**EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**ANTIGUA AND BARBUDA**

**ANUHCVAP2015/0035**

**BETWEEN:**

**AHMED WILLIAMS**

Appellant

**and**

**THE SUPERVISORY AUTHORITY**

Respondent

**Before**:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario F. Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

**Appearances**:

Dr. David Dorsett for the Appellant.
Mr. Justin Simon, QC with him, Mr. Curtis Bird and Mr. Kwame L. Simon for the Respondent.

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2017: February 28;
July 13.

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*Antigua and Barbuda civil asset forfeiture regime – Whether regime infringes ss. 3(a), 7 and 15 of the Constitution of Antigua and Barbuda – Whether s. 20A(2) of the Money Laundering Prevention Act 1996 (as amended) unconstitutional, null and void – Whether judgment of learned judge in court below ordering that appellant's interests in properties be forfeited to the Crown ought to be set aside*

The appellant, Mr. Ahmed Williams ("Mr. Williams"), was convicted of the offences of possession of cocaine with intent to supply and possession of cocaine with intent to sell contrary to sections 6(3) and 12(1), respectively, of the Misuse of Drugs Act (as amended). After Mr. Williams was sentenced, the respondent, The Supervisory Authority ("the Authority"), applied to the High Court in its civil jurisdiction pursuant to the Money Laundering Prevention Act 1996 (as amended) ("the MLPA") for an interim freeze order in relation to real properties that were registered in Mr. Williams' name. The application for the freeze order was granted and Mr. Williams subsequently applied to have it discharged. Prior to the hearing of the discharge application, the Authority filed a claim pursuant to

section 20A(2) of the MLPA to have the frozen properties forfeited to the Crown. This claim was vigorously opposed by Mr. Williams on the basis that the frozen properties were not obtained from the proceeds of criminal activity and therefore were not subject to forfeiture under section 20A of the MLPA. Mr. Williams further argued that section 20A(2) of the MLPA violated sections 3(a) and 15 of the Constitution and that it amounted to a finding of a criminal conviction in civil proceedings and in relation to which there was no criminal charge.

Mr. Williams was unsuccessful at discharging the freeze order. The judge who heard the discharge application found that there was evidence on which Mr. Williams' properties could have been frozen since he had engaged in 'money laundering activity', as defined in section 2H of the MLPA. In relation to the forfeiture proceedings commenced by the Authority, it was ruled (by a different judge) that the forfeiture claim pursuant to section 20A(2) of the MLPA had been established and Mr. Williams' properties were to be forfeited to the Crown. The judge who heard the Authority's claim also found that the civil asset forfeiture regime is not criminal in nature and therefore, Mr. Williams could not avail himself of the protection which section 15 of the Constitution provides to persons charged with a criminal offence. The judge also held that the civil asset forfeiture regime was not disproportionate in nature and accordingly, there was no breach of Mr. Williams' constitutional rights as urged by him. The judge further concluded that the Authority had satisfied the court that Mr. Williams had engaged in 'money laundering activity' as defined in section 2H of the MLPA.

Mr. Williams appealed to this Court. The main issue raised on appeal was whether the learned trial judge erred as a matter of law in concluding that section 20A(2) of the MLPA did not infringe sections 3(a), 7(1) or 15 of the Constitution.

**Held:** dismissing the appeal; upholding the ruling of the learned judge that section 20A(2) of the MLPA is constitutional; and ordering that each party bear its own costs, that:

1. The civil asset forfeiture regime which was introduced with the amendments made to section 20A of the MLPA, is distinct and separate from the criminal asset forfeiture regime which had been in existence for several years in the MLPA in its original form. In the case of civil asset forfeiture, there is absolutely no requirement for the defendant to have been charged with a criminal offence. In particular, in this regime, the Crown is able to recover property identified as being obtained merely from 'money laundering activity'; the owner of the property need not have been charged with a money laundering offence for forfeiture to take place. On the other hand, the legislature stipulates that criminal asset forfeiture can only follow a conviction. The two separate and distinct regimes should not be conflated.

   **Walsh v Director of Asset Recovery Agency** [2005] NICA 6 applied; **Allen v The United Kingdom** ECHR 2013 IV distinguished.

2. The civil asset forfeiture regime provides extensive due process of law guarantees, which guarantees Mr. Williams took full advantage of. He had a full

trial and was given the opportunity to oppose the freeze order, lead evidence, and also cross examine witnesses. He therefore cannot properly complain that he was not afforded procedural fairness as provided by section 3(a) of the Constitution. Section 3(a) was not infringed, but rather, the appellant was afforded the full due process of law.

**Attorney-General of Barbados and Others v Joseph (Jeffrey) and Boyce (Lennox)** (2006) 69 WIR 104 applied; **Maya Leaders Alliance and Others v The Attorney General of Belize** (2015) 87 WIR 178

3. Civil asset forfeiture is civil in nature and should not be classified as criminal proceedings. It does not amount to a trial for a criminal offence without due process for such a trial. Accordingly, the regime in no way infringes the fundamental rights that are provided in section 15(2)(a) and 15(5) of the Constitution, which speak specifically to criminal offences.

**R (on the application of the Director of Asset Recovery Agency) v Paul Ashton** [2006] EWHC (Admin) 1064 applied; **Walsh v Director of Asset Recovery Agency** [2005] NICA 6 applied; **Director of Asset Recovery Agency v Charrington** [2005] EWCA Civ 334 applied; **Gale and another v Serious Organised Crime Agency** [2011] UKSC 49 applied.

4. With regard to Mr. Williams' alternative argument based on section 7(1) of the Constitution that the civil asset forfeiture regime amounts to cruel and inhuman punishment, it has long been settled that the fundamental right to protection from cruel and inhuman punishment has to do with a person's protection from bodily impairment. What is at issue in this matter is the seizure of one's property. The fundamental rights jurisdiction is a special jurisdiction and should only be used in appropriate circumstances. Mr. Williams' reliance on section 7(1) of the Constitution is misplaced.

**Harrikisson v Attorney General of Trinidad and Tobago** (1980) AC 265 applied; **Hinds v The Attorney General** (2001) UKPC 56 applied.

## JUDGMENT

### Introduction

[1] **BLENMAN JA**: This appeal raises an important question about the constitutionality of the civil asset forfeiture regime in Antigua and Barbuda. It interrogates the decision of learned Justice Claire Henry in which she held that the civil asset forfeiture regime in Antigua and Barbuda did not infringe sections 3(a) and 15 of the **Antigua and Barbuda Constitutional Order 1981** ("the Constitution") and was therefore valid.

[2] Dr. Dorsett forcefully urged this Court to allow his appeal and order that section 20A(2) of the **Money Laundering Prevention Act 1996** as amended by the **Money Laundering Prevention Act 2002** (the "MLPA") is unconstitutional, null and void. He also implored this Court to set aside the judgment of the learned judge in which Mr. Williams' interests in the relevant properties were forfeited to the Crown and to award him costs. The Supervisory Authority (the "Authority") strenuously opposed his appeal and argued that the learned trial judge did not err in her application of the relevant law or in relation to the conclusions at which she arrived.

[3] I propose to address the factual background to this appeal.

**Background**

[4] Mr. Ahmed Williams ("Mr. Williams") was convicted of two offences, namely: unlawful possession of cocaine with intent to supply contrary to section 6(3) of the **Misuse of Drugs Act**;[1] and possession of cocaine with intent to sell contrary to section 12(1) of the **Misuse of Drugs Act**. Upon his convictions he was sentenced to five (5) years imprisonment and fined $100,000.00 on the second offence. In relation to the first offence, he was reprimanded and discharged. His appeal against his convictions and sentences was dismissed by the Court of Appeal but the sentence imposed in default of payment of the fine was varied.

[5] Subsequent to his convictions and sentence, the Authority, acting pursuant to the MLPA, applied to the High Court in its civil jurisdiction for an interim freeze order in relation to real properties that were registered in Mr. Williams' name. Indeed, the freeze order was granted by the High Court pursuant to section 19(1)(A). Mr. Williams filed an application pursuant to section 19(B)(5) of the MLPA to have the interim order discharged. After a full hearing, his effort to discharge the freeze order was unsuccessful since learned Justice David Harris held, in a closely

[1] Cap 283, Laws of Antigua and Barbuda as amended.

written judgment, that there was evidence on which Mr. Williams' properties could have been frozen on the basis that he had engaged in money laundering activity and therefore the properties remained frozen.[2]

[6] However, before the hearing of the discharge application, the Authority had filed a claim pursuant to section 20A(2) of the MLPA to have the frozen properties forfeited to the Crown. Mr. Williams vigorously opposed the forfeiture claim, on the basis that the frozen properties were not obtained from the proceeds of the criminal activity and therefore were not subject to forfeiture under section 20A of the MLPA. More importantly, Mr. Williams challenged the constitutionality of section 20A(2) of the MLPA. He argued that it violated sections 3(a) and 15 of the Constitution.

