMD\$556,000.00 (made up to October 2011) and JMD\$2,607,820.50 (made after October 2011) will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct;
- v. **WCCU Shares Account** – this account was used primarily for the payment of a mortgage. It was opened before the relevant day with a cash deposit of JMD\$100.00. JMD\$1,177,563.65 was deposited to the account between the 10th of July 2008 and the 08th of August 2011. Deposits of JMD\$451,910.00 were made to the account after August 2011. The total deposits made to this account after the relevant day is JMD\$1,629,474.03 which will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct;

- vi. **WCCU Golden Anchor Account** – this account was opened before the relevant day with a deposit of JMD\$5,000.00 (which will not be taken into account). JMD\$553.14 was deposited to this account on the 26th of November 2008 and JMD\$2,000.00 on the 24th March 2010 totalling JMD\$2,553.14. This sum will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct; and

- vii. **WCCU Golden Harvest Account** – this account was opened on the 26th of November 2008 with a cash deposit of JMD\$5,708.86. JMD\$17,128.96 was transferred from WCCU Shares Account making a total of JMD\$22,839.72 deposited to this account between the 26th of November 2008 and the 30th of September 2009. However, only the amount of JMD\$5708.86 will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct. This is because the deposit of JMD\$17,128.96 was already accounted for⁴⁴ and ought not to be double counted as this would cause an injustice to Mr. Gregg.

[112] I will now address the two accounts that are held jointly by Mr. Gregg and Ms Parker. It has been submitted that the ARA has not made any submissions concerning how these two joint accounts are to be treated by the court. However, this issue has been addressed, in my view, by the decision in **May** that “a defendant ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control...”⁴⁵, as well as, by section 8(2)(a) of POCA. That section makes it clear that for the “purpose of valuing any property obtained, or assumed to have been obtained, by the defendant, he obtained the property free of any other interests in it.” Therefore,

⁴⁴ see the discussion at v. concerning the WCCU Shares Account

⁴⁵ per Bingham LJ at paragraph 48(6) of the judgment (see paragraph [71] above).

the deposits made to these accounts, during the relevant period, can be assumed to be property that was obtained by Mr. Gregg free from any other interests in them.

[113] Where any figure is stated in USD, I have accepted the conversion/exchange rate that has been used by the ARA (USD\$1.00 to JMD\$100.9525) in order to arrive at the JMD equivalent.

- i. **BNS USD\$ savings account 928272572** – this account was opened before the relevant day with a deposit of USD\$100.00 (which will not be included in the benefit calculation). However, a total of USD\$806.00 (JMD\$81,367.72) was deposited to the account between the 26th of March 2010 and the 17th May 2010. The figure of USD\$806.00 will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct.
- ii. **Scotia Gain savings account 803676** – this account was opened before the relevant day with a deposit of JMD\$480,245.70. This account was used primarily for the disbursement and payment of three loans totalling JMD\$2,926,800.00. Between the 09th of May 2007 and the 18th of June 2010 cash deposits of JMD\$2,356,292.13 were made to this account in the amounts of JMD\$883,709.16 and JMD\$1,472,582.97. The former amount was the proceeds from a bank loan and therefore will not be accounted for in the benefit calculation. However, the latter figure of JMD\$1,472,582.97 will be included in the benefit calculation on the assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct.

[114] Thirdly, during the period the 12th of March 2009 to the 11th of January 2011 remittances in the amount of USD\$53,143.73 (JMD\$5,364,992.40) were received by Mr. Gregg. This figure will be included in the benefit calculation on the

assumption that it is property that was transferred to Mr. Gregg after the relevant day that was obtained by him as a result of his general criminal conduct.

Property held by Mr. Gregg after the date of conviction

[115] On the 13th of May 2009, Mr. Gregg acquired a Honda motor car at a cost of JMD\$3,900,00.00. Of this amount JMD\$3,120,000.00 was funded by way of a bank loan from NCB. Mr. Gregg sold this vehicle in April 2015. In light of the fact that he was convicted on the 23rd of April, 2013 this motor vehicle is property that was held by him after the date of conviction.

[116] Since JMD\$3,120,000.00 was obtained from NCB as a loan, this fact would remove the assumption that the entire market value of the motor car (JMD\$3,900,000.00) was property that was held by Mr. Gregg after the date of conviction which was obtained as a result of his general criminal conduct.

[117] However, the remaining JMD\$780,000.00 will be included in the benefit calculation on the assumption that it is property that was held by Mr. Gregg after the date of his conviction which was obtained by him as a result of his general criminal conduct.

Expenditure incurred by Mr. Gregg after the relevant day

[118] Mr. Gregg obtained five small loans from JNBS.⁴⁶ He made payments of JMD\$794,500.00 towards the liquidation of these loans. This figure will be included in the benefit calculation on the assumption that it was an expenditure incurred by Mr. Gregg after the relevant day which was met with property obtained by him as a result of his general criminal conduct.

[119] Mr. Gregg also made payments of JMD\$1,722,585.39 towards a credit card that he acquired from NCB.⁴⁷ This figure will also be included in the benefit calculation on the assumption that it was an expenditure that was incurred by Mr. Gregg

⁴⁶ see bank records exhibited at RG/JN04 to RG/JN09 in the SOI of Ms Golding.

⁴⁷ see paragraph 30 of the supplemental SOI in response to Mr. Gregg's affidavit and exhibits RG/NC27 to RG/NC 30.

after the relevant day which was met with property that was obtained by him as a result of his general criminal conduct.

[120] Exhibit RG/GR shows Mr. Gregg sent remittances on four occasions totalling USD\$696.89 (JMD\$70,352.79). This amount will also be included in the benefit calculation on the assumption that it was an expenditure that was incurred by Mr. Gregg after the relevant day which was met with property that was obtained by him as a result of his general criminal conduct.

[121] Having identified and quantified Mr. Gregg's benefit from his general criminal conduct the court agrees with the ARA and finds that the recoverable amount is JMD\$17,567,588.80.

Disposal

[122] The Defendant Ralph Gregg shall pay to the Crown the sum of JMD\$17,567,588.80 as a pecuniary penalty order on or before the 28th of August 2018.

[123] Costs to the Applicant to be agreed or taxed which is to be taken from the assets realised.