



[2019] JMSC Crim 5

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

**CRIMINAL DIVISION**

**CLAIM NO. CL55/16(1)**

<b>BETWEEN</b>	<b>ASSETS RECOVERY AGENCY</b>	<b>APPLICANT</b>
<b>AND</b>	<b>DIAN ALECIA WILLIAMS</b>	<b>RESPONDENT</b>

**IN OPEN COURT**

Mr. Courtney Smith, instructed by the Assets Recovery Agency for the Applicant

Mrs. Nateline Robb Cato, instructed by Townsend, Porter for the Respondent

HEARD: May 15, 16, 21, 27, 30, June 17, 19, 28, September 17, October 15 & 29,  
2019

**Application for pecuniary penalty order- Proceeds of Crime Act- Sections 5, 6, 7, 8,  
11, 17 AND 18**

**CAROLYN TIE, J**

**The Application**

- [1] The Assets Recovery Agency, hereinafter referred to as the ARA, in its filed application sought an order for either forfeiture or pecuniary penalty against Dian Williams, pursuant to section 5 of the Proceeds of Crime Act (hereinafter referred to as POCA). In its various submissions however, it rested on the latter.
- [2] The underpinning of the application is the conviction of the respondent in the Clarendon Resident Magistrate's Court (as it then was), for the offences of possession of and dealing in cocaine, through a plea of guilt. The drug had been found concealed in the roof of the motor vehicle she was driving by the police.

Thereafter the matter was committed to the Clarendon Circuit Court for consideration of the said application.

- [3] Since the committal of the matter, various applications had been heard and the substantive matter set for hearing. On the scheduled date for hearing of the substantive matter, two preliminary applications were made.
- [4] One was at the behest of the ARA, for the Court to allow a document filed and served on the respondent in the month prior to stand. This application was refused. The Court did so on the grounds that the Court had previously set clear timelines for the filing of documents on both sides and the document in issue had been filed out of time by almost two years, without seeking the leave of the Court. Further, to allow same would have necessitated the respondent being afforded the opportunity to respond, which would have resulted in the delay of the trial.
- [5] The other application sought to have the substantive application for forfeiture or pecuniary penalty struck out. The respondent submitted that the applicant had accepted the accounts presented on behalf of the respondent and hence the application is without merit. This application was also refused as there were clearly triable issues since the applicant, whilst accepting the accounts presented by the respondent, refuted the accompanying analysis.
- [6] The hearing of the substantive matter extended over several days. Given the volume of the evidence, the extensive written and oral submissions, the numerous authorities and the nature of the matter, it required time to analyse and consider same. I am most grateful to counsel on both sides for their assistance and wish to indicate that all submissions and authorities were reviewed in my consideration of this matter even if specific reference is not made thereto.

### **The legal framework**

- [7] It is convenient to firstly outline the relevant statutory provisions prior to turning to the case presented by each side and the rival arguments.

**[8]** The POCA is the governing legislation in relation to applications of this nature. Given that the ARA is contending that the respondent has a criminal lifestyle and is inviting the Court to impose a pecuniary penalty, this overview focuses on the legislative provisions which relate to same.

**[9]** The defendant having been committed to the Circuit Court, section 5 (2) stipulates that:

*“The Court shall:*

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

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

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

**[10]** According to section 5(7), these various issues are to be decided on a balance of probabilities.

**[11]** The first step therefore is to determine whether the defendant has a criminal lifestyle.

**[12]** Section 6(1) of the Act stipulates that a defendant is regarded as having a criminal lifestyle in certain circumstances, and these include where the defendant is convicted of an offence specified in the second schedule. Under the second schedule, a conviction for an offence under section 8(a) of the Dangerous Drugs Act mandates a finding that the defendant has a criminal lifestyle. The offence of dealing in cocaine, for which the defendant was convicted, is found under this section of the Dangerous Drugs Act.

**[13]** Where it has been determined that the defendant has a criminal lifestyle, the second step for the Court is to decide if the defendant has benefitted from his

'general criminal conduct'. The legislation requires the Court to make certain assumptions in this regard and also in identifying his benefit from that conduct.

**[14]** According to section 8(1), *"...where the Court determines under section 5 that a defendant has a criminal lifestyle, the Court shall make the assumptions listed in subsection (2) for the purpose of – (a) determining whether the defendant has benefitted from his general criminal conduct, and (b) identifying his benefit from that conduct."*

**[15]** The assumptions that shall be made are set out in section 8(2) and relate to the following four categories:

*"(i) any property transferred to the defendant at any time after the relevant day;*

*(ii) any property held by the defendant at any time after the date of conviction;*

*(iii) any expenditure incurred by the defendant at any time after the relevant day; and*

*(iv) valuing of any property obtained, or assumed to have been obtained by the defendant."*

**[16]** As it relates to property transferred to the defendant after the relevant day, as well as to property held by the defendant after the date of conviction, the assumptions are that:

*"(i) the property was obtained by him as a result of his general criminal conduct; and*

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

**[17]** As it relates to expenditures incurred by the defendant after the relevant day, it is to be assumed that these "was met from property obtained by him as a result of his general criminal conduct."

- [18]** The final assumption relates to the valuing of any property obtained, or assumed to have been obtained, and specifies that the defendant obtained same free of any other interests in it.
- [19]** The “relevant day” is the commencement point for considering the benefit accrued to the defendant. This is defined in section 8(5) of POCA. Within the context of the circumstances of this case, “where no previous forfeiture order or pecuniary penalty order has been made against the defendant in relation to benefit from general criminal conduct, the “relevant day” is the first day of the period of ten years ending with-(i) the day when proceedings for the offence concerned were started against the defendant.”
- [20]** The defendant was charged on March 23, 2015 and hence ordinarily the relevant date would be March 23, 2005. By virtue however of section 2(10), “conduct occurring, offences committed or property transferred or obtained before the 30<sup>th</sup> May, 2007” is not applicable. The relevant date is therefore May 30, 2007.
- [21]** Section 8(3) adds the proviso that the Court shall not make these assumptions if it “is shown to be incorrect” or “if there would be a serious risk of injustice.”
- [22]** In circumstances where the Court determines that the defendant does not have a criminal lifestyle, it must determine if the defendant has benefitted from particular criminal conduct. This will not be delved into as the ARA maintains that the defendant had a criminal lifestyle.
- [23]** As per section 7(1), a person benefits from conduct if he obtains a benefit as a result, of or in connection with, the conduct in issue.
- [24]** Once it has been determined that the defendant has benefitted from criminal conduct, section 5(3) demands that the Court ‘identify the property that represents the defendant’s benefit from criminal conduct.’ The Court may thereafter either make an order that the property that represents the defendant’s benefit be forfeited

to the Crown or make a pecuniary penalty order against the defendant in an amount equal to the value of his benefit.

### **The case for the Applicant**

- [25]** The case for the applicant was presented primarily through the evidence of Desmond Robinson, a forensic examiner employed to the Financial Investigations Division (hereinafter referred to as FID). In compliance with the POCA, he filed an affidavit along with a statement of information, and thereafter, upon the filing of a response by the respondent, a further statement of information.
- [26]** The ARA has advanced that the respondent is to be regarded as having a criminal lifestyle, as per section 6(1)(a) of POCA, given that she has been convicted of a second schedule offence. Further, it submits that she has benefitted from general criminal conduct.
- [27]** In its initial statement of information, the ARA assessed the respondent's benefit from her general criminal conduct at \$46,442,123.13. The ARA arrived at this figure having scrutinised her business, her assets and liabilities as well as her income and expenditures. The ARA made assumptions as provided under section 8 of the legislation, as it relates to property transferred to the defendant after the relevant day, property held by the defendant after the date of conviction, and expenditures incurred by the defendant after the relevant day, and concluded that the defendant had benefitted from her general criminal conduct.
- [28]** Based on their analysis of the defendant's statement of information, the ARA was of the view that the respondent had commingled illegitimate funds with legally earned monies, and determined that a separation of same was necessary to determine the extent of the respondent's benefit from her criminal activity. As a consequence, it adopted a different approach. Using the financial reports presented by the respondent, it prepared a comprehensive statement of her cash flows and concluded that her expenditures far exceeded her legitimate income. It

opined that this difference must have been covered by another source of undeclared funds.

- [29]** Mr Robinson accepts that his first statement of information is flawed and indicates that this was primarily due to the absence of proper records kept by the respondent, inaccurate tax returns filed by her, and limited resources at the agency. He however rejected that this and the accompanying adjustments to the benefit figure by over 50% amounted to a risk of injustice to the respondent. According to him, he relied on the provisions in the Act which allowed for assumptions to be made and rebutted by the respondent. He insisted that his second statement of information is reliable as he relied on information primarily provided by the respondent.
- [30]** The revised benefit figure amounted to \$20,139,162, which comprised primarily of four items of expenditure. Namely, personal expenditure that the ARA contends was excluded from the financials, stock in trade which they contend was also excluded, mortgage contributions that the ARA assumes she made, and the value of the cocaine that she was found with.
- [31]** In filing a further statement of information, the ARA explained the need to revise the benefit figure on three grounds.
- [32]** Firstly, because the record keeping by the respondent in relation to her business was woefully inadequate, the ARA's initial statement of information relied primarily on assumptions in accordance with the provisions of the POCA. It indicates that it had always been mindful that the respondent was involved in legitimate business activities but because of the challenge in relation to records, it was impossible for the ARA to identify all legitimate transactions undertaken by the respondent and therefore all legitimate income generated.
- [33]** Secondly, the respondent had filed inaccurate tax returns over the years in issue which led to inaccuracies, and thirdly limited time on the part of the ARA.