[7] Mr. Williams also sought a number of declarations on the constitutionality of various provisions of the MLPA in general but specifically in relation to section 20A(2) as it deals with the seizure of the properties that belonged to him. His main contention was that none of the properties were used in, or in connection with any unlawful activity and were not derived, directly or indirectly from proceeds of crime or from any money laundering activity. He also argued that section 20A amounted to a finding of a criminal conviction in civil proceedings and in relation to which there was no criminal charge. He therefore asserted that the Authority's claim for civil asset forfeiture is unlawful, invalid and unconstitutional. Learned Justice Henry held that the civil asset forfeiture regime is not criminal in nature and since section 15 of the Constitution provides protection to persons charged with a criminal offence, Mr. Williams could not avail himself of the section 15 protection. Also, Justice Henry, having reviewed the evidence adduced by both sides and the submissions, concluded that the Authority had established the claim pursuant to section 20A(2) of the MLPA for the forfeiture of Mr. Williams' properties to the Crown. Accordingly, the learned judge ordered that his interests in the relevant

[2] See: The Supervisory Authority Under the Money Laundering (Prevention) Act 1996 v Ahmed Williams ANUHCV 2009/0302 (delivered 14th October 2009, unreported).

properties, which had been frozen, were forfeited to the Crown. Finally, the learned judge held that the civil asset forfeiture regime was not disproportionate in nature and there was therefore no breach of Mr. Williams' constitutional rights as urged by him.

[8] Specifically on the forfeiture issue, the learned judge, having reviewed Mr. Williams' evidence and that adduced on behalf of the Authority, together with the submissions advanced by both sides, concluded the Authority had satisfied the court that Mr. Williams had engaged in money laundering activity as defined in section 2H of the MLPA.[3]

[9] Also, the learned judge held that Mr. Williams had tendered no evidence to establish that section 20A(2) of the MLPA is not reasonably justifiable in a democratic society. Also, she stated that given the presumption in favour of constitutionality, Mr. Williams had failed to discharge the burden of providing clear circumstantial evidence of violation of the Constitution. The learned judge found that the provisions of the MLPA in relation to civil asset forfeiture, as they stand, are not unlawful, invalid or unconstitutional. Accordingly, the learned judge refused to grant the declarations that Mr. Williams had sought. In so doing, the judge also rejected Mr. Williams' contention that section 20A(2) of the MLPA was draconian.

[10] Mr. Williams is aggrieved by the decision of the learned judge and as alluded to, he has filed two grounds of appeal in his amended notice of appeal.

[11] I will now repeat his grounds of appeal.

[3] See: para. 44 of judgment of Henry J dated 10th September 2015.

**Grounds of Appeal**

[12] The grounds of appeal are as follows:

(a) The learned judge erred in failing to find that section 20A(2) of the MLPA violated the appellant's constitutional right to the protection of the law as guaranteed by section 3 of the Constitution in that the said section permits civil forfeiture upon the court finding that a person has in effect committed a criminal offence though the finding need not be established beyond reasonable doubt which is contrary to universally accepted standards of justice observed by civilised nations which observe the rule of law.

(b) The learned judge erred in failing to find that section 20A(2) of the MLPA was draconian and for this reason contravened both the separation of powers principle and section 7(1) of the Constitution which protects against inhumane and degrading punishment.

[13] With the greatest of respect to Dr. Dorsett, the above grounds of appeal may helpfully be formulated as follows:

(i) Whether the learned trial judge erred as a matter of law in concluding that section 20A(2) of the MLPA did not infringe sections 3(a), 7(1) or 15 of the Constitution.

**Appellant's Submissions**

[14] Learned counsel, Dr. Dorsett, took issue with the fact that one of the offences for which Mr. Williams had been convicted was not an offence that fell within section 2H of the MLPA. Indeed, he argued that section 12(1) of the **Misuse of Drugs Act** was not an offence that was recognised under the MLPA, as it then stood. He pointed out that Mr. Williams was convicted in 2008 and section 12(1) of the **Misuse of Drugs Act** at the relevant time was not included as an offence which fell within the money laundering offences. He said that the section 12(1) offence only became a relevant offence on 24th December 2009 when it was gazetted,

therefore it would not be taken into account by the learned judge in construing the requirement of section 2H of the MLPA. He therefore urged this Court to find that it was not open to the court below to confiscate any property under the MLPA on the basis of money laundering activity. He also argued that Mr. Williams was not convicted of the second offence in relation to section 6(3) of the **Misuse of Drugs Act** of possession of cocaine with intent to supply since he was merely reprimanded and discharged.

[15] Next, learned counsel Dr. Dorsett argued that the civil asset forfeiture regime as provided in section 20A(2) of the MLPA is unconstitutional. He submitted that as a consequence any civil asset forfeiture order made pursuant to section 20A is unconstitutional and void and cannot stand. Dr. Dorsett posited that there is no practical difference between "money laundering activity" for the purposes of section 20A(2) of the MLPA and "money laundering offence". Dr. Dorsett's main challenge to section 20A(2) is, in his view, that the section permits the court to conclude that a person has committed a criminal offence without that person having been found guilty of a money laundering offence or having admitted to committing the offence. Further, he says that section 20A(2) enables a person to be found guilty of being engaged in a money laundering activity even though there is no necessity for the person to have been charged. Therefore, he submitted that section 20A(2) violates section 3(a) of the Constitution which guarantees persons the protection of law. He purported to rely on the pronouncements of President de la Bastide and Justice Saunders in **Attorney-General of Barbados and Others v Joseph (Jeffrey) and Boyce (Lennox)**[4] at paragraph 63 where they stated:

> "'In their lordships' view, "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law; see the illuminating judgment of Phillips JA in *Lasalle v Attorney-General* (1971) 18 WIR 379, from which their lordships have derived much assistance.
>
> "The clause gives constitutional protection to the concept of procedural

[4] (2006) 69 WIR 104.

fairness."

[16] Learned counsel, Dr. Dorsett, also sought to place reliance on the judicial statements of President Byron and Justice Anderson in **Maya Leaders Alliance and Others v The Attorney General of Belize**[5] at paragraph 47 where they addressed due process of law:

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multidimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy and breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

[17] Having referred to the above judicial pronouncements, Dr. Dorsett contended that section 20A(2) of the MLPA infringes the due process of law as provided by section 3(a) of the Constitution; accordingly he submitted that it is void to the extent of its inconsistency. He therefore argued that the learned judge erred in concluding that section 20A(2) was constitutional and urged this court to reverse the decision of the judge.

[18] Next, Dr. Dorsett submitted that section 20A(2) offends section 15(2)(a) of the Constitution which provides that every person who is charged with a criminal

[5] (2015) 87 WIR 178.

offence shall be presumed to be 'innocent until he is proved or has pleaded guilty'. He reiterated that section 20A(2) of the MLPA enables the court to find a defendant guilty of a criminal offence even though that defendant has not been charged. Dr. Dorsett reiterated his opinion that section 20A(2) of the MLPA is criminal in nature and he said that this is so even though it has the nomenclature civil asset forfeiture. Due to its criminal nature, he says that Mr. Williams' fundamental rights were affected. Dr. Dorsett reminded this Court that the provisions in the Constitution are greatly influenced by the **European Convention for the Protection of Human Rights and Fundamental Freedoms** ("the Convention"). He correctly stated that the European Court of Human Rights is the guardian of the Convention and accordingly resort can be had to its jurisprudence which is well known as "the Strasbourg jurisprudence". Dr. Dorsett highlighted the fact that section 15(2) of the Constitution corresponds with Article 6(2) of the Convention, the latter which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty". He consistently took issue with the Authority's contention that the proceedings under section 20A(2) are civil. He submitted that in determining whether the proceedings are criminal for the purposes of Article 6(2) of the Convention, jurisprudence from Strasburg indicates that a number of factors must be considered: (a) whether the proceedings satisfy the Engel criteria; (b) whether subsequent proceedings are linked to prior criminal proceedings; and (c) where there are subsequent proceedings imputing criminal liability.

