JCPC/2025/0031 & 0031A

IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL
OF THE EASTERN CARIBBEAN SUPREME COURT
(BRITISH OVERSEAS TERRITORY OF MONTSERRAT)

B E T W E E N

THE KING

Appellant

- and -

WARREN CASSELL

Respondent

CASE FOR THE RESPONDENT

A. Introduction and summary

1. It is submitted that this prosecution under section 33(1)(a) of the Proceeds of Crime Act 1999 went irretrievably wrong at multiple points, starting with an indictment that was bad in law and ending with a summing up by the learned judge that was replete with serious misdirections. The Board will accordingly be asked by the Respondent to advise that the Court of Appeal's decision to allow his appeal against conviction be upheld, both for the procedural reason that it gave and for several other reasons besides. **[EB/2092]**

2. The reasons correspond to the issues identified in the agreed Statement of Facts and Issues. Each will be addressed below (albeit in a different order from the Statement of Facts and Issues) after a brief reference to earlier proceedings. The parties agree that if the Court of Appeal's decision is otherwise upheld its order should be varied so as to include an express verdict of acquittal (see Appellant's Case at para 4). **[EB/1024]** **[EB/1044]**

B. The earlier proceedings

3. This is the second prosecution the Respondent has faced as a result of the same events in 2007 and 2008. The first, which charged a variety of offences of dishonesty (but not an offence under the Proceeds of Crime Act 1999), led to a wrongful conviction, principally as a result of what were described by the Board (Lords Mance, Kerr, Reed, Hughes and Toulson) as 'extensive misdirections allied with doubtless well-intentioned but quite improper judicial comment which was likely to influence the jury and lead to it not doing its job properly'. The Board declined to apply the proviso because it was impossible to conclude that

> '[…] any jury, properly directed, [must] have rejected the possibility that [the Respondent] thought that he was entitled in law to act as director of [Providence Estate Ltd], sell the land, and settle with Rooney afterwards.'
>
> (*Cassell v The Queen* [2016] UKPC 19, [2017] 1 W.L.R. 2738 at paras 31 and 32 *per* Lord Hughes, giving the judgment of the Board.) **[EB/2337]**

C. The Respondent's submissions on the issues

(14.4.1) Whether the amended indictment was bad on its face because it did not identify any indictable offences of which the EC$855,380.54 constituted the proceeds

4. Section 33(1)(a) of the Proceeds of Crime Act 1999 ('**the Act**') (which has since been repealed by the Proceeds of Crime Act 2010) made it an offence for a person to 'conceal[..] or disguise[..]' any property which was (or represented) 'his proceeds of criminal conduct', if he did so for the purpose of avoiding prosecution for an offence to which the Act applied or of avoiding the making or enforcement of a confiscation order. 'Criminal conduct' was defined in section 2 as conduct constituting an offence to which the Act applied (or to which it would apply if the act were done in Montserrat). By section 3(2), the Act applied to all indictable offences except drug trafficking offences. **[EB/2092]** **[EB/2061]**

5. A successful prosecution in the present case accordingly required proof to the criminal standard of the following:

   a. the Respondent had concealed or disguised property;

b. the property in question was (or represented) the proceeds of an indictable offence (other than a drug trafficking offence) that the Respondent had committed; and

c. the Respondent's purpose in concealing or disguising this property was that of avoiding (i) prosecution for an indictable offence other than a drug trafficking offence or (ii) the making or enforcement of a confiscation order. [1]

6. It was not necessary for the prosecution to show that the property in question was (or represented) the proceeds of the commission by the Respondent of a particular indictable (non-drug-trafficking) offence on a particular occasion. This much is apparent from the wording of sections 33(1), 2 and 3(2). Case law in an analogous situation is to the same effect: in a prosecution under section 50 of the Drug Trafficking Act 1994 (UK) ('[a]ssisting another person to retain the benefit of drug trafficking'), where it was admitted that the money in question was the proceeds of drug trafficking, the Court of Appeal in England & Wales (Mance LJ (as he was then), Hunt J and Judge Pitchers) rejected the appellant's submission that it was necessary for the prosecution to prove the particular instance of drug trafficking from which it derived: *R v Sabharwal* [2001] EWCA Civ 392, [2001] 2 Cr App R (S) 81 at para 13.[2]

