[2021] JMSC Civ 11

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIRCUIT COURT**

**CLAIM NO. HCC 309/18**

**IN THE MATTER OF INFORMATION #4469/14, 4471/14, 4472/14 – R v EWART FOWLER FOR POSSESSION OF COCAINE, DEALING IN COCAINE AND ATTEMPTING TO EXPORT COCAINE**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR A FORFEITURE ORDER OR PECUNIARY PENALTY ORDER PURSUANT TO SECTION 5 OF THE PROCEEDS OF CRIMES ACT, 2007 AGAINST EWART FOWLER**

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| **BETWEEN** | **ASSETS RECOVERY AGENCY** | **CLAIMANT** |
| **AND** | **EWART FOWLER** | **DEFENDANT** |

**OPEN COURT**

**Charmaine Newsome for the Assets Recovery Agency**

**Kaysian Kennedy instructed by Townsend, Whyte and Porter for Ewart Fowler**

**November 7, 8, 2018, January 14, 16, May 13, July 31, October 28, November 2019, January 13, June 3, July 15, 2020, January 26, 2021**

**Proceeds of Crime – Whether defendant has benefited from criminal conduct – Meaning of benefit - Whether cocaine is a benefit under Proceeds of Crime Act – Whether seizure of cocaine means there is no benefit -**

**SYKES CJ**

**Context**

**[1]** It was high noon on September 5, 2014 when Mr Ewart Fowler and his wife were en route to Canada. They were at the Sangster International Airport. The police stopped the couple. They were searched. Each had cocaine. The combined weight of the drugs was 4lb 6.31 oz/1993.33g. Both were arrested and charged with possession of cocaine, dealing in cocaine, and attempting to export cocaine.

**[2]** Seven months later on April 1, 2015, Mr Fowler pleaded guilty to all three offences. Remarkably, Mrs Fowler escaped any criminal liability. His wife was freed despite being in possession of cocaine. Mr Fowler pleaded guilty to the full weight of the drugs.

**[3]** Arising from this, Mr Fowler was made the subject of a benefit hearing under section 5 of the Proceeds of Crime Act (POCA). He is challenging the amount of JA$14,948,570.36 that the Assets Recovery Agency (ARA) says is his benefit. He is saying that he did not benefit from these crimes and that the money he received and paid out were legitimate earnings. He claims that he was a mere courier of the drugs.

**The Proceeds of Crime Act, 2007**

**[4]** The underlying assumption of POCA is that the Crown has the right, duty, and obligation to undermine the capacity of criminals to continue their criminal lifestyle by weakening their economic viability.

**[5]** The Jamaican POCA takes the position that where the benefit is property and it can be identified the appropriate order is a forfeiture order (fo) and not a pecuniary penalty

order (ppo). [1] Where the benefit is value, then that value is quantified in money and the appropriate order is a ppo and not a fo.[2] POCA also includes within the ambit of the fo, property used in or in connection with the offence concerned. Where such property is identified then the appropriate order is the fo. [3] This means that the fo may be applied to (a) property identified has the defendant's benefit from criminal conduct and (b) property used in or in connection with the offence concerned.

**[6]** The Jamaican POCA speaks to a third order which has no equivalent in the English POCA. That is the payment in lieu of forfeiture order (pilfo). [4] This order arises where a

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[1] Section 5 (3): *Where pursuant to subsection (2) the Court determines that the defendant has benefitted from criminal conduct, the Court shall identify the property that represents the defendant's benefit from criminal conduct and*

> *(a) make an order that the property be forfeited to the Crown; or*
>
> *(b) order the defendant to pay to the Crown an amount (hereinafter referred to as the recoverable amount) equal to the value of his benefits, assessed in accordance with the provisions of this section and sections 6, 7, 8 and 11.*

[2] See note 4.

[3] Section 5 (2) (c):*The Court shall-*

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

[4] Section 5 (5): *Where the Court is satisfied that a forfeiture order should be made under this section, but that the property or any part thereof or any interest there in cannot be made subject to such an order, and, in particular –*

> *(a)…*

fo, in the normal course of things, would be the appropriate order, but for some reason (stated in the statute) it cannot be made, then the property that would have been taken under the fo is quantified in money. This money value takes the form of a pilfo. It is not a new expression. It was originally an order that could have been made under the now-repealed Drug Offences (Forfeiture of Proceeds) Act.

**[7]** The English POCA, it appears, authorizes only monetary orders called a confiscation order that is issued after a successful benefit hearing. By contrast, in Jamaica there are two possible monetary orders arising from a benefit hearing: the ppo and pilfo. The Jamaican equivalent of the confiscation order is the ppo. The English cases need to be read with these things in mind.

**[8]** The Jamaican POCA requires the court to ask the following questions depending on the order being sought in the benefit hearing. These are:

(a) has the defendant benefited from the relevant criminal conduct? If not, the enquiry ends;

(b) if yes, is that benefit property and has it been identified? If yes, then fo is to be made;

(c) if the benefit is not property, what is its value? Once valued, a ppo is to be made;

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*…*

*(e)…*

*the Court may, instead of ordering the forfeiture of the property or part thereof, or interest therein, order the defendant to the Crown an amount equal to the value of the property, part or interest, as the case may be.*

(d) has the defendant used property in or in connection with the relevant crime? If yes, then that property may be subject to a fo.