[19] Dr. Dorsett said that in relation to the **Engel** criteria three factors are considered in the determination of whether or not a person is charged with a criminal offence namely: (a) the classification of the proceedings under the national law; (b) their essential nature; and (c) the type and severity of the penalty to which the person is potentially exposed. He referred to **Ezeh and Connors v The United Kingdom**[6] in support of those principles. Dr. Dorsett posited that the first criteria is no more than a starting point and the indications so afforded have only a formal and relative

[6] ECHR 2003 – X101 at p. 82.

value. He said that if national or domestic law classifies an offence as criminal then this will be decisive. Otherwise, he said, the court will look behind the national classification and examine the substantive reality of the procedure in question. Dr. Dorsett said that in relation to the second criterion, the very nature of the offence is of far greater import. He said that in this second evaluation a number of factors are taken into consideration including whether the law is directed solely at a specific group or is of general application, whether proceedings are instituted by a public body with statutory powers of enforcement or whether the imposition of any penalty is dependent upon a finding of guilt. Dr. Dorsett accepted that what matters is if the factors that are present "clearly give them a certain colouring which does not entirely coincide with that of a purely (non-criminal) matter". In relation to the third criterion, he stated that the nature and degree of severity of the penalty that the person concerned risks incurring is relevant.

[20] In purporting to place reliance on the above principles, Dr. Dorsett therefore argued that applying the above criteria to the case at bar, the proceedings under section 20A of the MLPA in which the court is empowered to make a finding that one has 'engaged in money laundering activity' is in effect criminal proceedings. He said that the essential nature of the allegation that one 'has engaged in money laundering activity' is that one has committed a money laundering offence and that accordingly section 15(2) of the Constitution is applicable. He said that the "offence" of money laundering activity has the same constituents as the offence of money laundering. Therefore, Dr. Dorsett posited that section 15(2) of the Consititution (protection of the law) is involved in relation to the "offence" of money laundering activity. Further, Dr. Dorsett complained that since the protection of the law afforded by section 15(2) of the Constitution is involved it means that a person such as Mr. Williams should be presumed to be innocent until proven guilty. He said however that section 20A(2) of the MLPA requires proof of guilt on the basis "that it is more probable than not that the defendant has engaged in "money laundering activity". He argued that since the standard of proof that is required is

not that of the criminal standard, it accordingly renders section 20A(2) of the MLPA unconstitutional. Dr. Dorsett highlighted the fact that the order made by the judge under section 20A of the MLPA was made on the basis of a civil standard of proof which is consistent with a civil trial. He said that Mr. Williams' trial was conducted in a civil court yet he was found guilty of having committed a criminal offence. He said that the learned judge therefore erred in concluding that section 15(2) of the Constitution was not breached and this Court should reverse the decision of the court below.

[21] Moving along, Dr. Dorsett said that the constitutional protection in section 15(2)(a) of the Constitution also arises in circumstances where subsequent proceedings are linked to prior criminal proceedings. He therefore argued that the proceedings in the court below were linked to the prior criminal proceedings in which Mr. Williams had been convicted of money laundering and therefore section 15(2) of the Constitution is brought into focus. Dr. Dorsett said that the Strasbourg jurisprudence recognises that Article 6(2) (in para materia with section 15(2)(a) of the Constitution) protection should be afforded to persons who have been acquitted of a criminal charge or in respect of whom criminal proceedings have been discontinued, from being treated as if they are in fact guilty. He posited that insofar as the civil forfeiture proceedings follow proceedings conducted under different legislation, including the **Misuse of Drugs Act**, which create money laundering offences, they are clearly linked to the prior criminal proceedings. Dr. Dorsett purported to rely on **Allen v The United Kingdom**[7] as authority for the proposition that once the determination of whether the offence has been committed can only be made against the backdrop of the criminal proceedings, Article 6 (2) protection is afforded for the defendant. He sought to argue that in the case at bar, the learned trial judge's finding was that it is more probable than not that Mr. Williams engaged in money laundering activity. He also therefore submitted that Mr. Williams' prior conviction was an important element of his asset forfeiture under section 20A(2) and therefore section 15 of the Constitution of

[7] ECHR 2013 IV at para. 94.

Antigua and Barbuda was applicable. He referred this Court to **Geerings v The Netherlands**[8] to buttress his arguments that the judge referred to Mr. Williams' previous conviction and therefore the fundamental rights provision is engaged.

[22] Dr. Dorsett said that the Authority's reliance on **Her Majesty's Advocate the Advocate General for Scotland v Robert McIntosh** [9] is misplaced. He said that case concerned section 1 of the **Scottish Proceeds of Crime Act 1995** and is very different from section 20A of the MLPA. He said that section 1(8) of the Scottish Act provided that for the purposes of any appeal, a confiscation order is a sentence. In that case, he pointed out that, the Board held that in relation to the application for a confiscation order made against him, the respondent was not a person entitled to rely on presumption of innocence guaranteed by Article 6(2) of the Convention. Dr. Dorsett opined that that finding is consistent with the Strasbourg jurisprudence and he said that it is distinguishable from the present case.

[23] However, Dr. Dorsett submitted that Article 6(2) of the Convention was infringed by findings in subsequent proceedings which cast doubt on the validity of a prior acquittal in criminal proceedings. In this regard, he purported to place reliance on **Gale v Serious Organised Crime Agency**.[10] He said that Gale had been acquitted of drug trafficking offences in Portugal but was subject to civil recovery proceedings in the United Kingdom. The UK Supreme Court held that since there was no link between the criminal proceedings which had led to this first acquittal in Portugal and in the civil recovery proceedings in England he could not have the benefit of Article 6(2) of the Convention. Dr. Dorsett opined that clearly if there was a link between the two sets of proceedings Mr. Gale would have been able to avail himself of Article 6(2) of the Convention.

[24] Moving along, Dr. Dorsett emphasised his view that since Mr. Williams had

[8] (2007) 46 EHRR 1212 at para 44.
[9] [2001] UKPC 1.
[10] [2011] UKSC 49.

already been tried and convicted of the money laundering offences, the trial before learned Justice Henry amounts to a criminal trial again for the "money laundering activity". This, he said infringes section 15(5) of the Constitution which prohibits a person from being tried twice for the same offence.

[25] Next, Dr. Dorsett, both in his oral and written submissions before this Court and in his amended grounds of appeal posited that the civil asset forfeiture as provided by section 20A of the MLPA amounts to imposing inhuman and degrading punishment on Mr. Williams and offends section 7(1) of the Constitution. He further submitted that the decision of the judge should be quashed on the basis that the civil asset forfeiture under the MLPA imposes wholly disproportionate penalties on Mr. Williams and therefore the forfeiture was unlawful and unconstitutional. Dr. Dorsett in support of the above proposition sought to rely on **Zuniga and Others v Attorney General of Belize**[11] in which it was held that:

> "It is vital precept of just penal laws that the punishment should fit the crime. The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or miniumum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime.

Dr. Dorsett therefore urged this Court to strike down section 20A(2) of the MLPA on the basis that it amounts to the imposition of cruel and inhuman punishment.

[26] Finally, Dr. Dorsett said that the Authority relied heavily on the case of **Walsh v Director of Asset Recovery Agency**[12] and to a lesser extent the case of **Gale**, ("the Walsh-line of cases") to argue that the MLPA does not contravene the constitutional rights. He submitted that reliance on these cases in support of the constitutionality of MLPA is misplaced because the Walsh-line of cases were

[11] [2014] CCJ 2 (AJ) at para. 61.
[12] [2005] NICA 6.

considering the United Kingdom's **Proceeds of Crime Act 2002** which he referred to as ("POCA 2002"), and in particular Part 5 of POCA 2002, which in critical respects is different from the MLPA. He said that critical to the operation of POCA 2002 is section 266(1) which reads thus:

> "If in proceedings under this Chapter the court is satisfied that any property is recoverable, the court must make a recovery order."

Dr. Dorsett said that under POCA 2002, there is civil recovery upon the court being satisfied that certain property is recoverable. Property is recoverable under POCA 2002 if it is obtained through unlawful conduct, that is, if it is obtained by or in return for unlawful conduct (i.e. conduct that is unlawful under the criminal law, see: sections 241, 242 and 304(1) of POCA 2002). Dr. Dorsett said on the other hand, under section 20A(2), civil asset forfeiture occurs upon the court being satisfied (to the extent that it is more probable than not) that 'the person concerned has engaged in money laundering activity'. Dr. Dorsett further submitted that under the civil recovery proceedings in POCA 2002, there is no finding of personal culpability. He said however that under the civil forfeiture procedures of the MLPA there is an express finding of personal culpability because the court is mandated and directed to make a finding that the person is 'engaged in money laundering activity'. He posited that there is no escaping the fact that civil forfeiture proceedings under the MLPA are directed against the person, namely, the person who has engaged (having being convicted or is suspected to have engaged) in money laundering activity. In his opinion there can be no civil forfeiture until there is a determination that the person is guilty of money laundering activity. He opined that the civil asset forfeiture proceedings under MLPA are predominantly proceedings in personam. Furthermore, he argued that in the civil asset forfeiture proceedings, the defendant is called upon to rebut the accusation that he did not engage in money laundering activity. If the defendant fails, his property is liable to forfeiture.