[EB/1877]

[EB/2433]

7. It does *not* follow, of course, that the prosecution in the present case were entitled simply to allege that the relevant property was (or represented) the Respondent's proceeds of impropriety in some looser sense. They did have to show that it was (or

[1] Section 33(1) was taken almost verbatim from section 93C of the United Kingdom's Criminal Justice Act 1988, which was inserted into the 1988 Act by the Criminal Justice Act 1993 to implement Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. The analogue of section 2 of the Montserrat Act (defining 'criminal conduct' as conduct constituting an offence to which the Act applied) was section 93A(7) of the UK Act, while the analogue of section 3(2) (applying the Act to all indictable offences except drug trafficking offences) was section 71(9)(c) of the UK Act.) The 1993 insertions into the 1988 Act were in turn closely modelled on the relevant provisions of section 49 of the Drug Trafficking Act 1994 (UK), which applied *only* to the proceeds of drug trafficking, and which in turn consolidated a provision that first appeared as section 14 of the Criminal Justice (International Co-operation) Act 1990 in order to give effect in the UK to the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). This was all before the overhaul of money laundering offences which produced the Proceeds of Crime Act 2002 (UK) (a reform that was followed in Montserrat by the Proceeds of Crime Act 2010).

[2] The Drug Trafficking Act 1994 (UK) is a direct ancestor of the Act: see n1 above.

represented) the proceeds of at least one indictable (non-drug-trafficking) offence that the Respondent had committed. This is confirmed by *R v Anwoir* [2008] EWCA Crim 1354, [2009] 1 W.L.R. 980, which was a case under the Proceeds of Crime Act 2002 (UK). That Act contains, in its section 340(2), a definition of 'criminal conduct' that omits both the requirement that the offence be an indictable one and the exclusion of drug trafficking offences, instead encompassing the commission of *any* offence.[3] The Court of Appeal held in that case that **[EB/2407]**

> '[…] the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a specific kind or kinds *and that conduct of that kind or those kinds is unlawful*, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.'
>
> (At para 21, emphasis added.) **[EB/2414]**

It is respectfully submitted that this approach applies equally to a prosecution under section 33(1)(a) of the Act, with the qualification that limb (a) should be read as if it stated: '(a) by showing that it derives from conduct of a specific kind or kinds *by the defendant* and that conduct of that kind or those kinds is *an indictable (non-drug-trafficking) offence*.'[4]

8. The property alleged in the present case to be the Respondent's proceeds of his 'criminal conduct' was the sum of EC$855,380.54 alleged to have been the total transferred into the account of Cassell & Lewis Inc as a consequence of sales of land at Providence Estate. If the indictment was to be one that charged an offence known to the

---

[3] The prosecution's note to the court dated 18 March 2020 in the present case was therefore well wide of the mark when it suggested (at para 9) that section 340 of that Act 'helpfully defined' criminal property. **[EB/1066]**

[4] As was explained by HM Government in the UK in *Proceeds of Crime Bill, Publication of Draft Clauses*, March 2001 (Cm 5066), at paras 2.2 and 112, 'The combined effect of the current drug trafficking and non-drug trafficking legislation is to permit, under varying circumstances, the confiscation of benefit from all indictable offences (other than certain terrorist offences which are dealt with in separate legislation) and a small number of summary offences. The Bill [for what became the Proceeds of Crime Act 2002 (UK)] simplifies and extends the existing legislation to make it possible to confiscate benefit from any conduct which constitutes an offence in England and Wales, or would constitute an offence if it took place here. […] The restriction of the scope of the legislation under existing legislation to drug trafficking, other indictable offences and specified summary offences is thus abolished.' **[EB/1942 & 1963]**

law of Montserrat, it was therefore essential for it to allege that this money was (or represented) the proceeds of the Respondent's commission of an indictable offence or offences (other than drug trafficking).