- [34]** Having received information on her behalf, the ARA accepted the findings of Hamilton Watson and Associates as it relates to legitimate business income for the period 2007 to 2015, and revised its initial position as regards the benefit figure. It however rejected the notion that all of her income was generated from her business and maintained that she benefitted from criminal conduct.
- [35]** The ARA found the financials presented on behalf of the respondent to be wanting. It regarded it as flawed as it failed to include personal expenditure, as well as stock in trade. Additionally, the ARA took issue with the assessment of the respondent's accountant that Earth Elements was profitable. The ARA found that the business had made very little profit when compared to the total sale revenue. The total profit for the years 2007 to 2015 amount to \$1,006,112.
- [36]** On the issue of her personal expenses, the ARA is of the view that the personal expenses of Ms Williams were excluded from the financials.
- [37]** Mr Robinson explained that standard accounting practice dictates that personal or non-business expenses should be excluded from a business entity's financial statement when computing profits. To do otherwise, was contrary to proper accounting practice, as including non-business expenses in these accounts would amount to a deliberate understating of the profits of the business and would amount to tax evasion.
- [38]** In the case of a sole proprietorship, such expenses would be captured in drawings and would be deducted from the proprietor's share of profits or from his or her respective capital. He posited that the only way 'drawings' would not be included in accounts is if there were no personal expenses.
- [39]** According to the ARA, the financial statements presented on behalf of the respondent for the period 2007 to 2015, as well as the statement of cash flow, make no allowance for drawings. This gives the impression that the owner's personal expenses were not met by business income and that profits were reinvested in the business. The ARA therefore contends that there is no

explanation as to the source of the respondent's living expenses. Given that the financials presented on behalf of the respondent do not include personal expenses, the ARA sought to ascribe a value for her personal expenses on a yearly basis during the relevant period.

- [40]** According to Mr Robinson, his analysis of the respondent's banking transactions revealed that she used her debit cards to make point of sale purchases for general living expenses such as food, entertainment, furniture and appliances, school fees and medical expenses. He opined that there were regular automated teller machine (ATM) withdrawals of relatively small amounts that were more likely used for personal expenditures. He attached schedules of the respondent's BNS and NCB ATM cash withdrawals and point of sale transactions that he attributed to her personal expenses. There was no data for the years 2007 and 2015 and so the ARA estimated that the amount relating to 2007 would be similar to the figure for 2008 and that the amount for 2015 was the average of the 5 previous years. The agency submits that these are conservative estimates of the respondent's personal expenses, as expenditures by way of her credit cards were not included.
- [41]** He was unable to say whether the bank omitted the information for these years or whether there were no POS transactions as he did not attempt to get this information from the bank. He however disputed that that this affected his analysis.
- [42]** The amount attributed to personal living expenses for the period 2007 to 2015, based on point of sale purchases and ATM withdrawals, is \$13,348,152.00. The point of sale transactions total \$3,870,710.00. Under cross examination he accepted the suggestion, or at least did not challenge it, that the POS and ABM withdrawals for 2015 was \$538,000.00 and not the \$1.9m that he estimated.
- [43]** He agreed that in trying to account for her non business expenditure there was a possibility that he included items that were business related, though this was very unlikely. He said that he would not attribute small withdrawals to the payment of suppliers and determined that this would more likely be in relation to her living

expenses. He said that his analysis showed that foreign suppliers were paid by credit card or by significant bank transactions in excess of One Million Dollars at times. In relation to local supplies he assumed that they were paid by transfers or large cash amounts. He did no checks to determine how they were paid. He however accepted that in her notebook there were payments of small sums (under \$10,000.00), which were paid to the suppliers of coconut oil and castor oil and conceded that he did not interview suppliers.

- [44]** The second basis for taking issue with the financials presented on behalf of the respondent, is the conclusion as regards the profitability of the business. Mr Robinson disagreed that the business was a profitable one, and defined same as one that can sustain the owner. He refuted the suggestion that the salary of the owner can be earned before profits are determined, as this he says would amount to tax evasion. He explained that this ought not to be treated as a business expense, but rather a withdrawal of capital or profits. He agreed however, that it would not necessarily mean that it is criminal activity.
- [45]** The ARA noted for instance, that the amount presented by the respondent as her income over the various years in issue in the financial reports, differed from that declared to the tax authority of Jamaica, with the latter being significantly less. It also observed that the income which was recorded for the years 2013 and 2014 in the notebook which served as a cash book, also varied from that declared to the tax authority of Jamaica, with the latter again being significantly less.
- [46]** The ARA was of the view that given the level of profitability of the business, and the non-inclusion of personal expenses, her personal expenses could not be explained by her reported income. This was true even when one takes into account an income item that had not been declared in the financials, (an investment at JMMB in the sum of \$1 million, which generated a small amount of profit).
- [47]** Another complaint by the ARA, in relation to the financials, is the exclusion of stock on hand at the end of the period, that is December 31, 2015. In the absence of a

physical count of stock, the ARA proposed that the best estimate of stock on hand is the amount owed to trade creditors, being \$2,839,109.00. He explained that this was contained in the financials presented by Ms Williams under the heading 'current liability'. Mr Robinson disagreed with the proposition that it would be unreasonable for a small business person to have that kind of closing stock. When challenged that 'current liability' could relate to things other than trade creditors, he conceded that this could be the case and admitted that he did not do any checks of his own to determine whether this figure is solely attributable to trade creditors.

- [48]** The ARA also observed that the financials presented by the respondent indicated a tax liability for the various years in issue which differed from that which had actually been paid. Based on the financials presented the sum of \$749,813.00 ought to have been paid for the years 2007 to 2015 (for this period tax liability arose only for the years 2012 to 2015). The actual taxes paid for the period 2007 to 2015 amounted to \$52,491.00.
- [49]** The agency contends that business profits were unreported to the tax authorities given the variance in the profits presented by the accounting firm on her behalf in contrast to taxes actually paid. As a consequence, the agency contends that be it from drug trafficking, or from unreported business profits, the respondent has benefitted from her general criminal conduct.
- [50]** The ARA concluded that this cash flow assessment approach of the financials presented by the respondent revealed that they failed to include personal expenses, and because of this, there was an excess of expenditure above the legitimate sources of income. As it relates to expenditure incurred by the defendant after the relevant date, the applicant relies on the assumption set out in section 8(2)(c) that any expenditure by the defendant at any time after the relevant date was met from property obtained by her as a result of her general criminal conduct.
- [51]** The ARA submitted that this approach of analysing inflows and outflows also removed the need to rely on certain assumptions. The ARA had initially made

assumptions in relation to property transferred to the defendant after the relevant date as per section 8(2)(a), but reneged on this in its further statement of information. The ARA took the position that since the respondent conducted a legitimate business and routinely made legitimate deposits into the bank, there would be a risk of injustice if these transfers were to be treated as a benefit. It concluded that any criminal proceeds which might form a part of these lodgements are caught under expenditures by the respondent in the methodology employed.

**[52]** The ARA also had originally made assumptions in relation to property held by the defendant after the date of conviction, pursuant to section 8(2)(b). It was felt that improvements to the assets held by her represented criminal benefits. This assumption was however abandoned given that the properties were held jointly with others who had contributed significantly to the acquisition of the assets, and also, given that she had acquired the assets having obtained loans. To include same as a benefit would be a grave risk of injustice to the respondent. The ARA opined that any criminal proceeds associated with the payments of these loans would be caught under expenditures by the respondent in the comprehensive cash flow approach.

**[53]** The ARA however, did not completely omit the properties owned by the respondent from its calculation of the benefit figure. It assumed that the respondent contributes to the repayment of the mortgage of both properties. In relation to the property owned with her mother, her mother is the principal on the loan and payments are made by standing order from an account in her name. The ARA nonetheless, was of the view that the respondent paid half of the mortgage, because the account from which it was paid was not made available to it by the bank. It therefore was not in a position to track the source of funds to the said account. Also, the ARA found it inconceivable that she does not contribute to the mortgage since she jointly owns the property, she lives there with her spouse and presumably operates a successful business. It made similar assumptions in relation to the other property owned with her spouse.