**[9]** Using Lord Bingham's guide the court bears in mind the principle that questions are separate and call 'for separate answers and the question and answers must not be elided' (**R v May** [2008] 1 AC 1028 **[48]**). In dealing with the questions 'the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions' **[48]**.

**The trigger for the benefit hearing**

**[10]** As noted earlier, Mr Fowler pleaded guilty to dealing in cocaine. Dealing in cocaine is an offence specified in the Second Schedule of POCA. Conviction of offences specified in the Second Schedule automatically triggers the conclusion that the defendant has a criminal lifestyle (section 6 (1) (a)).

**[11]** However, a benefit hearing is not about whether a defendant has a criminal lifestyle but rather about whether he has benefitted from his criminal lifestyle (sections 5 and 7 of POCA). It has been repeatedly pointed out that POCA is not concerned with punishing the person for the crime committed (that would be a violation of the double-jeopardy rule) but the benefit he/she derived from criminal conduct. Lord Bingham said in **Jennings v Crown Prosecution Service** [2008] 1 AC 1046 at **[13]**:

> *The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent**. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine**. This must ordinarily mean that he has obtained property so as to **own** it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.* (emphasis added)

**[12]** To the same effect is **R v Allpress** [2009] EWCA Crim 8 where Toulson LJ stated at **[47]**

> *We are concerned with the construction of provisions in criminal statutes designed, as the House of Lords has emphasised, to deprive criminals of the benefit which they have gained from the relevant conduct and not to operate by way of fine.*

**[13]** Section 7 of POCA advises that '[a] person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct.' What does obtain mean in this context? In **R v May** Lord Bingham stated at **[48]**:

> *D ordinarily obtains property if in law he **owns** it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. **Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property**.* (my emphasis)

**[14]** Lord Bingham's use of the word 'own' in **May** and **Jennings** highlights one of the pressing issues in this area of law: finding the right language to give meaning to the verb 'obtains.' The courts are mindful of the fact that we are dealing with criminal activity and therefore it is not quite the same as when a person has acquired property by legitimate means. Thus there is no exact point-for-point analogy between acquisition by a criminal from criminal activity and acquisition by an honest person from lawful activity. The property law concepts we are familiar with in the civil law were developed, as was said, over hundreds of years in the context of legitimate activity (**R v Ahmad** [2014] 4 All ER 767 **[36]**). In light of this it was noted in **Ahmad** in the joint judgment of Lord Neuberger, Lord Hughes and Lord Toulson (Lord Sumption and Lord Reed agreeing) at **[42]**:

> *When a person 'obtains' a chattel, money, a credit balance or land through criminal dishonesty, he does not acquire title to, or ownership of, the item in question, although he does acquire control over it. As was pointed out by Lord Walker and Sir Anthony Hughes in Waya, at para [68] a person who dishonestly obtains property has 'at most a possessory interest good against third parties, and thus of*

> *no significant value'. When Lord Bingham spoke of obtaining something 'so as to own it' he was doing so in the context of contrasting the position of someone who unlawfully assumes the rights of an owner (ie 'a power of disposition or control') with the position of a mere courier or custodian of stolen property: see May at para [48] (6). In Allpress at para [64] the Court of Appeal helpfully interpolated the words 'assumes the rights of an owner' to make this clear.*

**[15]** The emphasis, then, is on obtaining not ownership [5] because the position is that a criminal who obtains property from his criminal conduct should be not be elevated to, spoken of, or equated with a person who has acquired property from legitimate activity. The court is ignoring for the moment the well-established fact that Anglo-Jamaican law does not have a concept of absolute ownership. The court is also ignoring possession for the purposes of the law relating to larceny. Thus the criminal obtains property from crime while the lawful actor 'owns.' A criminal acquires 'no rights of ownership in the property obtained' (**Ahmad** [**43]**) because 'burglars do not become the owners of the television, and the argument about them being 'joint owners' or 'owners in common' proceeds on a wrong premise. Each burglar has usurped the rights of the owner' (**Ahmad [44]**). POCA, therefore, 'is not concerned with ownership but with obtaining' (**Ahmad [45]**). What **Ahmad** was guarding against is this: while in some instances a criminal may become the 'owner' of property obtained through crime, he/she does not acquire title to or ownership of the item although he has possession and/or control over it (**Ahmad [42]**). Therefore, when Lord Bingham, in **May**, said that the criminal obtained something so as to own it, his Lordship was really saying that the criminal had assumed rights over the property, or more accurately, acquired property from criminal conduct thereby appearing to have legitimately acquired them. Such rights may include possession but definitely include the

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[5] Even speaking of ownership is a loose way of speaking because there is no such thing as ownership in Anglo-Jamaican law. What exists are a bundle of rights that a person may possess at any point in time. Even a right to possession is not decisive since bailee for a fee may have a more immediate right to possession than the bailor.

power of disposition and control as if property was acquired lawfully with no fetter on the power of disposition and control. Note that it is the power of disposition and control not the physical ability to dispose of property that is important. The question is: did he/she acquire a power of disposition or control to such an extent that makes him/her more than 'a mere courier or custodian of stolen property' (**Ahmad [42]**)? Thus burglars who break into a house and take property have obtained it but it would be a gross misuse of language to look at them in the same way and through the same lens the 'owner' of the stolen television. This then is how criminals who obtained property from criminal conduct ought to be seen.