9. There was no question in this case of any 'irresistible inference' that the EC$855,380.54 could only have come from the commission of such an offence or offences. Rather, the prosecution sought to take the first route as described by the Court of Appeal in *Anwoir*, i.e. it sought to show that the property derived from conduct of a specific kind. According to the amended indictment, the Respondent's 'criminal conduct', of which the EC$855,380.54 was the proceeds, was **[EB/138]**

> '[…] [his] *fraudulent conduct* […] in dishonestly
>
> i. representing that he was a legitimate Director of Providence Estate Limited, and/or
>
> ii. representing that he was legally entitled to sell land at Providence Estate, and/or
>
> iii. filing a Change of Directors application with the Companies Registry regarding Providence Estate Limited, and/or
>
> iv. receiving funds into the bank account of Cassell & Lewis Incorporated for the sale of land at Providence Estate, […].'
>
> (Emphasis added.)

10. The fundamental difficulty with this is that 'fraudulent conduct' is *not* a description of an indictable offence, or indeed of any offence. There was and is no offence of 'fraudulent conduct', or of 'fraud', in the law of Montserrat.[5]

11. Conceivably, this might not have mattered if each one of the indictment's four particulars of the Respondent's 'fraudulent conduct' had described acts necessarily

---

[5] See the Penal Code (Ch 4.02), where the criminal law of Montserrat is codified. The Law Commission (England & Wales) explained in 2002 that '[t]here is no offence of "fraud" in English criminal law' (*Fraud*, Cm 5560, at para 2.4). That lacuna was filled in England & Wales (with effect from 15 January 2007) by the Fraud Act 2006, but the same has not happened in Montserrat. **[EB/2148]**

constituting the commission by him of one or more indictable offences (other than drug trafficking). (It had to be *each one* because of the 'and/or'—otherwise, how would one know that a guilty verdict meant that the jury had been sure that the money was the proceeds of an indictable (non-drug-trafficking) offence committed by the Respondent?) But they did not do so. In fact, none of them did, for it was not an offence against the law of Montserrat for the Respondent:

a. to represent that he was a legitimate director of Providence Estate Limited ('**PEL**'),

b. to represent that he was legally entitled to sell land at Providence Estate,

c. to file a change of directors application with Companies House regarding PEL, or

d. to receive funds into the bank account of Cassell & Lewis Inc for the sale of land at Providence Estate,

even if (which he denies) he did any of these things dishonestly.

12. It follows, it is respectfully submitted, that the amended indictment failed to allege an offence against the law of Montserrat. The amended indictment was a nullity and there is accordingly no basis for restoring the Respondent's conviction on it.

(14.4.2) Whether the amended indictment was bad on its face because it did not give any particulars as to how the Respondent was alleged to have concealed or disguised the EC$855,380.54

13. Section 100 of the Criminal Procedure Code 2010 provides that: **[EB/1776]**

> 'Every indictment shall contain, and, subject to the provisions of this Code, shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, *together with such particulars as may be*

necessary for giving reasonable information as to the nature of the offence alleged and the acts or omissions alleged to have given rise to the offence.'[6]

(Emphasis added.)

14. Section 7 of the Constitution of Montserrat goes further: **[EB/1682]**

'(2) Every person who is charged with a criminal offence—

[…]

(b) shall be informed […] *in detail*, of the nature and cause of the accusation against him or her;

[…].'

(Emphasis added.)

15. It follows that the law required the indictment to give such particulars as were necessary for giving the Respondent reasonable information, in detail, as to what he was alleged to have done that constituted 'conceal[ing]' or 'disguis[ing]' the EC$855,380.54. Yet the amended indictment on which the Respondent was tried gave *no* particulars at all of the alleged concealment or disguise. It was silent on this subject.