[27] Dr. Dorsett emphasised that, in his view, the civil recovery proceedings under POCA 2002 are not directed against the person; instead they are clearly directed

against the property. This, he said is evident from the statutory language of section 266(1) of POCA 2002. He opined that this is why the Court of Appeal of Northern Ireland concluded its judgment in **Walsh** at paragraph 41 in the following terms:

> "They are not directed towards him 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 appellant, 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."

In contrast to the MLPA, Dr. Dorsett said that in **Gale** at paragraph 23, the United Kingdom Supreme Court confirmed that Part 5 proceedings under POCA 2002 operate in rem. Civil recovery proceedings under POCA 2002 are designed to recover property obtained through unlawful conduct. Such proceedings may be brought against 'any person who the authority thinks holds recoverable property [emphasis supplied]" (see section 243(1) and 304(1) of POCA 2002), not against a person whom the authority thinks has committed unlawful conduct.

[28] In view of all of the above, Dr. Dorsett urged this Court to allow Mr. Williams' appeal and set aside the decision of the judge below in its entirety.

**Respondent's Submissions**

[29] Learned Queen's Counsel, Mr. Simon, at the commencement of his oral submissions before this Court, pointed out that he had drawn to counsel for Mr. Williams' attention that at the material time Mr. Williams had been convicted of two offences. He said that while he concedes that the offence in relation to possession of cocaine with intent to sell as provided by section 12(1) of the **Misuse of Drugs Act** was not caught by section 2H of the MLPA, however, unlawful possession of cocaine with intention to supply contrary to section 6(3) of the **Misuse of Drugs Act** and of which Mr. Williams was convicted, was definitely

amenable to section 2H of the MLPA. Mr. Simon, QC said that Mr. Williams' complaint with regard to unconstitutionality of section 20A of the MLPA therefore is baseless and should be rejected. Mr. Williams was convicted of a money laundering offence that was recognised by the statute at the material time as one of the relevant offences. Mr. Simon, QC pointed out that in accordance with section 2H of the MLPA, 'a reference to "money laundering activity" by a person is a reference to anything done by the person that at the time was a money laundering offence whether or not the person has been charged with the offence and, if charged: (a) has been tried; or (b) has been tried and acquitted; or (c) has been convicted (even if the conviction has been quashed or set aside)'.

[30] Learned Queen's Counsel, Mr. Simon, was adamant that one of the offences of which Mr. Williams was convicted falls under section 6(3) of the **Misuse of Drugs Act** and clearly falls within section 2H of the MLPA. However, he hastened to add that in order for the Crown to move for civil asset forfeiture, it is unnecessary for the person against whose property forfeiture is sought to have been convicted at all. He underscored the fact that the section did not even require that the defendant should have been charged with any offence before his property could be liable to forfeiture. He said that the civil asset forfeiture regime is separate and distinct from the criminal asset forfeiture regime; the latter which is recognised by section 20A(f) of the MLPA. In the criminal asset forfeiture, an accused must have been convicted but there is no such requirement in relation to the civil asset forfeiture.

[31] Moving along, learned Queen's Counsel, Mr. Simon, maintained that section 20A neither violates section 3(a), 7(1) nor 15 of the Constitution and the learned judge did not err in upholding its constitutionality. In further developing his argument, Mr. Simon, QC said section 20A(2) of the MLPA provides the complete regime for civil forfeiture to the Crown and for such an application and the matters which are to be considered by the court in making a determination. He reminded this Court that firstly, the application for a civil forfeiture order may only be made in respect of

property in which the appellant had an interest and that, that interest is subject to a freeze order 'when the forfeiture order takes effect'. He referred this Court to section 20A(1) in support of his argument. Mr. Simon, QC said that a freeze order was in effect at the date of the forfeiture application, and in fact had been in effect from 7th July 2009 and the appellant failed in his attempt to discharge that order. He said that secondly, under section 20A(2):

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

[32] Mr. Simon, QC therefore submitted firstly that the standard of proof required in the case of civil asset forfeiture is that of civil probability, so that it is sufficient to satisfy the first limb of the section if the court's finding on the evidence before it was a real or substantial possibility. Secondly, the "finding" must be that the defendant was engaged in money laundering activity at some time during the six years prior to the date of the forfeiture application (i.e. anytime from July 2003). The limitation period is referable only to the appellant's engagement in 'money laundering activity' which is defined in section 2H of the MLPA to include (specifically) his conviction of a money laundering offence. Mr. Simon, QC posited that section 20A(3) of the MLPA provides an aide to the court when making a determination as to the grant of a civil forfeiture order. He pointed out that a finding of the High Court for the purposes of subsection (2) need not be based on a finding that some offence or other constituting a money laundering offence was committed'. Mr. Simon, QC, however, submitted that in the case of Mr. Williams, the court did not need to invoke that sub-section in its deliberations given the fact that Mr. Williams was found guilty of a particular money laundering offence, to wit, possession of cocaine with intent to supply contrary to section 6(3) of the **Misuse of Drugs Act**.[13]

[13] Cap. 283 as amended by Act No. 6 of 2001.

[33] Mr. Simon, QC indicated that section 20A(1) is pellucid as to 'the interests in property' which can be the subject of a forfeiture order. He pointed out that 'all or any of the interests in property are subject to the freeze order when the forfeiture order takes effect'. He reminded this Court that following the making of a freeze order against any property under section 19 of the MLPA, a defendant who has an interest in the subject property can apply to the High Court for a discharge of the order in relation to his interest therein. He said that the onus of proof lies on the defendant to satisfy the court that:

> "(1) the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity; and
> (2) the property was not related in any way, directly or indirectly, to any unlawful activity including (and without limiting the generality of the foregoing) any money laundering scheme established in Antigua and Barbuda and elsewhere" – see section 19B and (6) of the MLPA."

[34] Mr. Simon, QC reiterated the fact that in the civil proceedings Mr. Williams made an application pursuant to section 19B(5) of the MLPA to discharge the freeze order, and that his application was supported by several affidavits including an affidavit from his common law wife, Idressa Ajene Andre. He said that after a full trial, learned Justice David Harris, at paragraph 38 of his judgment delivered on 14th October 2009 held, that:

> "On the evidence, I find weakness in the inherent consistency of the defendant's assertions and explanations as identified in the claimant's affidavits. I am not satisfied that the documentary evidence shows a lumber import business activity or income generating capacity as alleged by the defendant. I find the assertion by Idressa Andre of her equitable interest in the property not made out on the evidence. I also find the reasoning provided by her for her not having got her name on the land title Register strongly defiant of logic and reality. Her physical presence at the Bank or Registry has never been and is not now a bar to her name being placed as a proprietor …"

[35] Mr. Simon, QC posited that from the above it is therefore abundantly clear that the issues which could have been raised by Mr. Williams in opposition to the civil asset forfeiture application (that the properties were not used in or derived from or related to any money laundering activity) have already been joined between Mr.

Williams and the Authority, adjudicated upon, and judicially determined by Justice David Harris on 14th October 2009. He reminded this Court that it was following that adjudication that the freeze order was upheld in favour of the Authority, and that gave "clearance" for the civil forfeiture application. He highlighted the fact that in rejecting the defence, learned Justice Harris, at paragraph 39 of his judgment concluded:

> "The source of funds for the acquisition and development of the subject properties are sufficiently unsubstantiated so as to give rise to the reasonable suspicion held by the Authority that, the defendant is engaged in the statutorily prohibited activity and, that the defendant has an interest in the subject property…"

[36] Turning his attention in more detail to the MLPA civil asset forfeiture regime, Mr. Simon, QC submitted that the MLPA provides a regime for the forfeiture of property to the Crown where a person has been convicted of, or has been or is about to be charged with a money laundering offence or is suspected of having engaged in money laundering activity. He said that the legislation provides adequate protection to a defendant or a third party who has an interest in the property to be forfeited before confiscation is effected and enforced. He pointed out that the regime is as follows:

(a) the starting point is to obtain a freeze order on an ex parte application in respect of property 'in which there is reasonable suspicion that the defendant has an interest': section19(1);

(b) the ex parte order is to be served on the defendant or any other person who may have an interest in the property within 14 days of the making of the order: section 19(1B);

(c) the High Court shall consider the application of a third party to exclude any interest that he may have in the property on specified grounds: section 19B(4);

(d) the High Court shall consider the application of the defendant to discharge the freeze order 'to the extent to which it relates to the interest in [the] property' on specified grounds: section 19B(5)(a) to (e);

(e) the onus of proof in any application made by a third party or a defendant lies upon them: section 19B(6);

(f) automatic criminal forfeiture within 90 days of the making of the freeze order or the conviction to the defendant if the freeze order has not been discharged: section 20(1);

(g) civil forfeiture operates upon application, where the freeze order is in force, on a finding by the court that "it is more probable than not that the person in respect of whom the freeze order was made had, at any time, not more than six (6) years before the making of the application … engaged in money laundering activity: section 20A(2).