**[16]** All this means that in a benefit hearing 'the court has to decide on the basis of the evidence, often relying on common sense inferences, whether the defendant in question obtained the property in the sense of assuming the rights of an owner over it' (**Ahmad [47]**).

**[17]** In **R v Mejia** [2009] EWCA Crim 1940 the court agreed with the submission made by counsel in that case: 'the fact of possession does not necessarily give rise to a finding of obtaining' **[14]**.'

**[18]** Finally on this, there is the case of **R v Mackle; R v McLaughlin** [2014] 2 All ER 170 four defendants (the Mackles) pleaded guilty to knowingly concerned in the fraudulent evasion of duty. The defendants consented to the orders made against them. However, they subsequently sought to challenge these orders on the basis that they were entered into on an erroneous legal basis. The problem arose because there was no evidence that the defendants caused the goods to reach the point where they would be subject to excise duty or had obtained the value of the goods themselves, that is to say, had the power of control or disposition of the goods as if they were the owners. The appeals were allowed for various reasons. Lord Kerr SCJ did emphasise the following **[61]**:

> *In other words, it is not to be assumed that because someone has handled contraband, even if that is in the course of a joint criminal enterprise, he has, on that account alone, benefited from that*

> *possession. This reasoning applies to the concept of obtaining benefit in both the 1996 Order and the 2002 Act.*

And at **[64]:**

> ***[64]*** *The focus must be, as Lord Bingham has said, on what benefit the defendant has actually gained. Simply because someone has embarked on a joint criminal enterprise, it does not follow that they have obtained an actual benefit.*

Finally, at **[66]**:

> ***[66]*** *Two assumptions must be guarded against, therefore.* ***Firstly, it is not to be assumed that because one has handled contraband one has had possession of it in the manner necessary to meet the requirements of the relevant legislation.*** *Secondly, participation in a criminal conspiracy does not establish that one has obtained a benefit—as Toulson LJ said, this is to confuse criminal liability with resulting benefit.* (emphasis added)

**[19]** It is clear then, that possession of contraband in and of itself does not mean that the defendant benefitted for the purpose of POCA. Neither does the absence of possession mean that the defendant did not benefit.

**[20]** It seems to this court that when determining whether a defendant obtained a benefit the critical issue is this: whether it has been shown that defendant has the power of disposition and control over property, whether arising from possession or otherwise, to such an extent that he/she was not a mere courier or custodian. The court now applies this understanding in this case.

**The cocaine**

**[21]** Mr Fowler is insisting that he was a mere courier and therefore he did not obtain a benefit which, in this case, would be the value of the cocaine. The evidence from Detective Corporal Shawna Earle is that she was on duty at the airport when Mr Fowler and his wife were at the airport about to board a flight to Canada. Both were searched and an unusual bulge was found in the region of their buttocks and hips. Both were taken to a private room for a more detailed search. That more detailed search revealed each

wearing a black underwear with a false compartment containing a white powdery substance resembling cocaine wrapped in transparent plastic.

**[22]** The detective told the court that Mrs Fowler after being cautioned by the police said that it was compressed ganja. Her police statement which was an agreed document has a statement attributed to Mrs Fowler to the effect that it was because they owed the National Housing Trust $180,000.00. The detective's oral evidence in the hearing does not have (a) any reference to Mr Fowler being cautioned; (b) any words attributed to him after he was cautioned - after the find - but before the formal charge was laid. In the detective's written statement tendered as part of the material in this benefit hearing Mr Fowler is alleged to have said after caution and before being charged, 'A jus one likkle tester miss.'

**[23]** The police went to the home of the Fowlers. Mrs Fowler went with the police. Mr Fowler was left at the airport. He gave his wife a bunch of keys. Initially, Mrs Fowler took the police to a house where the occupant declared that Mrs Fowler did not live there and kept insisting on that position even after Mrs Fowler suggested to the elderly occupant Mr Fowler was her son and Mrs Fowler was her daughter in law. Of note is the fact that at this house Mrs Fowler was using a knife to open a window to gain entry to a door inside the house rather than the keys. The stentorian tone of the police officer eventually convinced Mrs Fowler that further delay would not be taken lightly and so she took the police to her house at Cornwall Court.

**[24]** Inside the house was a refrigerator. It was searched and three parcels of cocaine weighing two ounces along with US$1,000.00, CAN$1,400.00 and J$28,000.00 were found. A gramme scale, small plastic bags, and packages similar to the package the cocaine was wrapped in were also found. The detective also found a document from the National Housing Trust. The document was described by the detective as a closure for the payment of the house which suggested that she meant that the house was already paid for.

**[25]** Eventually, the police and Mrs Fowler returned to the airport where Mrs Fowler told her husband that cocaine was found in the refrigerator. He then said that he had put it there. The detective said she asked him if he put it there and he repeated that he placed it in the refrigerator. After these exchanges, the Fowlers were both charged with possession of, dealing in and attempting to export cocaine. On April 1, 2015 Mr Fowler accepted responsibility for the cocaine found on himself and his wife. On July 8, 2015 he was sentenced on each of the offences. In respect of the possession of and attempting to export cocaine a fine and in the alternative a term of imprisonment if the fine was not paid. On this same date, ARA made an application under section 52 (1) (a) of POCA for the matter to be transferred to the Supreme Court for a benefit hearing.