16. The only reference to what the Respondent was alleged to have done with the EC$855,380.54 appeared as the last particular of the supposed offence of 'fraudulent conduct': 'receiving funds into the bank account of Cassell & Lewis Incorporated […].' **[EB/138]** This was not, however, a particular of concealing or disguising the money. How, one might ask, were the sums making up the EC$855,380.54 (or their nature, source, location, disposition, movement or ownership, or rights with respect to them[7]) 'conceal[ed]' (and from whom) by being transferred through the banking system into

[6] This is modelled on section 3 of the Indictments Act 1915 (UK), though the latter only requires 'such particulars as may be necessary for giving reasonable information as to the nature of the charge.'

[7] Section 33(3) of the Act provided that '[…] the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.'

the bank account of a company publicly registered in Montserrat that bore the Respondent's own name? In what way were they 'disguis[ed]', i.e. made to appear to be something other than what they were, namely the proceeds of sales of property at Providence Estate? The amended indictment left the case against the Respondent on this core element of the offence completely obscure.

17. For this reason also, it is respectfully submitted, the amended indictment was a nullity.

(14.4.3) Whether there was any basis on which a reasonable jury, properly directed, could have concluded that the EC$855,380.54 constituted the proceeds of criminal conduct within the meaning of the Act

18. Not having alleged in the amended indictment that the EC$855,380.54 was the proceeds of 'criminal conduct' within the meaning of the Act (see above), the prosecution unsurprisingly did not adduce any *evidence* that it was the proceeds of such conduct. This is apparent from the prosecution's note to the court dated 20 June 2022 in response to the Respondent's submission, at the close of their case, that he had no case to answer. It proceeds on the erroneous basis that dishonestly making representations in itself constituted 'criminal conduct' within the meaning of the Act: **[EB/619]**

> '17. […] There is evidence that these funds were, in whole or in part, directly or indirectly, the proceeds of criminal conduct *in that the evidence indicates that WC made all, or at the very least, one of the representations at (i)-(iv)* [sic – para (iv) does not in fact allege the making of a representation] *dishonestly.*'
>
> (Emphasis added.)

For the reasons already discussed, it is respectfully submitted that none of this was evidence that the EC$855,380.54 was the proceeds of 'criminal conduct' within the meaning of the Act.

19. It follows, it is respectfully submitted, that even if the case had properly reached this stage, it ought to have been stopped then. The judge declined to stop the case, but since he never revealed his reasons for this decision it is impossible to engage with them.

(14.4.4) Whether there was any basis on which a reasonable jury, properly directed, could have concluded that the Respondent concealed or disguised the EC$855,380.50

20. It is submitted that none of the prosecution's evidence advanced any coherent case that the Respondent had concealed the sums comprising the EC$855,380.50 from anyone or had disguised them as anything that they were not.

21. The only evidence led by the prosecution concerning what happened to this money consisted of the evidence of Lucille Irish, a former bank clerk, who was asked about copies of bank statements in the jury bundle relating to the account of Cassell & Lewis Inc (see transcript at pages 209 to 218). Even if the bank statements had been admitted into evidence (which they were not, but this is the subject of a different issue), they did not show that the Respondent had concealed the sums making up the EC$855,380.50 (or their nature, source, location, disposition, movement or ownership, or rights with respect to them) or disguised them (or these things) as anything else. On the contrary, Ms Irish's evidence explained that the bank statements identified the persons paying the money into the account, such as Kenneth Allen (page 212 at line 14) and Dion Weeks (page 214 at line 4) whom the prosecution's evidence had earlier identified as purchasers of land at Providence Estate. The prosecution's evidence, far from showing that the Respondent had concealed or disguised the money making up the EC$855,380.50, showed that he had done nothing of the sort. **[EB/344]** **[EB/347]** **[EB/349]**

22. Moreover, this was in a context where the Respondent had taken (or apparently taken) a transfer of Walter Wood's 60% shareholding in PEL for US$300,000; had publicly advertised the fact that PEL was selling (or apparently selling) lots of land; had himself dealt personally with the putative buyers of land; had caused conventional property sale transactions to take place (or apparently to take place) with lawyers on both sides; had applied to the High Court to have PEL restored to the register of companies (it having become dormant and been struck off); and had filed notice of an alleged change of directors of PEL with the registrar of companies. Whatever other criticisms might be made of the Respondent's conduct, it was about as far away from clandestine as could be imagined. It is respectfully submitted that the proposition that the Respondent concealed or disguised the proceeds of these transactions (within the meaning of the Act) was simply not supported by the evidence even to the level of a *prima facie* case.