- [54] The ARA also argued that there were inconsistencies between the accounts presented by Mr Lawrence and his affidavit. For instance, Mr Lawrence asserted in his affidavit that the expenditure of the defendant was covered by the profits of the business. The ARA deems this inconsistent with the accounts presented as the profits stated therein could not meet her non business expenses.
- [55] The benefit figure calculated by the ARA also included the market value of the cocaine, as per section 11(3)(a) of POCA. Detective Inspector Sheldon Coulson's evidence was admitted by agreement and he set out therein his training and experience in investigating drug offences. He ascribed a value to the cocaine, given its weight, of \$574,957.42.
- [56] Given all of the information it has in relation to the respondent, the ARA contends that at the end of the day the respondent has benefited in the sum of \$23,736,341.82 from her criminal lifestyle. The ARA asserts that during the relevant period, the respondent had expenditures of \$19,639,162.00 which are unexplained by her reported legitimate income. This is primarily comprised of the figure assessed to be her personal expenses, closing stock, and her contribution to mortgage payments. Included in the benefit figure is also the ascribed value of the cocaine. Arising from the evidence during trial, the ARA asserts that the benefit figure should also include other items. It insists that the court fines in issue were not paid from legitimate income and should form part of the benefit figure. Also, what it describes as a fictitious loan from the respondent's mother of \$1,000,000.00 which was used by the respondent to pay a person by the name of Richard Myers, as well as additional mortgage contributions that it argues that the respondent in all likelihood paid, but are not included in the financials, should all be included.
- [57] The applicant relied on a number of authorities to support its interpretation of the relevant provisions of POCA, as well as other aspects of its case.
- [58] It was the applicant's position that it was not bound to accept the defendant's version of events as regards her plea of guilt. In support thereof it relied on **R v**

**Knaggs** [2010] 1 WLR 435 wherein the accused had entered plea of guilt without contradicting the evidence of the prosecution. Prior to sentence however, he indicated to the judge that he disputed an aspect of the evidence. At the confiscation hearing, the judge ruled that since the defendant had not contested the prosecutions case, in whole by trial or in part by a **Newton** hearing, the defendant was bound by his unequivocal guilty plea and could not seek to challenge that case in whole or in part during the confiscation proceedings. On appeal however, it was held that the unqualified plea of guilt and his refusal to challenge the prosecutions evidence in a **Newton** hearing did not mean that he accepted all of the prosecution's evidence for the purposes of the confiscation process. It was noted that a court is required to act with "scrupulous fairness".

- [59] The English Court of Appeal decision of **R v Dickens** [1990] 2 QB 102 was also cited to assist in the proper treatment of assumptions and the rebuttal of same. The ARA argued that the defendant is required to prove on a balance of the probabilities that the assumptions are incorrect or their application is unjust.
- [60] That case involved the Drug Trafficking Offences Act. The relevant provisions therein, as it relates to property, indicate that the assumption is "that any property appearing to the court" to have been held in certain stated circumstances, was received by him as a payment or reward in connection with drug trafficking.
- [61] The judges therein opined that the words "appearing to the court...mean that if there is prima facie evidence that any property has been held by the defendant" in these circumstances, "the judge may make the assumption that it was a payment or reward in connection with his drug trafficking".
- [62] The authority was also used to support the contention that once an assumption has been made under the Act, the defendant has the evidential burden to rebut same.
- [63] That legislation provides that whilst assumptions can be made, they can be displaced if they are "shown to be incorrect in the defendant's case". The Lord

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

- [64] The ARA also relied on the English Court of Appeal decision of **R v Wilkes** [2003] EWCA Crim 848 to support its interpretation of the POCA provisions. The legislation in issue therein was the Proceeds of Crime Act 1995. The relevant provisions prohibit the Court from making an assumption if it is ‘shown to be incorrect in the defendant’s case’ or if there is ‘a serious risk of injustice in the defendant’s case’. There in the Court endorsed the submission of the Crown that “the purpose of the assumptions ... is to shift the burden to the appellant to show (on balance) that it is not from criminal conduct.” Further, “The safeguard for the appellant is that the assumption can be displaced by him on a balance of probabilities by showing that his expenditure was supported by income from legitimate sources.” (paragraph 26)
- [65] The ARA cited the cases of **R v Agombar** [2009] EWCA Crim 848 and **Mahmood v R** [2013] EWCA Crim 325, to illustrate the need for sufficient evidence to be furnished by the respondent. This issue was also dealt with in the English court of Appeal in **R v Singh** [2008] EWCA Crim 243. This case also commented on an approach employed in **R v DePrince** [2004] EWCA Crim 524, and approved of the first instance judge discounting the benefit figure by 25% to guard against the possibility that a small part of the money was legitimate.
- [66] On the issue of the inclusion of the value of the cocaine itself, the ARA referenced the cases of **R v Islam** [2009] UKHL, 30, as well as **R v Kakkad**, [2015] EWCA Crim 385. These established the appropriateness of the value of the drug being included in the benefit calculation, and further that this value is the market value at the time that the defendant held it.

[67] It was the ARA's position that Ms Williams made false declarations and was guilty of tax evasion. In addressing those issues, it presented the authority of **R v O'Shea** [2015] EWCA Crim 139. Davis LJ, at paragraph 10 of his judgment noted that, "*... the deliberate false representation to the Revenue about his cash assets, can give cause for concern as to how open and frank he is prepared to be....that, it has to be said, is suggestive of a man whose principal concern is to preserve his own financial position as best he can, even if it comes at the expense of revealing the whole truth.*"

[68] As regards the issue of there being a serious risk of injustice to the respondent, the ARA asserts that it has exercised care in ensuring that the assumptions are applied in a just manner. It took guidance from **R v Jones and others** [2006] EWCA Crim 2061. Therein, Latham LJ found assistance from Blackstone's Criminal Practice 2006, para E-217, at p 2129. "*The risk of injustice must arise from the operation of the assumptions in the calculation of the benefit and not from any eventual hardship in the making of a confiscation order (Dore [1997] 2 Cr App Rep (S) 152; Ahmed [2005] 1 WLR 122). What is contemplated is some unjust contradiction in the process of assumption (e.g. double counting of income and expenditure), or between an assumption and an agreed factual basis for sentence (see Lunnon [2005] 1 Cr App Rep (S) 111; Lazarus [2005] Crim LR 64)*". He continued that "*The purpose of the exercise is to ensure that there is ultimately a sensible calculation of benefit. It is not a discretionary exercise by the judge to determine whether or not it is fair to make an order against a particular defendant.*"

### **The case for the respondent.**

[69] The respondent filed a statement in response to the agency's initial statement of information and also gave sworn evidence. She also relied on the affidavits of her mother, Hirfalene Williams, her spouse, Oniel Bailey, Constable Jheanel Watkis

and Dennis Lawrence, chartered accountant, which were all admitted into evidence by agreement.

- [70]** The respondent asserts that she does not have a criminal life style and denies benefiting from any criminal conduct. She contends that any income or property identified by the agency were legitimately and legally earned. In an effort to demonstrate this, she explained the circumstances of her being discovered with cocaine.
- [71]** Whilst admitting that cocaine was concealed in the vehicle that she was driving, she declares that she was unaware of its presence. She stated in her affidavit that unbeknownst to her it had been placed in her vehicle by a former boyfriend whom she had not seen in a very long time and with whom she had met up with. She says that it was not until he called her whilst on the road heading home that she learnt that something illegal was in the vehicle.
- [72]** According to her, the presiding Resident Magistrate “accepted that...I did not profit or benefit from the drugs and that they were placed in my vehicle by a former boyfriend whom I had not seen in a very long time and had met up with and that it was put in the vehicle unbeknownst to me and that it was not until he called me whilst on the road heading home that I learnt that something illegal was in the vehicle...”
- [73]** When cross examined however, she revealed that she never actually met up with the ex boyfriend. She explained that what was to have been a sexual encounter never materialised. She instead saw his friend ‘baller’ and only spoke to the ex boyfriend on the telephone, who, when the police stopped her, told her “if they say nothing, say nothing”.
- [74]** She indicates that during the search by the police, money was also seized but subsequently returned to her. She avers that this was because the officer was satisfied that she operated a very lucrative business and that the money seized represented payment for goods supplied by her company Earth Elements.

- [75]** Under cross examination she confirmed that she had told Constable Watkis, the officer who had returned the cash to her, that she had withdrawn \$500,000.00 from her NCB bank account on March 17, some two days prior to the incident, as a means of convincing the officer that the cash seized was not criminal property. She was unsure as to the purpose of the withdrawal, indicating that this money could have been to clear goods at the wharf as she uses cash for that. She also offered that it could have been a withdrawal from one bank to deposit into another bank to maybe clear credit cards, or just to put money in the bank because the bank would have suggested it in order to procure a loan.
- [76]** Constable Watkis, the officer who recommended the return of the cash to the respondent, indicates in her affidavit that based on investigations, the cash was not shown to have been derived from unlawful conduct or intended to be used in unlawful conduct.
- [77]** The respondent also gave insight into the genesis of her business and development of her business Earth Elements. She divulged that she started Earth Elements in 2007. She informed the Court that she was able to build her business by securing loans from the bank and borrowing from her parents as well as from the mother of her spouse, Oneil Bailey. She refuted the position that her business was not profitable and that she could not earn to sustain herself. She says that she was able to repay her loans and pay her credit card bills and increase the volume of products that she would buy.
- [78]** She indicated that she was not always able to take home a salary at the end of the month. She said that the accountant would mention taking a salary but she said that if she did that, it would just go back into the business. She explained that she would pay for her personal expenses either from cash from the business, or withdrawals from the ATM, or by withdrawing cash from her business account from point of sale transactions (POS).