[37] He said that these are two separate and distinct forfeiture regimes; one civil and the other criminal. In order to provide context to the civil asset forfeiture regime, Mr. Simon, QC highlighted the fact that section 20(1) of the original MLPA (Act No. 9 of 1996) provided that, '[w]hen a person is convicted of a money laundering offence, the court shall order that the property, proceeds or instrumentalities derived from or connected or related to such an offence be forfeited and disposed of in such a manner as the Minister may direct'. He pointed out that the amending Act (No. 6 of 2001) repealed and replaced section 20, thereby removing all direct linkages between a money laundering offence and all property made subject to a freeze order or a forfeiture order. Additionally, the amending Act (No. 17 of 2002) inserted 'Part IVB Civil Forfeiture' comprising sections 20A, 20B and 20C and which provide for civil asset forfeiture orders. Mr. Simon, QC pointed out that the linkage is now between the defendant and his money laundering activity and, once established to the satisfaction of the court, an order of forfeiture will be made in respect of all property listed under the freeze order.

[38] Mr. Simon, QC was adamant that the civil asset forfeiture regime is civil in name and nature. He accepted that the test for determining whether proceedings are criminal or civil is, quite apart from the words of an enactment, established in **Engel v Netherlands**,[14] using three criteria: i. the classification of the proceedings under national law; ii. their essential nature; and iii. the type and severity of the penalty to which the person is potentially exposed. However he maintained that section 20A(2) MLPA proceedings are civil in name and nature. Learned Queen's Counsel, Mr. Simon, called in support of his argument the decision in **Walsh v Director of Asset Recovery Agency**.[15] He said that in discussing the classification of the proceedings, paragraphs 27-31 of decision in **Walsh v Director of Asset Recovery Agency** are instructive. He said that paragraph 27 reads:

> "We are satisfied that all the available indicators point strongly to this case being classified in the national law as a form of civil proceeding. The appellant is not charged with a crime. Although it must be shown that he was guilty of unlawful conduct in the sense that he acted contrary to the criminal law, this is not for the purpose of making him amenable as he would be if he had been convicted of crime. He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal."

[39] In respect of the nature of the proceedings in the case at bar, Mr. Simon QC referred this Court to other judicial pronouncements in **Walsh v Director of Asset Recovery Agency** at paragraph 28:

> "Mr. McCollum drew our attention to a formulation of the issue that appeared in the opinion of Lord Macfayden in **S's case [S v Lord Advocate]** where he said (2001 SC 977 at para 33):
>
> > '… the second criterion involves consideration of whether the situation in which the person concerned finds himself is of such a nature that he ought objectively for the purposes of the Convention to be regarded as "charged with a criminal offence." That will involve consideration of the nature of the allegation against him, and of the nature of the proceedings in which the

[14] (No. 1) [1976] 1 EHRR 647.
[15] [2005] NICA 6.

> allegation is made. It may involve consideration of the capacity in which the person making the allegation is acting. It may involve (at this stage rather than in the context of the third criterion) consideration of whether the imposition of a punishment or penalty is either the purpose or a possible outcome of the proceedings.'

[40] In respect of the third criterion, Mr. Simon, QC also referred to **Walsh v Director of Asset Recovery Agency** at paragraph 37: '… the purpose and function of the civil recovery procedure is to recover property obtained through unlawful conduct but not to penalise or punish any person proved to have engaged in such conduct'.

[41] He relied on the further pronouncement in paragraph 38, that:

> "A distinction between confiscation orders and recovery proceedings can be drawn in that, as Lord Bingham pointed out in *McIntosh's*, the sum ordered to be confiscated need not be the profit made from the drug trafficking offence of which the accused has been convicted, whereas recovery may only be ordered in relation to assets that have been acquired by proven unlawful conduct. The recovery of assets may more readily be described as a preventative measure, therefore. After all, the person who is required to yield up the assets does no more than return what he obtained illegally."

[42] Mr. Simon, QC submitted that the Engel test is that civil proceedings are instituted to recover the proceeds of money laundering activity rather than establishing guilt. He submitted that the judgment of Kerr LJ in **Walsh v Director of Asset Recovery Agency** at paragraphs 40 and 41 is instructive:

> "[40] Mr. McCollum argued that the effect of the recovery action in terms of both its impact on the appellant and in the way that it was instituted and presented militated strongly against a finding that these were civil proceedings. He pointed out that the proceedings were initiated by a public authority on referral from PSNI, a state agent. The agency would rely on material adduced in the criminal trial of the appellant. It would seek to establish his guilt of criminal conduct and, if successful, the proceedings would have a direct impact on him by depriving him of his personal property. It was invidious that he should be stigmatised with having been guilty of criminal conduct if that was not proved beyond reasonable doubt. Viewed cumulatively, the *Engel* test should be applied to this case, he claimed, to identify the proceedings as criminal in

character."

[43] Mr. Simon, QC said that much the same argument is being made before this Court by Mr. Williams' counsel but Kerr LJ stated at paragraph 41 that:

> "We cannot accept these submissions. The essence of art 6 in its criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him 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 appellant, 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 offenses. The cumulative effect of the application of the test in *Engel* is to identify these clearly as civil proceedings."

[44] Mr. Simon, QC referred to Mr. Williams' complaints that section 20A(2) of the MLPA permits civil forfeiture upon a finding of criminal guilt, though the finding is not established beyond reasonable doubt. In response, Mr. Simon, QC said that the Constitution provided 'for the taking of possession or acquisition of any property, interest or right- … (ii) by way of penalty for breach of the law or forfeiture in consequence of breach of law …; and (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations.' There is no stipulation that a person must first be convicted for there to be a forfeiture; nor does it stipulate the standard of proof required. He reminded this Court that the confiscation of unlawfully imported property is similarly executed under the **Customs (Control and Management) Act**.[16]

[45] Further, Mr. Simon, QC advanced **Gale and Another v Serious Organised Crime Agency**[17] in support of his contention and pointed out that in that case the Supreme Court unanimously rejected the proposition that the criminal standard of proof should be applied to civil proceedings. He underscored the fact that the

[16] Act No. 8 of 2013, Laws of Antigua and Barbuda.
[17] [2011] UKSC 49.

burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. Mr. Simon, QC reiterated that the criminal standard of proof does not apply, although 'cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not'. In addition, Learned Queen's Counsel, Mr. Simon, referred to **Secretary of State for the Home Department v Rehman (Consolidated Appeals)**[18] in further support of his argument.

[46] Also, Mr. Simon, QC posited that very helpful guidance can be found in **Gale and another v Serious Organised Crime Agency** where the Court cited the ECHR in **Phillips v United Kingdom**[19] and **van Offeren v The Netherlands**[20] and stated at paragraph 40 as follows:

> "In each case the court held that confiscation proceedings in relation to the benefits of drug trafficking did not involve charging the Defendant with a criminal offence so as to bring them within the scope of art 6(2). In each case the Applicant had been convicted of drug offences and the confiscation proceedings related to property held by him. The issue was whether art 6(2) was infringed by a presumption that this property was derived from similar offences. In holding that it was not the court treated the confiscation procedure as analogous to the sentencing process. It does not seem to me that the analogy is very precise. The important point is, however, that the ECTHR approved of the confiscation of property on the basis that it was derived from drug trafficking without treating the proof that it was so derived as involving criminal charges and thus involving the application of art 6(2)."