**[26]** Detective Earle indicated that from her interrogation and interviews she realized that Mrs Fowler had never worked and Mr Fowler had worked with Air Jamaica, approximately seven years before this incident. The detective stated that she received information on the street value of the drugs in Jamaica as well as the Canadian value. She could not recall the Jamaican street value.

**[27]** Importantly though, she indicated, in cross examination, that Mr Fowler stated that since his employment at Air Jamaica he was a self-employed business man. She said he indicated that someone was operating a taxi for him. In response to the question of whether he told her about being engaged in selling clothes, the detective's response was that Mrs Fowler said she travelled to Canada from time to time. Mrs Fowler showed the detective some 'fashion jewellery' which Mrs Fowler said she would sell. However, the detective said that she was never told about clothing and not shown anything in relation to that business activity. The officer also said that she cannot recall recovering any document relating to a business called E & N Traders.

**[28]** The statement of information provided by ARA as well as the statement exhibited did not focus on the capacity in which Mr Fowler had the cocaine. It is clear from the formulation of the statement of information and the written submissions of ARA it was not thought that that was an important point to be considered. The approach seemed to be as follows: Mr Fowler pleaded guilty to dealing in cocaine; dealing in cocaine is a Second

Schedule offence; he is now deemed to have a criminal lifestyle; the cocaine is a benefit and therefore the value of that cocaine at the time he had it is the benefit. However, as I have endeavoured to show, the relevant case law on the question of the capacity in which the defendant interfaced with the cocaine is very important. Was he/she simply a courier, a bailee who had to act in accordance with the instruction of a third party, or was the he/she acting with authority to dispose of or deal with the property as they saw fit?

**[29]** Mr Fowler's case was two-fold: (a) he was a courier; and (b) he did not benefit from the cocaine because he earned money legitimately.

**[30]** At the house, the police found paraphernalia consistent with the packaging and preparation of the drug for export. The police found material similar to the packaging that the drugs had when he was accosted at the airport. The police found a gramme scale which is consistent with weighing the product. The police also found Canadian, United States, and Jamaican currency.

**[31]** In analysing the evidence, it must be bourne in mind that section 5 (7) indicates that the 'Court shall decide any question arising under subsection (2), (3), (4) or (5) on a balance of probabilities.'

**[32]** From all the circumstances there is no evidence to suggest that Mr Fowler was a courier or mere custodian. In evidence, Mr Fowler did not indicate the circumstances under which he came into possession of the drugs. He contented himself by simply asserting that he was a courier without further details. That is not sufficient to displace the inference of power of disposition and control that arises, at least, initially from the fact of possession. The paraphernalia, the scale, the money, the packaging is more consistent with an own-account cocaine dealer than a courier. The presence of the multi-country currency is not inconsistent with obtaining a benefit. The initial response of Mr Fowler that this was a tester strengthens the finding that he was neither a mere courier nor bailee. His response to the officer was more consistent with him having the control and power of disposition over and above that of a courier or bailee. It appears that the assertion that

he was a courier was produced more by a desire to avoid the possible consequence of POCA rather than a true assertion that he was courier.

**[33]** This court is satisfied on a balance of probabilities that Mr Fowler's possession of the cocaine was such that he had the requisite power of disposition and control so that it can be said he was dealing with the cocaine in a manner sufficient to conclude that its value should be regarded as a benefit to him.

**[34]** The next question is the value of the cocaine. The case law has established that the market value of the drugs can be used to determine the value of the benefit (**R v Islam** [2009] AC 1076). Value is determined, for benefit purposes, at the time the crime was committed. The fact that these are illegal drugs and in the normal course of things has no legal market is irrelevant. The fact that the drugs have been seized and no longer available to the defendant is of no moment (**Islam**).

**[35]** The statement of Detective Inspector Sheldon Coulson came into evidence as an agreed document. He states that he is the officer in charge of major investigations at the Narcotics Division. His job requires him to conduct intelligence gathering and investigations into drugs and guns. From his experience, background, training and contacts he is able to secure information regarding the value of drugs locally and internationally. The Detective Inspector asserts that one kilogramme of cocaine in the Canadian market can be sold for CAN$30,000.00 – CAN$35,000.00. He also stated that in Canada in 2014 on average one kilogramme of cocaine fetched CAN$30,000.00.

**[36]** An important question which does not seem to have been decided explicitly in the cases is whether the illegal market that is to be used for determining the value of the cocaine is the local market where the cocaine was found or the market for which the cocaine was intended. It seems to this court that the value of the cocaine should be that of the intended market, namely, Canada, and not the Jamaican market. This approach is not unfair to Mr Fowler because had he been successful he would have disposed of his product in the intended market. That value has been put at JA$5,367,750.00.

**[37]** ARA is relying on the assumptions set out in section 8 (2) to prove that Mr Fowler benefitted from his criminal activity.

**The Assumptions and their effect**

**[38]** Under section 8 (1) the court shall make the assumptions in section 8 (2) unless they are shown to be incorrect or there would a serious risk of injustice (section 8 (3)). The purpose of making the assumptions under section 8 (2) is to determine whether the defendant benefitted from his general criminal conduct; and identify his benefit from that conduct. The assumptions arise in this case because Mr Fowler is deemed to have a criminal lifestyle because of his conviction for dealing in cocaine.