- [79]** On the matter of the earnings of Earth Elements, it was evident that there were differences in the amounts stated in the tax returns filed on behalf of Earth Elements and that presented on her behalf to the Court.
- [80]** The earnings stated in the tax returns for each of the years spanning 2007 to 2014 were lower than that stated in the financials presented to the Court on her behalf. For instance, for 2007, she had declared a gross receipt/sales income of \$546,000.00, whilst the accounts she filed in relation to this matter indicated that she had gross receipt income of \$1,271,060.00. For 2014 the tax returns filed declared earnings of \$510,000.00, whilst the accounts she filed in relation to this matter gave earnings of \$41,393,139.00.
- [81]** She had filed a further statement of information and therein indicated that the tax returns that had been filed did not represent accurate earnings of Earth Elements. She conceded under cross examination that there were differences in the earnings stated in her tax returns for the various years in issue, vis a vis that stated in the financials presented to the Court in this matter. Her explanation was that a lot of information was lacking from her previous accountant who had never gone into the detail that her current accountant Hamilton Watson did. She however proposed that the figures were not significantly different, and that it was not a deliberate effort to understate any figure on her part, nor was it an attempt to evade taxes. According to her, evading taxes and understating financials work against her business.
- [82]** The issue of earnings also arose in relation to her interaction with Constable Watkis. Though accepting the contents of the affidavit of the officer, she equivocated as to whether she had stated to the officer that she made \$200,000.00 in daily sales. She countered that this was an estimate that she gave, and also offered that perhaps she made this on a month end, or a fortnight, depending on the season. She eventually indicated that she could not remember the conversation she had had with the officer.

- [83]** The respondent also disputes the ARA's treatment of mortgage payments. She maintains that there is no basis for the ARA to assume that she pays half of the mortgage for the properties.
- [84]** She indicates that the property at St Augustine Road was purchased by her mother, Hirfalene Williams, and that her name was placed on the mortgage solely for convenience. She insists that her mother pays the mortgage in full, whilst Mr. Bailey and herself maintain the property and pay the other expenses as they reside there, her mother having migrated.
- [85]** In relation to the other property in which she has an interest, she maintained that the mortgage is paid from her spouse's salary and from the rental of the property, and she denied reimbursing him for same from the proceeds of drugs.
- [86]** She was questioned about her connection with her mother's bank accounts. She indicated that she makes withdrawals only when she borrows from her mother and thereafter would repay same by making a transfer to her mother's account. She was directed to a particular transfer which she identified as the repayment of a loan she had received a few days prior. There was however no evidence of such a loan in the financials. Instead, there was a manager's cheque from her mother to one Richard Myers. She then explained that her mother drew a manager's cheque to this person on her behalf and that she in turn repaid her. She, however, was unable to speak to the identity of this Richard Myers.
- [87]** According to her, her mother has other sources of income other than her salary which accounted for various deposits into that account.
- [88]** As it relates to expenditures, she accepted the figures put forward by the ARA as regards her credit card expenses, but stated that these were expenses that arose in the course of running Earth Elements, and which were paid out of income generated by the business to pay for goods and raw materials both locally and abroad. She admitted also paying court fines in the sum of \$1,500,000.00 for the

offences for which she was convicted, but asserts that this was paid from monies earned from her business and drawings made by her.

- [89]** She challenged the accuracy of the figure proffered by the ARA of \$2.8 million for stock at hand for the end of December 2015. She maintained that the shelves are empty at the end of the year.
- [90]** She denied the various suggestions put to her as regards her having benefited from criminal conduct and claims that she has suffered an injustice because the ARA has put forward varying benefit figures.
- [91]** The affidavit of Dennis Lawrence, chartered accountant, associated with Hamilton, Watson & Associates, indicated that his task was to review the financials and prepare a financial report for Dian Williams. This involved a review of the statement of information dated April 19, 2015 prepared by the ARA, as well as undertaking a forensic and in depth analysis of Earth Elements for the period 2007 to 2015. He indicates that he reviewed all source documents including bank statements, bank print outs, credit card statements, loan statements, loan agreements, point of sale transactions, receipts, invoices, statements from suppliers, orders from customers, GCT and other tax returns, copies of hard cover note books which had been seized by the ARA, custom import forms and other documents.
- [92]** The report that he prepared is premised on his acceptance of the explanations from the proprietor that all the business transactions have been reflected in the financial statements from the year ended 31 December 2015.
- [93]** He opined therein that the statement of information by Desmond Robinson is incomplete as it does not include a detailed review of source documents. He initially said in chief that he does not agree with the comprehensive cash flow methodology used by Mr Robinson, but thereafter indicated that he did not have an issue with the methodology, but rather did not agree with the items included.

- [94]** He said that in preparing the financials, he essentially started from scratch as there were no internal accounting records, other than a book in which she recorded inflows. He therefore went through all the bank accounts examining the inflows and eliminating inter bank transfers. He indicated that he examined the inflows for each year. He says that for 2014 and 2015, he did checks on a global basis, but did not go into details because of time constraints.
- [95]** He explained that he examined the inflows versus outflows. He traced every transaction in relation to the bank accounts, and identified personal versus business expenses. He went through each POS and ABM transaction, the latter with Ms Williams, to identify whether the items was personal or business. He also assigned certain amounts for salary for Ms Williams.
- [96]** He addressed the differences in the findings of Mr Robinson and his own.
- [97]** In relation to the personal expenses of Ms Williams, he disagreed with the figure put forward by the ARA of \$13,348,152.00, which was based on the defendant's point of sale and ATM transactions. His own figure was \$10.9 million and he explained the difference partly due to an overstatement by the ARA for 2015. The ARA put forward a figure for personal expenses of \$1.9 million for 2015, which was an estimated figure being the average of 4 years, whilst he, Dennis Lawrence, arrived at a figure of a little over \$500,000.00. He said that he also got additional information that would explain the additional difference, but this explanation was never completed to the Court.
- [98]** He opined that the assumptions made by Mr Robinson as regards stock at the end of December 2015 amounting to \$2,839,109.00, and his inclusion of same in the benefit figure, was flawed. Mr Lawrence was of the view that this figure could not be supported based on the order levels from credit card to suppliers on a monthly basis, and also would not have made financial sense given activity levels in January. He said that he did not include closing stock in his financials because this

would have to be supported by a stock taking exercise and he did not have the requisite information to assign a value.

**[99]** He also differed with the ARA's treatment of repayments of money borrowed from her parents. The ARA included a loan from her father of \$1,000,000.00 with interest of \$94,813.00. Mr Lawrence was of the view that this loan ought not to have been credited to Earth Elements in any way at all since it was a loan from her father.

**[100]** He says that he found no income from sources that he could not identify nor did he find any evidence of commingling of funds. He found no evidence that there was an excess of expenditure over income and dismissed the figure put forward of \$19,639,162.00 by Mr Robinson. He says that he could not verify what makes up the excess figure put forward by Mr Robinson as money in the bank accounts came from point of sale transactions. He opines that Dian Williams did not benefit from any general or particular criminal conduct and that the source of her income can be properly identified as being legal and legitimate income from her business. He concludes that the transactions and activities identified and analysed were in the normal course of business and were generated and paid out from legitimate sources.

**[101]** He says that he also looked at the bank records for Hirfalene Williams and traced the source of deposits and transfers. Her income was associated with her nursing profession.

**[102]** He was challenged as to whether his analysis included both her business and non-business expenses and he maintained that it did, but indicated that these were not itemised in his report.

**[103]** He agreed that there was another proprietor of Earth Elements and that this person would be entitled to a share in the profits. He agreed that this was not reflected in his financials. He later explained that Ms Williams had indicated that there was no

profit sharing agreement and that profits were redistributed back into the business in the earlier years as the emphasis was on growth.