[47] Mr. Simon, QC emphasised that the civil asset forfeiture regime is distinct from that of the criminal asset forfeiture regime. He was adamant that the proceedings under section 20A of the MLPA are not linked to the prior criminal conviction of Mr. Williams. He reiterated that a criminal conviction is not a condition precedent for civil forfeiture proceedings, and are definitely not a continuation of those proceedings. In fact, he said that the legislation makes it clear that civil forfeiture

[18] [2003] 1 AC 153 at para. 55, per Lord Hoffmann.
[19] (2001) 11 BHRC 280.
[20] (Application No 19581/04) (unreported) 5 July 2005.

proceedings can be instituted irrespective of whether a defendant had been convicted or acquitted. He highlighted the following passage in **Gale** at paragraph 123:

> "The purpose of Pt 5 proceedings is not to determine or punish for any particular offence. Rather it is to ensure that property derived from criminal conduct is taken out of circulation. It is also of importance that Pt 5 proceedings operate in rem."

[48] At paragraph 3 of the judgment, the judge found that the property was derived from criminal activity in the form of drug trafficking – albeit in Portugal. Gale was prosecuted and acquitted of drug trafficking and in Spain criminal proceedings against him were brought but discontinued.

[49] Additionally, at paragraph 55 the judge stated that:

> "The starting point in this case is the possession of property by the Appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned."

[50] Further in support of his above proposition, Mr. Simon, QC pointed out that in **Gale**, Lord Dyson concluded at paragraph 133:

> "To return to the present case and applying the Strasbourg jurisprudence, I would hold that there is no sufficient link between civil recovery proceedings under Pt 5 of SOCA (sic) and any criminal proceedings to justify the application of art 6(2) [presumption of innocence] to the Pt 5 proceedings. Indeed, there is no link at all. The Pt 5 proceedings are not a "direct sequel" or a "consequence and the concomitant" of any criminal proceedings. They are free-standing proceedings instituted whether or not there have been criminal proceedings against the Respondent or indeed anyone at all".

[51] Mr. Simon, QC posited that the mechanism authorised by the MLPA for determining whether property is or is not 'proceeds of crime' arises out of the difficulty that is often the case in discovering proceeds of crime that have been concealed or disguised. In overcoming this difficulty, he invited this Court to bear

in mind that the words of Lord Hope in **Her Majesty's Advocate the Advocate General for Scotland v Robert McIntosh**:[21]

> "Then there is the nature of those offences which the Act defines as drug trafficking offences: see section 49(5). The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate."

Learned Queen's Counsel, Mr. Simon, stated that even though the case at bar is of a different species, the admonitions above are just as relevant in money laundering offences as they are to drug trafficking offences.

[52] Turning to the contention that section 20A(2) is draconian and disproportionate, Mr. Simon QC said that bearing in mind that confiscation proceedings are in personam, while civil forfeiture proceedings are in rem, the fact that the legislation may appear to be draconian, is not on its own a basis for bringing into question its constitutionality. The mischief that the legislation seeks to address must also be taken into account. He said that the question which it raises is that of "proportionality". He reminded this Court that the test for "proportionality" was set out in the Irish case of **John Gilligan v The Criminal Assets Bureau and Others**,[22] and he posited that it accords with our court's interpretation and the 3 prong test application of the proportionality doctrine in constitutional cases:

(1) The objective of the provision must be of sufficient importance to warrant overriding a constitutionally protected right.

(2) It must relate to the concerns pressing and substantial in a free and democratic society; and

[21] 2001 S.C.C.R. 191 at para. 45.
[22] [1998] 3 IR 185 at para. 147.

(3) The means chosen must pass a proportionality test:- be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; impair the right as little as possible; and be such that its effects are proportional to the objective.

[53] Mr. Simon, QC also submitted that insofar as Mr. Williams has been convicted of a drug trafficking offence, he cannot properly complain about the forfeiture of his assets pursuant to section 20A of the MLPA. In support of this proposition, Mr. Simon, QC placed reliance on the decision of the Privy Council in **Her Majesty's advocate v Robert Mc Intosh**,[23] where Lord Bingham said:

> "The Court is therefore dealing with a proven drug trafficker. It is then incumbent on the prosecutor to prove, as best as he can, the property held by the accused and his expenditure over the chosen period up to six years, including any implicated gifts relied on …. It is only if a significant discrepancy is shown between the property and expenditure of the accused on the one hand and his known sources of income on the other that the court will think it right to make the section 3(2) assumptions, and unless the accounting details reveal such a discrepancy the prosecution will not in practice apply for an order. It would then be an obviously futile exercise to seek an order where the assets and expenditure of the accused are fully explained by his known sources of legitimate income".

[54] Learned Queen's Counsel, Mr. Simon, submitted that in any event civil asset forfeiture under section 20A(2) of the MLPA is a proportional response to serious organised financial crimes, and that the legislative provisions are consistent with the qualified constitutional provisions which guarantee fundamental individual rights and freedoms, and secure protection of the law whilst balancing the greater good of society as a whole. He therefore urged this Court to hold that: civil forfeiture proceedings are civil in nature; civil forfeiture proceeds are directed at and relate to the nature of property and are therefore orders in rem; that the standard used for determining a breach of the law is the civil standard set by statute and does not offend the Constitution; that it is the court in civil proceedings which determines whether money laundering activity, has been engaged in by a

[23] [2001] UKPC 1 at para. 35.

defendant; that as the proceedings are not criminal, there is no presumption of innocence; that there is no double jeopardy as there is no criminal charge in these proceedings; that the proceedings do not impose penal sanctions nor do they affect the status of the appellant as they do not establish guilt; that civil forfeiture proceedings provide for due process by providing the appellant and third parties having an interest in the "Freezed" property to be heard; that civil forfeiture proceedings are a proportionate response to a very serious growing social threat that arise out of the possession and laundering of proceeds of crime; and that this appeal be dismissed.

**Discussion**

**Statutory Framework**

[55] I propose firstly to refer to the relevant statutory provisions (at some length) before addressing the critical issues that arise for this Court's consideration.

[56] The Constitution contains a number of fundamental human rights. Mr. Williams alleges that some of these fundamental rights have been infringed. I would therefore identify the relevant sections of the Constitution, in this context.

[57] Section 2 of the Constitution stipulates that it is the supreme law of the land.

[58] Section 3 of the Constitution provides:

> "Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place or origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms or others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of law …"

[59] Section 7(1) of the Constitution stipulates that:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

[60] Section 15(2)(a) of the Constitution establishes that every person who is charged with a criminal offence shall be presumed to be innocent until he is proven or has pleaded guilty.

[61] Section 15 (5) of the Constitution states that:

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

[62] Section 18 of the Constitution provides for the special fundamental rights jurisdiction of the High Court.

[63] Insofar as Mr. Williams is seeking to impugn the constitutionality of section 20A(2) of the MLPA, it is necessary to indicate the content of that section and the other relevant sections of the MLPA. It is noteworthy however, that Part II of the MLPA prohibits money laundering. Part IV of the MLPA addresses the freezing and forfeiture of assets in relation to money laundering.

[64] Section 2 of the MLPA defines money laundering as an offence against:

(a) sections 3 and 5 of the Act;

(b) sections 11A and 18 of the Act;

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

(d) sections 4, 5, 6(3), 7 and 8 of the **Misuse of Drugs Act**, Cap. 283.

[65] Section 2H of the MLPA provides:

> "In this Act a reference to money laundering activity by a person is a reference to anything done by the person that at the time was a money laundering offence whether or not the person has been charged with the offence and, if charged:
>
> (a) has been tried; or

(b) has been tried and acquitted; or
(c) has been convicted (even if the conviction has been quashed or set aside)."

[66] Section 19(1) of the MLPA provides:

"Where a person (referred to in this Part as "the defendant") –
(a) has been convicted of a money laundering offence; or
(b) has been, or is about to be charged with a money laundering offence; or
(c) is suspected of having engaged in money laundering activity

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

[67] Section 19(B)(5) of the MLPA stipulates:

"Where:
(a) a person (in this subsection called the defendant) has been –
i. convicted of a money laundering offence; or
ii. charged with a money laundering offence or is about to be charged with a money laundering offence; or
iii. joined as a defendant in an application pursuant to sections 20A or is about to be joined as a defendant in such an application;
(b) the High Court has made a freeze order against any property under section 19; and
(c) the defendant has an interest in the property;
(d) the defendant applies to the High Court for an order under this subsection in relation to the interest; and
(e) the court is satisfied that:
i. the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity; and
ii. the property was not related in any way, directly or indirectly to any unlawful activity including (and without limiting the generality of the foregoing) any money laundering scheme established in Antigua and Barbuda or elsewhere,

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

[68] Section 20A(1) states:

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

[69] Section 20A(2) provides as follows:

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

[70] Now, I turn to learned Counsel Dr. Dorsett's more discrete points of contention and on which Mr. Williams' appeal was launched, namely, that an application of the Engel principles would lead to the conclusion that section 20A(2) is criminal in nature. I am afraid that the application of the Engel principles (the three principles) to which both sides have referred extensively, inexorably leads to the conclusion that section 20A(2) is civil. I am fortified in this view since all of the indicia of section 20A(2) points to the ineluctable conclusion that it is civil in every respect. This view is buttressed by the fact that the nomenclature of the matter is civil. The penalty that is provided for is not a fine and the essential nature of the infraction is not by any means criminal. It is pellucid that everything about the new regime is civil in nature. The case of **Ezeh and Connors v The United Kingdom** is clearly distinguishable from the case at bar.