**[39]** The assumptions are that:

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

(i) as result of general criminal conduct; and

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

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

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

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

(c) any expenditure incurred by the defendant after the relevant date was covered by property he obtained from his general criminal conduct; and

(d) for the purpose of putting a value any property obtained, or assumed to have been obtained was obtained free from any interest or encumbrance.

**[40]** The legal effect of assumptions in benefit hearings was stated by Staughton LJ in **R v Redbourne** [1992] 1 WLR 1182, 1188:

> *An assumption, in this context, is the acceptance of something as true which is not already known or proved, and therefore may or may not be true. If the court is directed or empowered to make an assumption, that means that the court must or may take the assumed fact as true. It matters not for that purpose whether the standard of proof is criminal or civil; whichever standard is appropriate, the assumed fact is still to be treated as true.*

**[41]** The court will now examine the various items of receipt and expenditure to determine whether ARA has made good its case.

**Other benefit**

**[42]** The statue is clear that no conduct occurring, offences committed or property transferred or obtained before May 30, 2007 can be used to prove benefit. However, it must unequivocally be stated that property held by Mr Fowler regardless of when acquired can be taken by the state in order to satisfy any ppo made. The ppo is analogous – in this limited way – to a civil debt. The ppo is a monetary liability owed to the state and unless it is satisfied the state can take steps to enforce it. It is not a fine because the benefit hearing is not concerned with criminal culpability. That was already decided when Mr Fowler pleaded guilty. This is about benefit obtained from criminality.

**[43]** The other fundamental point that must be made is that the Jamaican POCA unlike its English counterpart requires the court to calculate the benefit obtained, make the ppo in the amount found to be the benefit and stop. The English courts are required to go further and find out how much the defendant has to meet the order (called in England a confiscation order) and where the defendant's assets (called in England the available amount) is less than the benefit (the recoverable amount) the English courts make the order for the available amount. Under the Jamaican POCA if the defendant cannot meet the ppo then he/she has to apply to the court to seek an order to pay a lesser sum (section

23). If section 23 is successfully activated by the defendant the sum substituted for the initial ppo.

**The Fowler's house and rental of accommodation**

**[44]** ARA concluded that the house was acquired from legitimate sources. Mr Fowler stated that he began to rent part of downstairs his house in December 2011. He also said that over the years he has had various tenants. He added that he expanded the downstairs portion of his house to accommodate other tenants. He began renting this expansion in April 2013.

**[45]** Mr Fowler asserts that he earned rental income from leasing the downstairs portion of the family home to tenants. In support of proposition he has produced two lease agreements consistent with the years he said he began renting his property. ARA's analysis revealed that Mr Fowler did receive rental income from property. Yet ARA wishes this legitimate income to be included as part of Mr Fowler's benefit. The court is unable to accede to this because a benefit hearing is to determine whether Mr Fowler benefitted from general criminal conduct arising from his conviction for a Second Schedule offence.

**[46]** In this case, the rental income is known to have come from a legitimate source. There is therefore no rational basis to apply the assumption that property received came from criminal conduct. The source of the property has been explained. The court concludes that the rental income of $3,108,000.00 is to be excluded from the benefit calculation.

**[47]** There is no evidence before the court regarding the amount expended to transform the downstairs portion of the house into a tenancy.

**Accounts at financial institutions**

**Credit card – Bank of Nova Scotia Magna Master Card number 5201 7690 1064 3167**

**[48]** The assumption at section 8 (2) (c) says that any expenditure by Mr Fowler at any time after the relevant day was met from property obtained from general criminal conduct.

According to section 8 (5) relevant day in cases where no previous fo or ppo was made against the defendant in relation to benefit from general criminal conduct is the first day of the ten-year period ending when proceedings began for the offence concerned were started against Mr Fowler. Where there are two or more offences and proceedings were started on different days the period would end on the earliest day proceedings began.

**[49]** In this particular case, Mr Fowler was charged will all offences on September 5, 2014. That is when proceedings began and that is when the ten-year period before September 5, 2014 would end. This would take us back to September 5, 2004 but because the barrier date for POCA, that is to say, the date beyond which POCA cannot go, is May 30, 2007, it means that the 'ten-year-period', in this case, began on May 31, 2007 and not September 5, 2004. Thus any expenditure on or after May 31, 2007 is assumed to be met from general criminal conduct unless evidence shows the contrary. That is the logic of the expenditure assumption.

**[50]** ARA says that its analysis showed that this credit card account was opened on October 9, 2008 at the Bank of Nova Scotia (BNS) Montego Bay Branch. There was no activity on the account for the period September 2014 to December 2015. Between 2009 and 2014 airline ticket purchases and other charges amounted to $2,451,920.20 while $2,462,381.42 were paid on the card. After arrest on September 5, 2014 the card was charged in the amount of $18,993.40. As at January 1, 2015 the balance on the card was $119.96.

**[51]** A credit card is a revolving loan scheme. Each time the credit card transaction is successful money is lent to the card holder. The money charged to the credit card when used by the card holder cannot be regarded as an expenditure for POCA purposes because it is a loan by the bank and that money lent is from a legitimate source. It is a revolving loan up to a fixed sum. It is the payment on the card since May 30, 2007 that can properly be taken into account as an expenditure. The expenditure assumption applies to the payments totalling $2,462,381.42.