- [104]** He was also cross-examined on his treatment of salary. He indicates that she was assigned a salary for each year but indicated that there was an error in the figure stated for the year 2014. He initially indicated that the figures in the statement of comprehensive accounts for salary, wages and benefits was money accruing to the defendant for the period. Under cross examination however he indicated that it was for her and other staff.
- [105]** He acknowledged that drawings are legitimate expenses taken out of the business to satisfy obligations of the owner. He agreed that they are deducted after taxation and that to do otherwise would be to unlawfully reduce the tax liability. He agreed also that when there are no profits, the proper accounting procedure is to deduct drawings from the proprietor's capital. Based on his financials he indicated that he did not make such deductions from capital. He indicated that he made provisions for drawings under salaries, wages and benefits. He says that in 2007, 2008 and 2009 there was a loss and so it would not have mattered if he deducted it before or after profit/loss. He declared that "rightfully or wrongfully he decided to be consistent with his treatment up to 2012, so that, at the end of 2015, whatever tax liability would have accrued as a result of the treatment, he would make one adjustment in 2015 and 2016." He said that his treatment of this would not have affected the figures and that it was not cheating in relation to tax purposes.
- [106]** He was grilled also as regards his handling of the court fines in the financials. He maintained that he was correct to record the court fines for Dian Williams as an administrative cost of the business and not as a personal expense. He explained that he did so because she was the major shareholder of Earth Elements, a limited liability company and maintained that he was correct in so doing even as he agreed that a limited liability company is a separate legal entity from the owner. He denied that by including it as an administrative expense, he incorrectly reduced the company's tax liability.

- [107] It was put to him that the proper approach would be to calculate the tax liability, then deduct personal legal fees from the profit after taxation. His response was as follows....*“when preparing 9 years financials, sometimes all these subsequent suggestions might seem feasible or workable but in the context of the assignment in 2017 what I did rather than go to the intricacies of what you suggested I calculated all known statutory liabilities of Earth Elements”*.
- [108] He denied that it was illegal to deduct personal expenses from a limited liability company and label it as an administrative expense. He denied that in so doing he would be misrepresenting the business expense. He denied that private expenses must come from drawings assigned to the defendant.
- [109] He was asked about the profitability of Earth Elements. He accepted that the entity made a loss in 2013 but disagreed that it was not profitable. He indicated that for 2014, the core business experienced a loss but that other income was derived from other assets of the company. In 2015, the core business made a small profit of just over \$400,000.00.
- [110] He was quizzed about the thoroughness of the financials in the context of certain aspects of the evidence. He was, for instance, asked about payments to “Dian’s friend” as was recorded in her notebook. He indicated that since it was a one off payment he would not list it. When informed that there were many such payments, he said they that would probably be listed if he had seen the actual cheques drawn or money paid out. He also saw no loan from Oniel Bailey’s mother or from Hirfalene Williams in 2015, as the respondent had testified.
- [111] He initially said that he only saw one transaction relating to Oniel Bailey but under cross examination he was pointed to three such transactions from the cash book seized from Ms Dian Williams, involving cash and cheques. He indicated that he would have to verify these transactions and check if they are recorded in the bank statement. Though admitting that he did not check all, he denied suggestions that this meant that the financials he prepared is incomplete.

- [112] The respondent relied on a number of authorities to bolster its posture in relation to the case.
- [113] As did the applicant, the respondent also commended the authority of **R v Jones** [2006] EWCA Crim 2061, as regards the steps the Court ought to employ in considering this matter, as per Vice President Mr Justice Latham. In summary, it put forward that the court must firstly decide if the defendant has a criminal lifestyle. If so, it must then determine if the defendant has benefited from his general criminal conduct. Where the defendant does not have a criminal lifestyle, it must decide whether he has benefited from particular criminal conduct. Having made the appropriate determination, the court must then proceed to determine the recoverable amount and must then make an order requiring him to pay that amount.
- [114] Similarly, in **R v May** [2008] UKHL 28, the court outlined three questions that a court ought to ask. The first relates to whether the defendant has benefited from his crime. The court ought not to make an assumption if shown to be incorrect or if there is a serious risk of injustice were the assumption to be made. The second relates to determining the value of the benefit and the third to determining the realizable amount. The respondent contends that since the ARA accepts conclusively that the information put forward by the respondent is correct, then it is in fact agreeing with the respondent that she neither has a general nor particular criminal conduct and neither has she benefited. It argues that the ARA has failed to carry out proper investigations and instead has sought to make assumptions which are within the remit of the court.
- [115] The respondent suggests that the ARA has been irresponsible in the assumptions made. It refers to the case of **R v Wya** [2012] UKSC 51, and the warning given as regards the making of assumptions. The court emphasised that the application of assumptions is subject to two qualifications. Assumptions should not be made if they are shown to be incorrect, nor should they be made if to do so would give rise to a risk of serious injustice. *“The combination of these provisions, and*

*especially the latter, ought to mean that to the extent that a confiscation order in a lifestyle case is based on assumptions it ought not, except in very unusual circumstances, to court the danger of being disproportionate because those assumptions will only be applied if they can be made without risk of serious injustice”.*

[116] The respondent commended the case of **R v Pearlina Wright** (1988) 25 JLR 221, to support the position that the court should accept the defendant’s version of events regarding guilt. Therein it was noted that *“the rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which (is) most favourable to the accused.”*

[117] It was argued that this explanation ought to be similarly accepted by this court. Based on this, it should be concluded that there is no evidence that the respondent has a criminal lifestyle and the conviction should be considered as particular criminal conduct from which no benefit was derived.

[118] Since she was a mere courier, the respondent argues that the value of the drugs should not amount to ‘property obtained’ within the meaning of the Act. In support thereof, it referred to the case of **Sylvia Allpress v R** [2009] EWCA Crim 8. Therein Lord Justice Toulson stated, *“We conclude that if D’s only role in relation to property connected with his criminal conduct... was to act as a courier on behalf of another, such property does not amount to property obtained by him within the meaning of POCA 2002 s80(1)...”*

[119] It relied also on the cases of **R v Dickens** and **R v Wilkes** as regards the application of assumptions. Both examine the displacement of the assumptions where they are shown to be incorrect in the defendant’s case. The respondent urges that this has been satisfied.

## **Analysis**

- [120] The applicant is seeking a pecuniary penalty order on the basis that the respondent has a criminal lifestyle. In considering the application before me, I am guided by the provisions of the POCA and the steps set out therein in so determining that issue. The first question for determination is whether the respondent has a criminal lifestyle? If answered in the affirmative, the second question for determination is whether she has benefitted from same? Thirdly, if she has benefitted, what is the recoverable amount?
- [121] On the first question, section 6(1)(a) of POCA dictates that a person is regarded as having a criminal lifestyle if convicted of a second schedule offence. Ms Williams was convicted for the offence of dealing in cocaine which is a second schedule offence and is therefore deemed to have a criminal lifestyle.
- [122] The respondent is so regarded even in the absence of previous convictions. It is the instant criminal conviction which triggers this characterisation. This lifestyle is not regarded to have commenced at the time of conviction, rather, the legislation sets a starting point for consideration of ten years preceding the day when proceedings for the offence were started.
- [123] I have considered the respondent's argument that she cannot be regarded as having a criminal lifestyle since she had refuted the prosecution's version of events and had countered same, putting forward an account that she had no knowledge that the cocaine was in the vehicle, and that she was a mere courier who had not benefitted from same. This account she says was accepted by the Resident Magistrate and ought to be similarly accepted by this court. Hence, according to her, there is no evidence that she has a criminal lifestyle and the conviction ought to be considered 'particular criminal conduct'. The respondent therefore posits that the live issue would be whether she had derived a benefit from this 'particular criminal conduct.'
- [124] I have also considered the authority of **R v Pearlina Wright** that was relied on in support thereof, which is authority for the position that where on a plea of guilt, the

accused gives an explanation which differs from the prosecution's account of events, the trial judge should sentence on the set of facts most favourable to the accused.

**[125]** I am of the view that the respondent has not established her assertion that she had challenged the prosecution's case and that the Resident Magistrate had accepted her account. Nothing has been presented in these proceedings, from that Court, to establish that the defendant had put forward a particular position and that this was accepted by the Magistrate. Further, her plea of guilt, and the acceptance of same, also appear antithetical to her absence of knowledge.

**[126]** I however accept that the defendant is now entitled as a matter of law to challenge the prosecution's evidence as noted by Moses LJ in **Knaggs**. The determination of this will turn largely on the Court's determination of the respondent's credibility.

**[127]** I have examined all of the evidence as it relates to the circumstances surrounding the discovery of the cocaine in the vehicle of Ms Williams, in particular the affidavit deposed to by her, as well as her testimony in Court. I find that there are material inconsistencies that tarnish her credibility in that regard. In her affidavit she stated that she had met up with her ex-boyfriend and that unbeknownst to her he put the cocaine in the vehicle. In the witness box however, she indicated that she had not seen the ex-boyfriend. This to my mind is a significant inconsistency and goes to the very root of her account as it relates to the discovery of the drug. In her testimony she spoke of meeting someone by the name of "baller", a friend of her ex-boyfriend. This however was not mentioned in her affidavit. I find that her credibility in this regard is not wholesome.

**[128]** Given the absence from the court below as to what transpired there, and given the concerns surrounding the respondent's credibility as regards the discovery of the cocaine and her connection thereto, this Court is not inclined to accept her account regarding the circumstances surrounding her plea. There is no basis to deviate

from the dictates of the statute in concluding that she, having been convicted of a second schedule offence, is to be regarded as having a criminal lifestyle.