(14.4.5) Whether there was any basis on which a reasonable jury, properly directed, could have concluded that the Respondent's purpose in concealing or disguising the EC$855,380.54 (if he had done so) was that of [(1)] avoiding prosecution for an

indictable offence or of [(2)] avoiding the making or enforcement of a confiscation order.

23. The prosecution expressly disavowed what has been numbered above as limb (2), asserting in their note to the court in answer to the Respondent's no-case submission that 'the purpose of concealing or disguising the property would have to be to avoid prosecution' (at para 17(3)). **[EB/621]**

24. It is submitted, however, that there was no evidence on which a reasonable jury could properly have concluded that such was the Respondent's purpose. The prosecution's own submission in their note failed to identify any such evidence, instead asserting without any reasoning that '[t]here is a clear inference that, whatever else he wanted, the [Respondent] wanted to avoid prosecution'. **[EB/621]**

25. There was, however, *no* evidence that the Respondent thought (or any evidence from which a reasonable jury might have inferred that the Respondent thought), at the time of the relevant transfers of funds to Cassell & Lewis Inc's bank account, that he might be prosecuted, or indeed that he had any reason for thinking that he might be prosecuted. And even if there had been any such evidence, there was no evidence such as might have provided a tenable basis for concluding that the Respondent's purpose in causing funds to be paid into Cassell & Lewis Inc's bank account was that of avoiding prosecution for (as it had to be) an indictable (non-drug-trafficking) offence.

(14.4.6) Whether the Judge conducted the trial fairly in so far as he allowed the Appellant to adduce Mr Rooney's opinion that PEL's property had been sold (or purportedly sold) for an undervalue.

26. Mr Rooney, the 40% shareholder in PEL, was taken during his examination-in-chief to a page in the jury bundle showing that a parcel of PEL's land had been sold (or apparently sold) at the Respondent's instigation to a Mr and Mrs Farrell for EC$105,000. Even on the prosecution's theory that 'fraudulent conduct' was a permissible predicate offence for a charge under section 33(1)(a) of the Act, the only admissible evidence that Mr Rooney was able to give about this transaction was that he had been unaware of it at the time. He duly gave that evidence (transcript, page 131, line 8). That ought to have been the end of it, and the questioning ought to have moved on to other factual issues. **[EB/266]**

27. Instead, however, Mr Rooney was then asked whether there was

[EB/266]

> '[…] any comment you would like to make on the amount that bit of land was sold for?'
>
> (*Ib.*, lines 9 to 11.)

It is respectfully submitted that this was an obviously improper question. Mr Rooney was a witness of fact. As such, he was not at liberty to give opinion evidence about the appropriateness or otherwise of the price that the Respondent had caused PEL to obtain for sales (or apparent sales) of its land, even if that information had been relevant to the question of whether an offence under section 33(1)(a) of the Act had been committed, which it was not. The very formulation of the question as an explicit invitation to a witness of fact to 'comment' ought to have prompted an immediate intervention by the judge.

28. The judge did not intervene, however, but instead allowed Mr Rooney to answer, and then compounded matters by staying silent as counsel summed up Mr Rooney's answer in a further (and leading) question which coupled inadmissible opinion evidence with inadmissible hearsay:

> 'Question: That $105,000 figure you say according to information you had was only 20% of the true value?
>
> Answer: Yes […]'
>
> (*Ib.*, lines 14 to 15.)

[EB/266]

29. A statement of opinion by Mr Rooney that the land had been sold for a substantial undervalue (and that someone else was also of that opinion) was not only inadmissible, it is submitted, it was also highly prejudicial to the Respondent, since it tended to show him in a bad light and to show Mr Rooney as the victim of a depletion of the value in PEL.