[71] It is noteworthy that I accept Mr. Simon, QC's submissions that the civil asset forfeiture regime is distinct and separate from the criminal asset forfeiture regime. In the case of the former, there is absolutely no requirement for the defendant to have been charged. This is in contradistinction to the situation in relation to criminal asset forfeiture which the legislature stipulates can only follow a conviction. There is no need to attempt to conflate the two separate and distinct regimes as Mr. Williams appears to be doing in his constitutional challenge. In this context, it must be borne in mind that criminal asset forfeiture was in existence for

several years in Antigua and Barbuda by virtue of the MLPA in its pristine form. Section 20A of the MLPA was amended so as to introduce the civil asset forfeiture, as Mr. Simon QC has correctly pointed out. I therefore see no real prospect of this Court being persuaded that section 20A(2) amounts to criminal asset forfeiture since it is wrong to submit for reasons which will become apparent shortly, that section 20A(2) forfeiture is criminal in nature. I place heavy reliance on the **Walsh v Director of Asset Recovery Agency** decision among others.

[72] Be that as it may, I have given considerable consideration to the competing views advanced as to the true nature of section 20A(2) of the MLPA and I have absolutely no doubt that Mr. Simon QC's submissions are very persuasive and correct. On any view of section 20A(2) it is civil in name and nature as urged by learned Queen's Counsel Mr. Simon. The civil asset forfeiture regime enables the Crown to recover property identified as being obtained from money laundering activity even if the owner has not, for whatever reason, been charged. There are numerous reasons why a defendant may not have been charged and these are not of concern to us. What is critical is that the legislature in its wisdom does not require the defendant to have been charged with a money laundering offence in order for the civil asset forfeiture regime to become engaged. It is trite that the legislature must be presumed to know the law. It is also of significance that Parliament has carefully utilised the term money laundering activity as distinct from money laundering offence. Parliament intended and succeeded in making a distinction between the two.

[73] Equally, I am satisfied that section 20A(2), civil asset forfeiture (against the property), operates in rem as opposed to criminal asset forfeiture which operates in personam (against the person). I am fortified in the above view based on the conjoint effect of section 20A(2) and 2H. I am not at all persuaded that the constituent elements of money laundering activity are the same as those for a money laundering offence. Had the legislature wished to so term it, it would have clearly said so. I am therefore unable to accept Dr. Dorsett's submissions in this

regard.

[74] It is evident that the Authority is clothed with the power to apply to the High Court to recover property if it can prove to the civil standard that the property has been obtained as a consequence of a money laundering activity. Contrary to the arguments that were advanced on behalf of Mr. Williams, the constituent elements of money laundering activity are not the same as those for the offence of money laundering. They are simply not one and the same as urged by Dr. Dorsett. Further, the learned judge was alive to this discrete but important distinction and was correct in holding that money laundering activity is not a criminal offence. I therefore have no hesitation in accepting the correctness of Mr. Simon, QC's submissions in this regard and make it pellucid that the criticism of the learned judge is misplaced. In addition, there is no requirement to refer any past criminal conviction in order to ground a civil asset forfeiture claim. Neither is there anything in the civil asset forfeiture regime that requires the imputation of criminal liability, contrary to what learned counsel Dr. Dorsett has suggested. **Allen v United Kingdom** is clearly distinguishable from the case at bar. I reiterate that civil asset forfeiture stands apart from any criminal charge or offence and is not based on either.

[75] If I need any support for the above conclusions they are as follows:

In **Serious Organised Crime Agency v Gale and others**,[24] Griffith Williams J provided some useful opinions about the inference that may be drawn from the fact that a respondent has no identifiable means to justify his lifestyle. He stated:

> "While a claim for civil recovery may not be sustained solely upon the basis that a Respondent has no identifiable lawful income to warrant his lifestyle, the absence of any evidence to explain that lifestyle may provide the answer because the inference may be drawn from the failure to provide an explanation or from an explanation which was untruthful (and deliberately so) that the source was unlawful."

[24] [2009] EWHC 1015 at para.14.

[76] It is clear that I do not accept the contention that, civil asset forfeiture should be classified as criminal proceedings as they amount to a trial for a criminal offence without due process for such a trial. I am buttressed in this view by the very helpful decision of **R (on the application of the Director of Asset Recovery Agency) v Paul Ashton**[25] in which Newman J held that there was no doubt that recovery proceedings which are analogous to the civil asset forfeiture proceedings were civil in nature. I find further support for my conclusion in the **Walsh** line of authorities and apply them to the case at bar. Also, in **Director of Asset Recovery Agency v Charrington**[26] Laws LJ held that it was entirely right to hold that asset recovery order was a part of civil asset forfeiture. I find those pronouncements very persuasive and apply them to the case at bar.

[77] In **John Gilligan v The Criminal Assets Bureau and Others** McGuinness J held:

> "From consideration of the authorities to which I have been referred, it seems to me that I must accept that firstly, forfeiture proceedings are civil and not criminal in nature." [27]

Treating in a bit more detail with **John Gilligan**, McGuiness J held that it is for the State to prove to the satisfaction of the court that the property has been obtained through unlawful conduct. It is only once that initial burden was to be established. At paragraphs 103 and 104 of the judgment, the learned judge stated:

> "103. It must be remembered that under Section 2 of the Act it is necessary before an Order can be made pursuant to either Section 2 or Section 3 for the State to establish to the satisfaction of the Court on the balance of probabilities that the Respondent is in possession or control of assets which comprise directly or indirectly the proceeds of crime. It is only when that initial evidential burden has been discharged by the State that any obligation is imposed upon a person to furnish any evidence to the Court."
>
> "104. Secondly, a Respondent is free to challenge or discredit any evidence adduced by the State pursuant to the provisions of the Act."

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[25] [2006] EWHC (Admin) 1064.
[26] [2005] EWCA Civ 334.
[27] [1998] 3 IR 185 at para. 101.

Those pronouncements are very helpful and I can do no more than apply them to the case at bar.

[78] Further, McGuiness J stated in **John Gilligan** that there is no constitutional infringement in the procedure where the onus is placed on the defendant to negative the inference from evidence adduced. The learned judge expressed himself as follows:

> "In civil proceedings the creation of presumptions and the shifting of the onus of proof is much more frequent and is clearly permissible."[28]

[79] I also apply the helpful principles that were enunciated in **Walsh**. It is clear that the power that is conferred on the Authority to seek civil forfeiture of assets in the High Court, is exercisable whether or not any proceedings have been brought for any money laundering offence and irrespective of whether the defendant has been charged for any money laundering activity. In a word, civil asset forfeiture has nothing to do with nor is it premised on a defendant being charged or tried for any criminal offence whatsoever.

[80] For the sake of completeness, it is also evident that the Strasbourg jurisprudence upon which Mr. Williams relied cannot avail him insofar as the case at bar concerns civil as distinct from criminal matters. In contrast, I accept the helpful and persuasive pronouncements in **Walsh** which are very applicable to the case at bar. Accordingly, I agree with Mr. Simon, QC's arguments that the civil asset forfeiture regime is not criminal in nature, on any view of the relevant statutory provisions.

**Jurisdiction**

[81] It is trite law that the jurisdiction of the High Court to review legislation for unconstitutionality in Antigua and Barbuda is clearly implied from a reading of section 2 of the Constitution which addresses its supremacy, sections 3 -17 of which provide for the fundamental rights and section 18 of which enables an

[28] At para. 112.

aggrieved person to obtain redress for breaches of his/her fundamental rights.

[82] Section 2 states that the Constitution of Antigua and Barbuda is supreme law. Its equivalent has been held in several well-known cases to confer the jurisdiction on the High Court to void any statute which is inconsistent with the Constitution, to the extent of its inconsistency. The Constitution also has provided the sovereign law making power to the legislature within the parameters of the Constitutions' provisions and the procedures which the legislature must follow in order to amend the Constitution. I will not dwell on these matters in so far as no issue has been joined in relation to the procedures that the legislature adopted in amending the MLPA; and I may add correctly so.