**BNS account number 66412**

**[52]** Mr Fowler opened account number 66412 at the Montego Bay Branch on September 6, 1996. ARA says that no unexplained deposit took place on this account. All the deposits were salary, redundancy payments, and rental income. The majority of the deposits since 2012 were rental income from rooms rented at the house. The withdrawals are largely in the form of Point of Sales payments. Nothing more will be said about this account.

**Jamaica National Building Society (JNBS) - Savings account number 000010292105**

**[53]** This account was opened on November 7, 2004. Mr and Mrs Fowler are joint holders of the account. It is not clear how the beneficial interest was held. On May 3, 2010 a Wilton Graham deposited $100,000.00 and on December 12, 2012 Mrs Fowler deposited $800,000.00. Mr Fowler withdrew $807,500 on May 18, 2015. Mrs Fowler withdrew $90,000.00. As at September 30, 2015 the balance on the account was $4,814.45.

**[54]** Mr Fowler said that Mr Sheldon Tracey, the brother of Mrs Fowler, was the person who owned the $800,000.00. The money was given to his wife to deposit. He stated that the withdrawal of $807,500,00 was simply returning the money to Mr Tracey.

**[55]** ARA says that that story is not be believed. The reason advanced by ARA was that Mr Tracey's affidavit and the defendant were saying that the deposit was made over a period of time whereas the financial records show that it was a lump sum deposit on December 12, 2012. ARA wants the withdrawal to be classified as an expenditure. It says that there is no supporting documentation from Mr Tracey or Mr Fowler.

**[56]** Mr Fowler relied on an affidavit of Mr Sheldon Tracey. Mr Tracey was not cross examined. He identifies himself as self-employed and owner of a garage at his home in Kansas City, Missouri in the United States of America. He says that in December 2012 he asked his sister to deposit the $800,000.00 in the account. At the time, he says, he did

not have a bank account in Jamaica. He says he was working and saving with the intention to return to Jamaica to purchase property for the purpose of building a house.

**[57]** The court should point out the difference between agreeing for evidence to be tendered and accepting the facts stated in the evidence. The admission of Mr Tracey's affidavit only meant that both sides agreed that it was his evidence but that is not saying that both are agreed that what he is saying is accepted as true.

**[58]** According to Mr Tracey his sister came to the United States to work from time to time and when she was returning to Jamaica he would send money with her to conduct business on his behalf in Jamaica. He returned to Jamaica in May 2015 and had opened a joint account at the Victoria Mutual Building Society (VMBS). The sum of $807,500.00 was withdrawn from JNBS and given to him by Mr Fowler and that money was deposited in the 'said account.'

**[59]** The court pauses here to examine these assertions by Mr Tracey. Mr Tracey is filing this affidavit in support of his brother in law who is facing the imposition of a ppo if ARA makes its case. Common sense would suggest that if his purpose was to tell the truth, the whole truth and nothing but the truth some documentation of some kind would be evident. Or at the very least, some explanation for the absence of documentation. Where did he keep his earning in the United States? Was it in a financial institution? Did he pay taxes of any kind and where are those tax records which would show earnings over time? Did he issue receipts of any kind to his customers to show receipt of payment? Is he saying that he gave Mrs Fowler the money all at once when she was returning to Jamaica with smaller sums over a period of time? His account is that the $807,500.000 was given to his sister was to have and to hold until such indefinite future time. Is it that during his time in the United States he never visited Jamaica?

**[60]** The court cannot help but note that Mr Tracey said the $807,500.00 was deposited in 'the said account.' The account was never clearly and properly identified. The assertion did not have supporting documents. The VMBS account uncovered by ARA does not show any deposit of $807,500.00. Further the account is in the names of Mr and Mrs

Fowler and it was opened on October 3, 2013. On the day that the Fowler's opened their account there was a deposit of $22,062.50. The only other activity was two additional deposits of $19,000.00 and $5,000.00.

**[61]** Mr Tracey is suggesting that he had a beneficial interest in the $807,500.00 and conveniently it is his sister who deposited it and his brother in law who withdrew. The idea here is that Mr Fowler was not engaging in expending money but rather returning to Mr Tracey what was his in equity. While this is not a case involving a claim to money in an account nonetheless it is money in a joint account in which, it appears, both Mr and Mrs Fowler had free access and could deposit and withdraw as they saw fit. The fact that Mr Fowler was able to withdraw the money – and there is no evidence that he encountered any resistance from the institution or any queries were raised regarding his right to withdraw funds – it seems to this court that the withdrawal and subsequent use ought to be treated as an expenditure. After all that is what people do with money unless it is an artefact of great historical interest. Mr Tracey's assertions has too many gaps to be accepted.

**[62]** Mr Fowler's attempt at explaining what became of the $807,500.00 that he withdrew is not accepted. While the court accepts that persons may keep minimal financial records without nefarious intent, in this case there is not even the account number or branch of VMBS into which the money was deposited.

**[63]** This method of analysing Mr Fowler's material is legitimate. What is not said may be even more important than what is said. In **Mahmood v R** [2013] EWCA Crim 325 **[13]**:

> *The judge heard evidence from the appellant. He concluded that he was neither reliable nor credible. In particular, the judge rejected the appellant's evidence that he had been doing causal jobs, when the appellant could not explain when and with whom he did them, apart from vague references to family members.*

**[64]** In other words, the absence of surrounding details when an assertion is made may provide reasonable grounds for not accepting an account even if there is no cross examination of the witness as was the case with Mr Tracey.