**[129]** The issue for the Court now is whether she has benefitted from this general criminal conduct. In so determining, I remind myself of the assumptions which the legislation allow, and the proviso that the Court cannot make same if it is shown to be incorrect or if there would be a serious risk of injustice. I bear in mind also that these issues are to be determined on a civil standard, that is, on a balance of the probabilities.

**[130]** I acknowledge also the provisions of section 5(8) which stipulate that:

*“For the purposes of deciding whether a defendant has benefited from criminal conduct and identifying such benefit, the Court shall take account of (a) conduct occurring up to the time when the court makes its decision; and (b) property obtained up to that time.”*

**[131]** One aspect of the defendant’s conduct that I find worthy of examination relates to the information that she gave to the officer, which contributed to the return of the money found in her possession on the day of the incident.

**[132]** She has accepted the contents of the affidavit of Constable Watkis. Therein, the officer indicated that documentation seized from the defendant’s premises revealed that Earth Elements generated \$200,000.00 in daily sales. I found the respondent to equivocate when prodded on the earnings of the business. She came across as less than forthright and in deed deceptive.

**[133]** The affidavit also indicates that Ms Williams stated that she had withdrawn the sum \$500,000.00 from her account two days prior to the incident. She was probed in this regard and her explanations for withdrawing same were uncertain and varied. According to her, the withdrawal could have been to clear goods at the wharf as she uses cash for that, it could have been a withdrawal from one bank to deposit into another bank to maybe clear credit cards, or just to put money in the bank because the bank would have suggested it in order to procure a loan. The diverse possible reasons for the withdrawal of this large sum of cash is perplexing. It would

seem to me that the respondent would be clear in her recall as to the reason for a cash withdrawal of such a large sum of money, given its size and close proximity to her arrest. The timing of the withdrawal, as well as the manifold and indeterminate explanations for same, give cause for concern. I find her conduct in this regard to be disconcerting. I find that it does not auger well for her credibility.

**[134]** On the issue of the return of the cash, given all of the circumstances, I do not place any significant weight on the officer's decision to return same. Her decision to do this was arrived at after a perusal of documents seized and utterances made by the defendant in relation to the withdrawal of \$500,000.00. From this, she concluded that Earth Elements was a very lucrative business and that "the investigation does not provide reasonable grounds to support a realistic expectation from an application for forfeiture as the cash is not shown to be derived from unlawful conduct." I am of the view that daily sales in isolation cannot give a complete and accurate indication of the financial health of a business. I therefore find her basis for the return of the money to be flawed. In any event, the defendant subsequently vacillated and sought to renege from this position in her evidence regarding the daily sales.

**[135]** I also find the defendant's conduct in relation to taxes to be telling. She has acknowledged that the taxes filed on her behalf, over the years in issue, were inaccurate. I find that her failure to accurately disclose her income was a deliberate deception. The difference between the earnings declared therein, in contrast to the earnings stated in the financials, is vast. It seems to me that the difference being so significant, it would have been evident to her that her declarations over the years were not accurate.

**[136]** In examining the issue of whether a defendant has benefited from criminal conduct and identifying such benefit, a proper interpretation of the relevant provisions is crucial. I have taken into account the various submissions as regards the proper interpretation of the provisions that relate to the application of the assumptions and

the displacement of same as grounded in the cases of **R v Dickens** and **R v Wilkes**.

[137] I have found however, that the legislative provisions which are the subject of both of these cases, differ from those contained in the Jamaican statute.

[138] In **Dickens**, the legislation in issue is the Drug Trafficking Offences Act. The judges therein opined that the words “appearing to the court,” in relation to the property in issue mean that if there is *prima facie* evidence that any property has been held by the defendant, in stated circumstances, the judge may make the relevant assumption. That Act also provides that the assumption shall not be made if they are ‘shown to be incorrect in the defendant’s case’. Hence the defendant has the evidential burden to rebut same.

[139] I am of the view however, that the legislative provisions therein differ from the provisions of the POCA. Firstly, I am certainly in agreement with the interpretation of the words “any property appearing to the court.” There is however nothing to that effect in the POCA. Secondly, unlike the provisions of the Drug Trafficking Offences Act which stipulate that the assumptions must be “shown to be incorrect *in the defendant’s case*”, POCA stipulates in section 8(3)(a) that the Court shall not make an assumption if “the assumption is shown to be incorrect”.

[140] Similarly in **Wilkes**, the relevant provisions prohibit the Court from making an assumption if it is “shown to be incorrect *in the defendant’s case*” or if there is “a serious risk of injustice *in the defendant’s case*”. There in, the Court endorsed the submission of the Crown that “the purpose of the assumptions ... is to shift the burden to the appellant to show (on balance) that it is not from criminal conduct”.

[141] Again, the legislative provisions therein differ from the provisions of the legislation in the instant case. The provisions of POCA do not stipulate that the evidential burden rests on the respondent in establishing that the assumptions are incorrect.

**[142]** What then is the correct interpretation of section 8 of POCA? The section stipulates that the Court “shall make the assumptions” for the purposes of “determining whether the defendant has benefitted from his general criminal conduct” and for “identifying his benefit from that conduct,” unless it “is shown to be incorrect” or if “there would be a serious risk of injustice if the assumption were made.”

**[143]** I find it helpful to examine other related sections of the Act. Where the Court is proceeding under section 5, that is making a forfeiture or pecuniary penalty order, Section 17(2) states:

*“Where the enforcing authority alleges that-*

*(a) the defendant has a criminal lifestyle, the statement of information required under this section must state the matters which the enforcing authority believes are relevant as to –*

*(i) whether the defendant has a criminal lifestyle,*

*(ii) whether the defendant has benefitted from his criminal conduct;*

*(iii) identifying the defendant’s benefit from his criminal conduct;*

*(iv) the making by the Court of a required assumption under section 8; and*

*(v) the making by the Court of a decision that such an assumption should not be made having regard to the circumstances.”*

**[144]** It is manifest that the ARA must present evidence in regards to the above issues.

**[145]** Thereafter, the Court “*may*” require, as it did in the instant case, the defendant to respond to the statement of information as per section 18(1)

*(a) to indicate the extent to which the defendant accepts each allegation in the statement of information; and*

*(b) so far as the defendant does not accept such an allegation, to give particulars of any matters on which he proposes to rely.*

**[146]** Matters accepted by the defendant may be treated by the Court as conclusive of the matters to which it relates. Section 18(3) provides that where the defendant

fails to comply with the order of the Court to respond to the applicant's statement of information, the defendant may be treated as accepting every allegation in the statement of information, "**except** any allegation - (a) in respect of which he has complied with the order; and (b) that the defendant has benefitted from his general or particular conduct." (emphasis supplied).

[147] Therefore, were the defendant to remain silent, the defendant cannot be treated as accepting allegations that he benefitted from criminal conduct. According to the legislation, the assumptions are to be applied in determining whether the defendant has benefitted from his general or particular criminal conduct. I am of the view that on a proper construction of the legislation, the onus is not on the defendant to show that the assumption is incorrect. I am fortified in this view when one bears in mind that the defendant may not be required by the Court to respond to the applicant's statement of information. I am in agreement with the stance taken by Sykes J (as he then was) in **Assets Recovery Agency v Uperit Smith and others** [2015] JMSC Civ. 168, where in he found that the ARA was seeking "to establish a reverse burden without legislative backing," and firmly rejected that approach.

[148] In the instant case, both sides having presented evidence, I am of the view that I must determine whether each assumption is incorrect or if there is a serious risk of injustice on a totality of the evidence.

[149] The assumptions that are available to be made under the statute are that:-

- i) property transferred to the defendant after the relevant day was obtained from her general criminal conduct and was obtained at the earliest time from which she appears to have held it;
- ii) property held by the defendant at any time since the date of conviction was obtained from her general criminal conduct and was obtained at the earliest time from which she appears to have held it;

iii) any expenditure incurred by the defendant after the relevant day was met from property obtained from her general conduct.

**[150]** According to the ARA, the methodology employed of examining all income versus all the expenditures of the respondent, allows for the separation of legitimate from illicit funds, given its theory of the commingling of funds by the respondent. The ARA says that this has obviated the need to apply assumptions as regards property transferred to the defendant and property held by the defendant.

**[151]** The ARA opined that the revised methodology would capture any criminal proceeds which might form a part of lodgements. As a consequence, as per section 8(3), I will make no assumptions as it relates to any transfer by the respondent at any time after the relevant day in the calculation of benefits as to do so would amount to double counting and would be incorrect and unjust.

**[152]** Likewise, the ARA had initially made assumptions as regards property held by the defendant after the date of conviction. Given the revised approach, which allows for the separation of illicit proceeds from that which was acquired legitimately, the ARA opines that it would capture any illicit funds associated therewith. As a consequence, as per section 8(3), I will make no assumption as it relates to property held by the defendant after the date of conviction in the calculation of benefits, as to do so would amount to double counting and would be incorrect and unjust.

**[153]** The remaining assumption that is set out in the legislation relates to expenditure, and this forms a significant aspect of the benefit figure proposed by the ARA. That assumption is that any expenditure incurred by the defendant, after the relevant day, was met from property obtained from her general conduct.