30. The judge, however, allowed inadmissible evidence of this nature to be adduced over and over again. It became a recurring leitmotif in Mr Rooney's examination-in-chief:

'Question: The transaction going back to 118 to the Osbornes again the amount of it 67,500 was that a true value or not? **[EB/267]**

Answer: As I recall it was about 84% less than the true market value.'

(*Ib.*, page 132, lines 22 to 24.)

'Question: You commented that that parcel which relates to lot 39 was 94% less than the true market value in your view? **[EB/268]**

Answer: Yes I had a separate appraisal done by Bertrand Burke.'[8]

(*Ib.*, page 133, lines 21 to 24.)

'Question: What do you say about the total the value $82,000 is that good value for the lot? **[EB/270]**

Answer: No that's super below value. As I recall both of those lots were worth about EC$500,000.'

(*Ib.*, page 135, lines 6 to 9.)

'Question: And so you have already commented haven't you about the value or the percentage of the true value of that lot, yes? **[EB/270]**

Answer: Yes. It was about 60% below true market value.'

(*Ib.*, lines 16 to 18.)

'Question: What do you say about that value of the property? **[EB/273]**

Answer: It was a fraction of the true market value. As I recall from the valuation we had done by Bertrand Burke is about EC$ l .9 million so he was getting it for roughly 20%.'

(*Ib.*, page 138, lines 7 to 10.)

[8] No such appraisal was in evidence.

‘Question: In terms of that price EC$80,000 does that reflect the true value of the land? **[EB/274]**

Answer: No it was roughly 15% or so I’d have to look and see.’

(*Ib.*, page 139, lines 6 to 7.)

‘Question: The US value of $199,000 we can see there, was that proper value for the lot? **[EB/276]**

Answer: No. As a cliff front lot it was about 38 to 40% of true market value.’

(*Ib.*, page 141, lines 23 to 25.)

‘Question: I think it’s US$80,000 is that transaction; is that right? **[EB/277]**

Answer: That is correct.

Question: And what’s that as opposed to the true value of the lot?

Answer: Roughly 38 to 40% of the true market value.

Question: Did you know about the sale at the time?

Answer: No I did not.’

(*Ib.*, page 142, lines 25 to 30.)

‘Answer: US $30,000 or US $35,000.

Question: And what is that compared to value of the valuation? **[EB/278]**

Answer: Probably about 80% less than true market value.’

(*Ib.*, page 143, lines 21 to 23.)

‘Question: Does it show the transfer on the 2nd May 2008 for EC$70,000? **[EB/280]**

Answer: Yes.

Question: The value was that a true value of the lot?

Answer: No it was a small fraction.'

(*Ib.*, page 145, lines 13 to 16.)

31. It is true that the Respondent did not himself object to these improper questions. But he was a litigant-in-person, and in any event it was ultimately the *judge's* duty to stop this line of questioning: 'a trial judge is not only entitled, he is duty bound, to control the questioning of a witness' (*R v Lubemba (Practice Note)* [2014] EWCA Crim 2064, [2015] 1 W.L.R. 1579 at para 51).[9] (That the Respondent is himself a lawyer is, it is respectfully suggested, nothing to the point. Experience suggests that a lawyer who acts for himself not infrequently 'lacks the objectivity which is necessary for sound judgment': *Johnatty v Attorney General of Trinidad and Tobago* [2008] UKPC 55 at para 1 *per* Lord Hope, referring to an instance of this phenomenon before the Board itself.) **[EB/2429]** **[EB/2345]**

32. The Respondent respectfully submits that for this reason he was denied a fair trial.

(14.4.7) Whether the Judge conducted the trial fairly in so far as he allowed the Appellant to adduce Mr Allen QC's opinion that any transfer of shares would have to be in accordance with any prior agreements or conditions that existed in relation to the shares.