**[65]** The Court of Appeal of England and Wales has had to deal with the issue of a lack of documentation and made this point in relation to counsel's submission that it is difficult to trace records after so many years. In **R v Agombar** [2009] EWCA Crim 903 Leveson J had this to say at **[7]**:

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

**[66]** This court accepts that point and in the Jamaican context much would depend on the evidence in the case. We are not very good at record keeping. Mr Tracey did not produce any supporting evidence of any kind.

**[67]** In another Court of Appeal decision of **R v Virk** [2016] EWCA Crim 81 the court had to consider a statement produced on a fresh evidence application. On the day of the hearing, the witness was not before the court. Davis LJ analysed the statement from the standpoint of what it did not say in a context where the omitted things should have been relatively easy to establish. His Lordship observed at **[29]**:

> *This statement raises as many questions as it seeks to answer. Mr Aulakh exhibits to it no documentation of any kind. He exhibits no written agreement relating to the loan. He exhibits no email or letter relating to the loan. He exhibits no bank statements evidencing the payments in as he claims to have made. He exhibits no written materials relating to the other alleged investors. Further, on his own*

> *account he had sought to invest a great deal of money; but he seems to have made no attempt to seek to recover it until he, as it were, out of the blue was repaid in October 2012 after the appellant had been arrested. Moreover, and importantly, Mr Aulakh on his own evidence was not able to explain, if he could, just what actual activities this company really was carrying on. He can give no evidence at all and does give no evidence at all that it really did carry on any kind of bakery business. Furthermore, Mr Aulakh gives no explanation as to how it was that he was then suddenly repaid in October 2012 and in particular does not explain why such repayment to him was not made directly to him but, as he himself accepts, was made "via the accounts of the others who I have named as investors as directed by me to Mr Virk". Why it was done in that way, if it was done in that way, is not explained. In addition, he seeks to explain why he had not given such evidence at the confiscation hearing below, it having been a point of comment made at the time that he had given no evidence.*

**[68]** This court concludes on a balance of probabilities that Mr Tracey did not have any such money from income from his garage that he gave to his sister. The court concludes on a balance of probabilities that the money was removed by Mr Fowler for expenditures and not to repay Mr Tracey because of Mr Tracey's beneficial ownership of the money. The court therefore comes to the final position, on a balance of probabilities, that the payment was from property obtained from general criminal conduct.

**VMBS Savings account number 400399697**

**[69]** It is convenient to deal with the VMBS account. The court will make the assumption in favour of Mrs Fowler that this was her money and that she has the beneficial interest in the sums deposited there and so would not qualify as property held by Mr Fowler. Mrs Fowler was not convicted and no ppo is being sought against her. This not a civil recovery proceeding under POCA.

**National Housing Trust loan**

**[70]** The evidence showed that Mr Fowler made mortgage payments from legitimate earnings between 2005 and 2010. His wife made payments as well. However, since 2010,

the evidence is that Mr Fowler made payments of $153,700.00. This is an expenditure caught by the expenditure assumption.

**Motor vehicles**

A. *Toyota Altis*

**[71]** Mr Tracey indicated that on or about September 2010 he visited Jamaica and made the decision to purchase a motor vehicle. He purchased the car and placed it in the name of Mr Fowler. He claims that he purchased it from Don's Car Mart in St Elizabeth. The documents from the relevant government agency show that the car was indeed bought in the name of Mr Fowler. The insurance cover note is in the name of Mr Fowler. Mr Fowler's evidence is to the same effect. [6]

**[72]** From the documents available, there is no mention of Don's Car Mart. It appears that the vehicle was initially purchased by someone with a loan from First Caribbean International Bank. The bank exercised its power of sale which suggests that there was default on the loan. The vehicle was apparently sold because there is a discharge of lien advice which states that the bank's lien was discharged after the debt was recovered.

**[73]** A gentleman was authorized by the bank to do the necessaries to effect whatever transfers necessary so that the bank could recover its loan. The documents show that Mr Fowler transferred the car to another owner. This transaction was done in St Elizabeth. The purchaser had a St Elizabeth address. [7]

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[6] Application for Motor Vehicle Transactions dated September 6, 2010; Cover note from Jamaica International Insurance Brokers dated September 6, 2010; Application for Transfer of Motor Vehicle dated September 6, 2010.

[7] Cover note from Insurance Company of the West Indies dated April 9, 2013; Sections 2 and 3 of Motor Vehicle Certificate of Title dated April 9, 2013. Application for Motor Vehicle Transaction dated April 9, 2013.