**[154]** The comprehensive cash flow methodology adopted by the ARA examines expenditures made by the respondent *vis a via* her income. The respondent's accountant, whilst initially vacillating on his position as regards the approach adopted by the ARA, in response to a direct question by the court indicated that

he had no issue with the methodology employed by the ARA, but rather disagreed with the contents. In the circumstances, I accept that the method itself is an acceptable and appropriate approach in determining whether there is illicit money at play. I also acknowledge the concerns of Mr Lawrence in regard to the content utilised.

**[155]** The benefit figure arrived at by the ARA is the excess of expenditure over income and is comprised primarily of the following items:

- i. Personal expenses not accounted for in the financials,
- ii. estimated value of closing stock,
- iii. cost of acquiring the cocaine,
- iv. court fines,
- v. mortgage contributions,
- vi. loan from Hirfaline Willimas to pay Richard Myers.

**[156]** I will consider each in turn commencing with the personal expenses.

**[157]** The ARA opines that the financial statements presented on the respondent's case relate to Earth Elements solely and that this does not give a fulsome view of the financial affairs of the respondent. Whilst the ARA accepts the income stated by the respondent in the financials, it is of the view that her personal expenses are not accounted for. On the other hand, it is the respondent's position, through the evidence of Mr Lawrence, that he did a review of the financials in relation to both Dian Williams and Earth Elements. He maintained that he identified personal versus business expenses and that he included her personal expenses in the financials.

**[158]** I accept that for a myriad of reasons, to include tax purposes, that the separation of the financials of ones business, from that of the proprietor, is a sound approach.

I acknowledge however that non-compliance with this is not necessarily indicative of anything untoward on the part the respondent.

**[159]** The first issue for the court in this regard is whether the financials include the respondent's personal expenses. I have dissected in particular the evidence of Mr Lawrence and I have scrutinised the financials presented.

**[160]** I find that the tenor of the accountant's report suggests that the subject of the report is Earth Elements. The report states inter alia that "all business transactions have been reflected in the financial statements for the year ended 31 December 2015."

**[161]** The financials themselves are headed "Dian Williams trading as Earth Elements." To my mind this is indicative that the reports relate to the business, Earth Elements.

**[162]** I have poured over the financials themselves and I find that there is nothing from which I could conclude that it related in any way to the personal financial affairs of the respondent. The various categories in the reports are consistent with business as opposed to personal matters.

**[163]** The accountant's responses to certain questions under cross examination also gave the clear impression that his work related to Earth Elements.

**[164]** He for instance was questioned about real estate owned by the respondent. In relation to the St Augustine property he indicated that this was never included in the accounts for *Earth Elements* as an asset. He was also asked about the rental property to which he indicated that it is owned by Ms Williams and her common law husband and that he did not include any rental for their property in the financials. He said that he excluded it from *Earth Elements financials*. He also indicated that he excluded a loan to the respondent from her father. He explained that he did not think it should be credited to *Earth Elements* in any way at all. These responses suggest that the financials were for Earth Elements and that matters that related to her personal financial affairs were excluded.

- [165]** Interestingly, the accountant included the legal fees and fines associated with her criminal case under administrative costs. He explained that he regarded this as a business expense, as Earth Elements was a limited liability entity at the time, and the respondent was the major shareholder. He disagreed that the only legal fees to be included in the financials of a limited liability company are those directly related to the company. Various suggestions were put to him as to the proper approach that ought to have been employed in this regard. His response was “when preparing 9 years financials, sometimes all these subsequent suggestions might seem feasible or workable but in the context of the assignment in 2017 what I did rather than go to the intricacies of what you suggested I calculated all known statutory liabilities of *Earth Elements*”.
- [166]** At other points of his cross examination he again indicated that he calculated all known statutory liability for Earth Elements to include GCT and income tax. These statements are suggestive of the financials relating solely to Earth Elements and not to the respondent herself.
- [167]** It is, however, the evidence of the accountant for the respondent that he included the personal expenses for the respondent in the financials and also assigned to her a salary.
- [168]** He agreed that drawings are legitimate expenses taken out of the business to satisfy obligations of the owner and are deducted after taxation. He was challenged about the absence of drawings in his financials and the impression this gives that there were no personal expenses. He disputed this, indicating that he made provisions for drawings under salaries, wages and benefits. When challenged about the appropriateness of his approach and his placement of this deduction, he indicated that he took the decision ‘rightfully or wrongfully’ for consistency sake. He said that his treatment of this would not have affected the figures and that it was not cheating in relation to tax purposes.

- [169] On the issue of her salary, he indicated that the respondent was assigned a salary for the various years in issue. He initially indicated that the figures in the statement of comprehensive accounts for salary, wages and benefits are money accruing to the defendant for the period. Under cross examination however he indicated that it was for her and other staff. It was at this point in the proceedings that the respondent was reprimanded for trying to communicate with him in the witness box by mouthing something. Needless to say this was disconcerting.
- [170] He spoke of the overall salary figure for 2014 and 2015, indicating that an error had been made and that the figures ought to be the same for these two years.
- [171] The evidence put forward as regards salary is challenging to rationalise in light of the respondent's evidence. The respondent's evidence was that she was not always able to take home a salary at the end of the month. She had told the court that she would pay for her personal expenses either from cash from the business or cash withdrawals. The court was given the distinct impression that she didn't take a fixed salary. She certainly gave no amount. According to her, her accountant at the time would speak to her about taking a salary but it seems that this was not done, because according to her, it would just go back into the business. In all the circumstances, it is difficult to fathom the basis on which the accountant arrived at this figure that he assigned to her for salary.
- [172] It seems to me that Mr Lawrence fully appreciated the concept of drawings. He understood that this was an appropriate delineation for the proprietor of the business. He however opined that it was also quite proper for him to include same as salaries. I however find that there is nothing on the evidence from which I can conclude that drawings were so included. His inconsistency on this aspect of the evidence, his failure to indicate the basis of arriving at this salary figure, the respondent seeking to assist him from the dock, and the evidence of the respondent herself all aid in arriving at this conclusion. The absence of this from the financials, is consistent with the evidence of the respondent, which gave the impression that there was no set monthly allowance on her part.

**[173]** On the matter of personal expenses in the financials, It was the evidence of Mr Lawrence that he included her personal expenses in the financials. He said that he did a review of the financials in relation to Dian Williams and Earth Elements. He says that he identified personal versus business expenses. He says that he went through ABM items from 2008 to 2015 with Ms Williams in order to post to the respective accounts. He thereafter assigned expenditures as being either business or non-business. When asked to show where he included personal expenses he said that he did not itemise it in any great detail. He said that he could not understand why he would have itemised that when he did not itemise other aspects.

**[174]** I, on the other hand, am mystified as to why he would have undertaken this exercise of distinguishing business from personal expenses if the intention was to lump them both together. Mr Lawrence testified that he identified personal versus business expenses with the aid of the respondent. He said that he assigned expenditures depending on whether they were business or non-business in nature. What then was the point of this exercise, given that the finances did not, by his admission, itemise the expenses accordingly? It seems to me that this separation exercise was to facilitate the preparation of the finances for Earth Elements solely, which was in keeping with the words of his report, the appearance of the financials themselves and his responses under cross examination.

**[175]** I have scrutinised the evidence of Mr Lawrence and I recall his demeanour in the witness box. His evidence did not engender confidence. He vacillated on certain matters, seemed unsure at times which prompted counsel for the respondent at one point to ask whether he needed a break given his responses to her questions. This coupled with the respondent's efforts to assist him whilst he was giving evidence, all resulted in my assessment of him as an unreliable witness.

**[176]** I am confident in the view that there is nothing on the evidence that satisfies me that her personal expenses were included in the financials. I accept the posture of the ARA that in order for there to be a fulsome analysis of the financials for the

respondent, an assessment must be made of her personal living expenses and same factored into the financials.

**[177]** The ARA arrived at a figure for her personal expenses by analysing her banking transactions. It was observed that she used her Bank of Nova Scotia (BNS) and National Commercial Bank (NCB) debit cards to make point of sale purchases in relation to general living expenses such as food and medical expenses. There were also regular cash withdrawals by way of ATM which the ARA concluded were most likely for personal expenditures. The point of sale purchases, (excluding business items) were added to the ATM cash withdrawals to arrive at the respondent's living expenses. There was no available information for the years 2007 and 2015 and as such the ARA made estimates in relation to these years. It submits that these are conservative estimates as the respondent's expenditures by way of credit cards are not included.

**[178]** The respondent takes issue with this approach and the quality of investigations conducted by the ARA, which they argue leaves the possibility of double counting live. The respondent points to the use by the ARA of estimates for personal expenses for 2007 and 2015. It noted that Mr Robinson agreed that the figure for 2015 could be \$538,000.00 and not his estimate of \$1,900,000.00. The respondent also points to Mr Robinson's indication that there was a possibility that he could have included business expense items as personal expenses which would amount to double counting. Further, Mr Robinson had concluded that it would have been unlikely that the defendant paid suppliers with small cash withdrawals and that this would have been more likely living expenses without interviewing suppliers. The notebook used by the defendant to record transactions has regular cash payments to local suppliers. These according to the respondent would have erroneously been regarded as personal expenses.