33. The Respondent's case, as he explained in his closing speech, was that 'I genuinely believed that I had a right to sell the property' and that 'I had a right to act on behalf of [PEL]' (transcript, page 239, lines 8 to 9). This derived from the fact that Mr Wood, the majority shareholder in PEL, had (albeit without consulting Mr Rooney) executed a transfer of his majority shareholding to Cassell & Lewis Inc for US$300,000. As the Respondent put to Mr Rooney when cross-examining him, although Mr Rooney had a right of pre-emption, Mr Rooney had never sought an order of the court in Montserrat declaring this transfer void (transcript, page 147, lines 16 to 18). **[EB/374]** **[EB/282]**

[9] The context in *R v Lubemba* was more sensitive than in the present case, that case being concerned with vulnerable witnesses, but this does not change the fundamental point that the trial judge is obliged to ensure that the questioning in a criminal trial stays within the bounds of what is permissible.

34. Kenneth Allen was one of the people who had purchased (or apparently purchased) land from PEL at the Respondent's instigation. Mr Allen was called by the prosecution to give evidence about this purchase and duly did so (transcript, page 77, line 22 to page 85, line 9). **[EB/212]**

35. Mr Allen happened to be a retired silk. In cross-examination, the Respondent sought to elicit opinion evidence from him about the lawfulness of his conduct with regard to PEL. He took Mr Allen to a copy of the share transfer document (transcript, page 86, lines 23 to 30). This had nothing whatsoever to do with Mr Allen, and this line of questioning ought of course to have been shut down at once, but the judge allowed it to run a little way. The Respondent put to Mr Allen that when a person sells his shares in a company he relinquishes his rights in the company and that 'transferring shares is a normal activity', propositions with which Mr Allen agreed (*ib.*, page 87, lines 9 to 17). **[EB/221]** **[EB/222]**

36. Counsel for the prosecution, alluding to the right of pre-emption, had told the jury in his opening speech that 'it wasn't legal to do this', i.e. for Mr Wood to transfer his shares to Cassell & Lewis Inc without first offering them to Mr Rooney (transcript, page 32, line 10). Presumably with this in mind, the Respondent put to Mr Allen that two persons who together own a company 'can have an agreement that before they offer their shares to persons outside the company they must offer to each other first' (*ib.*, lines 19 to 20), but that if such an agreement is breached 'that would be a civil wrong' (*ib.*, lines 24 to 25). The judge intervened at this point, noting (rightly, of course) that this was 'an issue of law' (*ib.*, lines 27 to 28), but allowed the question to be put all the same, which elicited the answer that Mr Allen was not sure (*ib.*, page 88, lines 2 to 3). The judge then allowed the Respondent to elicit agreement from Mr Allen to three more anodyne propositions: that a company can own and sell property, that it can have a bank account, and that it acts through directors (*ib.*, lines 4 to 12). **[EB/167]**

37. It is respectfully submitted that this ought to have been the end of any attempt *by either side* to elicit Mr Allen's opinions on questions of law. Instead, however, Mr Allen's re-examination proceeded as follows:

> 'Question: Of course any transfer of shares would have to be legal wouldn't it? **[EB/224]**
>
> Answer: Yes.

Question: And any transfer of shares of course would have to be in accordance with any prior agreements or conditions that existed in relation to the shares?

Answer: Absolutely.

Question: So if for instance there were other documents and I appreciate you've not seen this before but if there were other documents indicating for example that another shareholder had the right of first refusal on the transfer of shares or if another shareholder had to be offered shares before they could be transferred --

Mr. Cassell: Objection. Calls for speculation.

The Court: You introduced it Mr. Cassell.

Mr. Cassell: That does not prevent the Court from ruling on a question that is not admissible.

The Court: What makes it not admissible? First of all you said it was speculation.

Mr. Cassell: It's okay. I withdraw.

Question: It has been put to you in terms of legalities but if there were documents indicating another shareholder had first call on the shares and say they hadn't been notified of this agreement of course that would have an effect wouldn't it?

Answer: Of course.'

[…]

Question: […] You were asked about how companies act through a director, do you remember that and you gave an answer effectively a company acts through a board?