B. *The Toyota Wish*

**[74]** Mr Tracey states that he returned to Jamaica in 2012 and expressed the desire to acquire a larger vehicle to accommodate his family who were visiting with him. Mr Tracey says that the Altis was returned to Don's Car Mart and traded in for the Toyota Wish. He paid an additional $100,000.00 because the Altis was in excellent condition. This car was also in the name of Mr Fowler. [8] He adds that the Wish was eventually sold to Mr Fowler's brother. This transfer of the car to Mr Fowler's brother, ARA pointed out, occurred in June 2015. [9]

**Resolution**

**[75]** The Altis was transferred to Mr Fowler during the relevant period and the transfer assumption applies here. No evidence has been adduced to displace the assumption applicable to transfers. The court cannot help but note that Mr Tracey's three dealings dealt with so far were done in such a manner that Mr Tracey's name does not appear on any document. The car was sold by Mr Fowler to the St Elizabeth purchaser for $1,100,000.00. This, in light of the assumptions, has to be seen as a conversion of the property received into cash and that cash represents in Mr Fowler's hands the value of the Altis that was transferred to him. The explanation advanced by Mr Fowler and Mr Tracey has not displaced the assumption.

**[76]** In respect of the Toyota Wish needless to say the explanation from Mr Fowler and Mr Tracey regarding this trading in of the Altis with a resultant upgrade to the Wish is not accepted. There is no evidence of Don's Car Mart having any role in this purchase of the

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[8] Cover note Jamaica International Insurance Company Limited dated December 11, 2012; Invoice from Millenium Industries Limited dated December 11, 2012 showing car sold to Ewart Fowler for $1,100,000.00.

[9] Cover note Advantage General Insurance Company Limited dated June 10, 2015; Application for Motor Vehicle Transaction (no date); Motor Vehicle Certificate of Title showing transfer to Mr Fowler's brother in June 2015.

Toyota Wish. No one has said that Millenium Industries Limited was trading as Don's Car Mart or that the two are connected in any way. On the face of it there is no reason to conclude that this was anything but a purchase by Mr Ewart Fowler.

**[77]** He spent $1,100,000.00. It is caught by the expenditure assumption and the evidence adduced by Mr Fowler has not displaced that assumption.

**E & N Variety Store and other sources of income**

**[78]** Mr Fowler claims that since 2008 he operated E & N Variety Store from his home as well as at Falmouth Market. He says the business sold clothing and other personal items for men and women. The business he says earned $50,000.00 (approximately). He also claims that he earned money from being the caretaker of property in Montego Bay. He was paid $30,000.00/month. He says that he worked with Caribbean Airlines when it bought Air Jamaica in 2010. He stopped working with Caribbean Airlines in 2011. Since 2011 he says, income details are unavailable because he did not work in any formal system and was now operating the store full time with his wife. Mr Fowler claims that a business account was established at VMBS. Other than the deposits referred to earlier there is no evidence consistent with a business account. There were three deposits, no withdrawals.

**[79]** The documentation produced is a certificate of registration of business name. The name of the business is E & N Trading. It was registered on April 16, 2014. Beyond that there are no other records. No financial records of any kind, not even of the crudest variety.

**[80]** Mr Fowler says the business began in 2008; registered in 2014; VMBS account opened in 2013. There is no other evidence of commercial activity on this account consistent with the nature of the business the account was established to support. There is no rational basis to accept Mr Ewarts assertions regarding this business. The court does not accept his evidence on this point.

**[81]** Regarding the employment as the caretaker. Mr Fowler produced a document to support his claim that he worked as a caretaker. He describes – rather ambitiously – as an 'instrument appointing [him] as caretaker.' The court has examined the document dated November 4, 2011. The document is not on a business letterhead. It has no signature other than that of a Sandra Downing. There is a stamp purporting to identify her as a Notary Public in Massachusetts. There is no other signature even though there is a line which says Carla Perez-Rivera on behalf of Morgan Estate. There is no evidence of the owner of this business. Mr Fowler described the person who employed him as a friend but he/she appears to be a friend without a name. None was given in the statement of information, none stated in his oral evidence and none stated in the documents. Thus this 'friend' remains a nameless, faceless person with no disclosed address. Other than Mr Fowler's naked assertion there is no support for his contention. The court does not accept that Mr Fowler was employed as a caretaker anywhere.

**[82]** Mr Fowler indicated that his wife worked in the United States. He exhibited an identification card from the state of Wisconsin, a debit card, a check card and a social security card. This was an attempt to establish that there was a legitimate source of income. There is no evidence of how much she earned. There were no bank statements, no documentation supporting the assertion that she earned as distinct from having access to money through the debit card and check card. Access of money is not proof of earning. This evidence is not accepted.

**[83]** Finally, he made the claim that worked he intermittently as a tailor from age 11 (the period his apprenticeship with a Mr Bunny began) to the year 2015. He asserted that he bought his own machine earning $30,000.00 per month. Assuming this to be true, this evidence is too vague and imprecise to be of value. How many months per year did he work as a tailor and in which years? The court does not accept this evidence.

**The JPS payments**

**[84]** ARA says that the JPS payments of $849,238.94 are expenditures and therefore the expenditure assumption applies and this amount should be regarded as his benefit

from general criminal conduct. The Agency said that on its calculations Mr Fowler was paying electricity bills from June 1, 2007.

**Conclusion**

**[85]** The court will subtract the rental income (JA$3,108,000.00) from the revised benefit figure (JA$14,948,570.36) claimed by the ARA. The rental income came from legitimate tenants. ARA has proved that Mr Fowler benefitted from his general criminal conduct. The value of the benefit is JA$11,840,570.36. In the event that the court is incorrect regarding his general criminal conduct, Mr Fowler benefited from his particular criminal conduct and that benefit is the value of the cocaine in the Canadian market (JA$5,367,750.00).