**[179]** I have considered the stance of the ARA as well as the protestations raised by the respondent. My starting point is that in principle the use of point of sale and ATM transactions is reasonable given the evidence of the respondent in relation to her

personal expenses. It is clear that these transactions in aggregate account for outflows and expenditures in relation to business and personal expenses. The issue is whether the ARA has properly distinguished personal from business. The major angst of the respondent is the accuracy of the figure put forward for personal expenses. The respondent raises the possibility of certain business items being included as personal, hence resulting in double counting.

**[180]** In this case, the respondent admittedly maintained incomplete business records. Her personal and business banking records were also intertwined. She explained that she would pay for her personal expenses either from cash from the business or withdrawals from the ATM or withdrawing cash from her business account from POS. She also had indicated in her evidence that her credit card expenses were those generated by Earth Elements, which she used to pay for goods and raw materials both locally and abroad. Mr Robinson in his affidavit attached a compilation of the various POS and ATM transactions that he determined to be personal expenses. He explained his basis for so doing. He says that he observed that she used her debit cards to make point of sale purchases consistent with general living expenses such as food, entertainment, furniture and appliances, school fees and medical expenses. He also opined that there were regular ATM withdrawals of small sums of money that were more likely used for personal expenditures. He attached schedules of the respondent's BNS and NCB ATM cash withdrawals and point of sale transactions.

**[181]** I accept that one would be able to determine the nature of a purchase from a point of sale transaction and that one would be able to discern whether it is a purchase of a personal as opposed to a business expenses.

**[182]** I have also evaluated the ARA's argument as regards ATM transactions of a particular nature. I have reviewed the schedule attached to the statement of information filed on behalf of the ARA containing those ATM withdrawals that have been taken into account. I am of the view that the amounts of the various withdrawals and the frequency appear to be more consistent with personal

expenses rather than business. The withdrawals ranged from a low of \$2,000.00 to a high of \$30,000.00. Whilst there were a few entries in the respondent's notebook that would suggest that the bill for some suppliers was relatively small, the entries themselves in the notebook suggests that those suppliers were paid from cash at the business and hence their payment would not come from ATM withdrawals.

**[183]** Furthermore, Mr Robinson was not challenged on any particular item included in this schedule of ATM withdrawals or POS transactions. This would have been expected, given Mr Lawrence's declaration that he had made a determination regarding the nature of each transaction. I accept that on a balance of the probabilities that these withdrawals and POS transactions as set out in the schedule by the ARA were for personal expenses.

**[184]** Mr Robinson was challenged in relation to the figure he estimated for personal expenses in 2015. He agreed that the figure could be \$538,000.00 and not his estimate of \$1,900,000.00. Other than the bare suggestion, without more, that the figures could be flawed, which he dismissed as being highly improbable, he was not challenged in relation to the figure he had put forward in relation to the other years.

**[185]** I am not satisfied that her personal expenses were met from legitimate funds. I am comfortable in assuming, given the totality of the evidence, that this was done from the proceeds of crime. Applying the assumption in this regard has not been shown to be incorrect nor do I find that there is a serious risk of injustice in my approach. I accept that there has been commingling of funds, and the task for me is ensuring that legitimate funds are distinguished from illicit funds.

**[186]** The figure of \$13,348,152.00 is therefore reduced by \$1,362,000.00, given the above stated concession by Mr Robinson in relation to her 2015 personal expenses. Whilst on the evidence I see no evidence of double counting and there being no specific challenge to any particular transaction, given the volume of

transactions, I appreciate that there is the remote possibility that a business expense could have slipped through. Out of an extreme abundance of caution, to ensure against any injustice to the respondent, I am minded to adopt the approach utilised in **R v DePrince** and discount this figure by a further 10% to guard against the possibility that a small part of the money in issue is legitimate. The figure that I will utilise for personal expenses, given the above considerations, is \$10,787,536.80.

**[187]** I will consider next the treatment of stock by the ARA. The ARA estimated stock on hand using the amount owed to trade creditors. It equated the figure presented in the financial report on behalf of Ms Williams under the heading 'current liability,' to that of the amount owing to trade creditors. Mr Robinson however conceded that 'current liability' could relate to other things in addition to trade creditors. He also conceded that he had not done checks to determine if this were in deed the case. In these circumstances I cannot accept the figure arrived at for closing stock as being accurate.

**[188]** Having not found favour with the defendant's account surrounding her conviction for possession of and dealing in cocaine, I will now turn to the inclusion of the value of the cocaine in the benefit figure.

**[189]** She has been deemed to have a criminal lifestyle by virtue of her conviction, even in the absence of previous convictions. The legislation sets out a time frame of ten years preceding the day when proceedings for the offence were started and I accept that her expenses exceeded her income for the period in consideration. Section 7(1) of POCA states that "*A person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct*". The word 'benefit' is defined to include "any property, service or advantage". I am of the view that the value of the cocaine should be included as part of her benefit figure. Section 11(3)(a) of POCA instructs that property should be valued based on its market value at the time it was held by the defendant. I accept the value ascribed to the

drug, which was not challenged, by Detective Inspector Sheldon Coulson, given his training and experience in narcotics.

**[190]** On the matter of the court fines, the respondent paid court fines for the offences for which she was convicted which amounted to \$1,500,000.00. The issue is whether the assumption should be applied regarding this expense, that is, that it was met from property obtained from her general criminal conduct. Mr Lawrence had initially indicated that the court fines were not included in “fees” under the heading “administrative costs” and had repeatedly maintained this, albeit not indicating where the court fines were recorded. Under re-examination on another day however, he sought to include the court fines under this heading. This inconsistency leads the Court to question the accuracy of this aspect of the evidence. Additionally, it is most curious that an expense of this nature, which is of a personal nature, would have been included in her business expenses. This, when coupled with the accountants initial declaration that it was not included leads to the conclusion that it really was not. I find on a balance of the probabilities that the court fines were not paid out of her declared earnings and hence were paid from other funds and ought to form part of her benefit figure. I find that this assumption has not been shown to be incorrect nor do I find that making the assumption would result in a serious risk of injustice.

**[191]** The ARA has asked the court to infer that the respondent contributed to mortgage payments on the two properties in which she has an interest.

**[192]** In relation to the property owned with her mother, the ARA assumes that the respondent contributed half of the monthly payments, even though her mother is the principal person on the loan, and payments are made by standing order from an account in her name. The ARA found it inconceivable that she does not contribute to the mortgages.

**[193]** I find no basis on which to draw the inferences that the ARA has drawn in relation to mortgage payments for the properties, given the relationship between the

respondent and the other owners. I do not find that these are expenses incurred by the respondent and hence I am satisfied that they ought not to be included in the benefit figure.

**[194]** The ARA has also included in its benefit figure a loan that the respondent herself gave evidence about. She testified of a loan of \$1,000,000.00 from her mother on January 14, 2015 which she said that she, the respondent, would have repaid. The financials however show only a transfer from her account to her mother's account, but no transfer from her mother's account to hers. It instead shows a manager's cheque to Richard Myers from her mother's account. She was unable to indicate who this Richard Myers is, but later stated that her mother drew a manager's cheque on her behalf for him and that she (the respondent), subsequently repaid her mother. Her explanation for this movement of money, given her lack of knowledge of this Richard Myers, gives credence to the treatment of that sum by the ARA. I find that the application of the assumption in this regard has not been shown to be incorrect nor do I find that there is a serious risk of injustice.

**[195]** Having considered all of the evidence, I am of the view that the ARA has proved the case on a balance of probabilities. I so find even in the face of the admission by the ARA that its investigations were not as thorough as it should have been. By way of excuse it points to poor record keeping by the respondent as well as limited time and resources on the part of the ARA. As such, its first statement of information was based primarily on assumptions. Having received the respondent's reply, they adjusted their initial benefit figure. Whilst this approach is not to be encouraged, I do not find that this has resulted in an injustice to the Respondent. I am of the view that the final decision is what determines if an injustice has taken place, and in particular the Court's application of the assumptions. The Court in coming to its final decision has had regard to the totality of the evidence before it, and has determined it appropriate to apply the stated assumption.

**[196]** I am of the view that the recoverable amount is the sum of \$13,862,494.20 as set out below:-

Personal expenses met from unexplained funds \$10,787,536.80

Value of cocaine seized - \$574, 957.42

Court fines - \$1,500,000.00

Unexplained loan payment - \$1,000,000.00

**[197]** It is hereby ordered that the respondent Dian Williams shall pay to the Crown the sum of \$13,862,494.20 as a pecuniary penalty. Payment is to be made within 6 months of today's date.

Verbal notice of appeal.

Cost to the applicant to be agreed or taxed.