[83] For the sake of convenience, I will now address the alleged breaches of sections 15(2)(a) and 15(5) of the Constitution. In my respectful view, this is an extremely short point due to the fact that I have already treated extensively with the nature of the civil asset forfeiture regime. Indeed, insofar as I have held that the section 20A(2) proceedings are civil in name and nature, it is unnecessary for me to address the issue of whether or not sections 15(2)(a) and 15(5) of the Constitution, both of which specifically speak to criminal offences, have been abrogated. By way of emphasis, section 20A(2) civil asset regime does not establish nor speak to criminal offences, to the contrary, it is civil in nature. Accordingly, Mr. Williams' reliance on section 15 of the Constitution is entirely misplaced. Accordingly, his appeal on this basis fails since the statutory regime in no way infringes the fundamental rights that are provided in section 15.

**Due Process of Law**

[84] It remains for me to deal with Mr. Williams' due process of law challenge to section 20A(2).

[85] I have already indicated that the civil asset forfeiture regime is entirely civil in nature. Against that backdrop, I will seek to ascertain whether it offends section

3(a) of the Constitution which provides for due process of the law. It is not entirely clear on what basis Mr. Williams asserts that section 3(a) of the Constitution is impugned. I say this because his oral and written arguments all seem to be tied to his assertion that the civil asset forfeiture proceedings are criminal in nature. He has provided no other basis on which to launch his attack against the civil asset forfeiture regime.

[86] It has long been settled that a fundamental, constitutional guarantee is that all legal proceedings will be fair and that one will be given notice of proceedings and an opportunity to be heard before the government acts to take away one's life, liberty or property. Also, a constitutional guarantee is that a law shall not be immeasurable, arbitrary or oppressive. Indeed the 'due process of law' guaranteed by section 3(a) of the Constitution has two elements relevant to the present case. First, there is the fairness of the trial itself and second, there is the question whether there was fairness to the defendant.

[87] Section 3(a) plainly recognises that the right to due process should be obtained in order to prevent arbitrary or capricious conduct by the State in relation to persons' basic human rights. Due process of law is a compendious expression in which the word "law" and is not a synonym, for common law or statute. Rather it involves the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law.[29] Respectfully, I accept without any reservation the very helpful pronouncements by President De La Bastide PCCJ and Saunders JCCJ in **Attorney General of Barbados v Joseph and Boyce** and those of President Byron PCCJ and Anderson JCCJ in **Maya Leaders Alliance v AG of Belize** on the nature and extent of due process of law. I can do no more than apply those very instructive and illuminating principles to the case at bar. However, in so doing I do not see much force in Dr. Dorsett's argument that the due process of law as provided for by section 3(a) of

[29] See: Hilaire v Cipriani Baptiste and others (1999) UKPC 3 at para. 22 for helpful judicial pronouncements on due process of law.

the Constitution has been infringed by section 20A(2) of the MLPA. In this regard, it must be borne in mind that section 20A(2) of the MLPA is not a stand-alone provision but as correctly stated by learned Queen's Counsel, Mr. Simon, it must be read together with section 19 of the MLPA. It is indeed a comprehensive statutory regime. It is trite that a Constitution embodies fundamental rights and freedoms, not their particular expression at the time of its enactment. The due process clause must therefore be broadly interpreted. The content of the clause is not immutably fixed at that date. A court of law that is faced with a challenge to a legislative enactment is enjoined to examine the statute so as to ensure that the complainant's right to due process is not infringed. In other words, the court seeks to ascertain whether or not there is any procedural unfairness based on the statutory legislative scheme.

[88] Though not specifically stated, it seems as though Mr. Williams' main complaint on the basis of due process of law is premised on his misapprehension of the true nature of section 20A(2) as being criminal in nature. Much of the arguments that were advanced were unfortunately based on his misconception of the true nature of the civil asset forfeiture regime. In fact they are all improperly presumed on the assertion that it is criminal in nature.

[89] Regrettably, the conclusion of Mr. Williams does not afford any real assistance on the present issue of whether or not section 20A(2) of the MLPA gives rise to procedural unfairness. I fail to see how Mr. Williams could properly complain about the section 20A(2) infringing section 3(a) of the Constitution in view of the comprehensive procedure that must be followed before property can be forfeited under the civil asset forfeiture regime. There can be no complaint that the Crown, through the promulgation of section 20A(2) of the MLPA, is enabled to misuse the State power. To the contrary, learned Justice Harris in a very closely reasoned judgment which was rendered after Mr. Williams was given the opportunity to deploy his defence in opposition to the freeze order, including leading evidence and cross examining the opposing witness, found that the case for the imposition

of the freeze order had been made out.

[90] The erudite and illuminating judicial pronouncements in the **Joseph and Boyce** case and the **Maya Leaders Alliance v The Attorney General** case cannot assist Mr. Williams' case since the due process of law as stated in section 3(a) of the Constitution is simply not impacted by section 20A(2) of the MLPA. Therefore those very good legal principles are with respect, good law, and having applied them to section 20A(2) of the MLPA leads to the ineluctable conclusion that due process of law is alive and well in the civil asset forfeiture regime. I also accept Mr. Simon, QC's argument that section 20A(2) of the MLPA cannot be regarded as disproportionate.

[91] In so far as the alleged criminal nature of the civil asset forfeiture regime was his launch pad, Mr. Williams' reliance on section 3(a) is misplaced. I agree with Mr. Simon that the civil asset forfeiture regime provides extensive due process of law guarantees, which incidentally, Mr. Williams took full advantage of. He therefore cannot properly complain that he was not afforded procedural fairness as provided by section 3(a) of the Constitution. Further, he cannot properly impugn section 20A(2) of the MLPA on the basis that it abrogates the fundamental rights that are afforded to citizens by virtue of section 3(a) of the Constitution.

[92] For the above reasons learned Justice Henry did not err in concluding that section 3(a) of the Constitution was not infringed. Mr. Williams' appeal on this basis also fails.

**Inhuman and Degrading Punishment**

[93] I note for completeness, the alternative argument advanced by Mr. Williams based on section 7(1) of the Constitution that the civil asset forfeiture regime amounts to cruel and inhuman punishment. This argument has no merit. I do not find it necessary to engage with this complaint in any great detail. To state that the circumstances amount to cruel and inhuman punishment is sufficient for it to be

rejected. The fundamental rights jurisdiction is a special jurisdiction and should only be used in appropriate circumstances. Authority for this principle can be found in a long line of cases. In **Harrikisson v Attorney General of Trinidad and Tobago**,[30] Lord Diplock stated as follows:

> "The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.
>
> "The instant case concerns and concerns only the right of a holder of a public office not to be transferred against his will from one place to another. In their Lordships' view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter I of the Constitution.
>
> The suggestion made on behalf of the appellant that it constitutes "property" within the meaning of section 1 (*a*), viz.:
>
> > 'the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law'
>
> needs only to be stated to be rejected."

[30] (1980) AC 265 at page 268.

[94] Further, in **Hinds v The Attorney General**,[31] Lord Bingham of Cornwall stated that Lord Diplock's salutary warning on the special nature of the fundamental rights jurisdiction remains pertinent. He stated that:

> "It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected."[32]

[95] In any case it is difficult to see how Mr. Williams can seek to rely on section 7(1) of the Constitution which addresses the protection of one's bodily integrity in circumstances where what is at issue is the seizure of one's property. It has long been settled that the fundamental right to protection from cruel and inhuman punishment has to do with a person's protection from bodily impairment. Mr. Williams' view is wholly incongruous. In this case, I am of the view that Mr. Williams' reliance on section 7(1) of the Constitution is misplaced and comes very close to a misuse of the special fundamental rights jurisdiction of the Court.

[96] For the reasons that I have given, none of arguments advanced on behalf of Mr. Williams succeeds. Accordingly, the learned Justice Clare Henry was entirely correct in holding that section 20A(2) of the MLPA is constitutional.

**Costs**

[97] Being cognizant of rule 56.8(13) of the Civil Procedure Rules 2000 (as revised), I am not of the view that this is an appropriate case in which costs should be awarded against Mr. Williams. I would therefore order each party to bear its own costs.

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[31] (2001) UKPC 56.
[32] See para. 24.

**Conclusion**

[98] For the reasons, I have given above Mr. Williams' appeal is dismissed. Each party is to bear its own costs.

[99] I gratefully acknowledge the assistance of learned counsel.

**Mario F. Michel**
Justice of Appeal

**Paul Webster**
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**