Answer: Yes

Question: A board is a board of shareholders?

Answer: Board of directors and directors are selected from shareholders.

Question: And so if there is more than one director indeed more than one shareholder should they be consulted if there is a proposal of any shares [sic]?

Answer: Absolutely.'

(Transcript, page 89 line 27 to page 91 line 6.)

38. It is submitted that this line of questioning should not have been permitted. The opinion evidence it elicited was inadmissible and prejudicial to the Respondent's case. If the prosecution, in support of their case as to the Respondent's alleged dishonesty, had wished to adduce evidence from a lawyer to the effect that it was obvious to lawyers ('absolutely', 'of course') that 'any transfer of shares of course would have to be in accordance with any prior agreements or conditions that existed in relation to the shares', they should have applied for permission to do so. They should not have been allowed to slip such evidence in by asking obviously improper questions of a witness of fact.[10]

(14.4.8) Whether the Judge directed the jury fairly as regards the significance of the ruling of the court in the United States concerning the 2007 share transfer.

39. The prosecution led evidence from Mr Rooney that he had commenced a civil action in Fairfax, Virginia, United States, against the Respondent and Cassell & Lewis Inc, seeking to impugn Mr Wood's transfer of the majority of the shares in PEL to Cassell & Lewis Inc (transcript, page 139 line 20 to page 141 line 10). Counsel for the prosecution, taking Mr Rooney to a page in the jury bundle, elicited his agreement to the following question: **[EB/274]**

[10] For a discussion about whether a transfer (or purported transfer) of shares in breach of a right of pre-emption operates (a) to confer an interest on the transferee, albeit one that is subject to an equitable right in the other shareholder or shareholders to demand to purchase the shares from the transferee, or (b) to transfer nothing, being wholly ineffective and void, see *Re Coroin Ltd* [2013] EWCA Civ 781, [2014] B.C.C. 14, especially at paras 140 to 144 *per* Moore-Bick LJ, concluding (notwithstanding 'indications to the contrary' in the first-instance decision in *Tett v Phoenix Property and Investment Co Ltd* (1985) 1 B.C.C. 99327) that the answer is (b). As the case demonstrates, the point is hardly obvious. **[EB/2513 - 2514]**

> 'Was the effect of those proceedings you'd taken challenging the transfer of shares if we look at point (a) count 1 declaratory relief, Cassell's and Cassell & Lewis Inc's purchase of Walter Wood's 60% interest in the shares in Providence Estate Ltd is null and void and Rooney shall have the right to purchase Wood's interest in Providence Estate, yes?'
>
> (*Ib.*, page 144, lines 16 to 20).

As Mr Rooney agreed during cross-examination, however (*ib.*, page 159, lines 10 to 12), this was a default judgment 'because you [sc the Respondent] didn't show up.' There was no evidence that either the Respondent or Cassell & Lewis Inc had ever submitted to the jurisdiction of the US court.

40. '[A] decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is […] an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity […]': *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] A.C. 670 (PC) at 683–684 *per* Lord Selborne, cited in *Dicey, Morris & Collins, The Conflict of Laws* (16th ed.) at 14-059 **[EB/2533]** (and see the Board's discussion in *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, [2016] Bus. L.R. 413). It follows, the Respondent submits, that the judgment of the court in Virginia was a nullity. It was not binding on the Respondent.

41. The US judgment had been formally tendered and admitted into evidence during the Respondent's first prosecution. When his appeal against conviction reached the Board, the Respondent contended that the judgment had been inadmissible. The Board responded as follows (at para 26, emphasis added): **[EB/2335]**

> 'The Board does not agree. True it is that the judgment was not binding on the appellants since they were not within the jurisdiction of the court and had not submitted to it. But at the very least these proceedings were admissible to show that from (apparently) late 2007 the appellants were on notice that Rooney was protesting the illegality of the sales which they were making, and that in due course they knew that a court had taken the view that they were in the wrong. It was relevant for the Crown to prove this knowledge and that the appellants' behaviour was unaffected by it. It went to rebut any possibility that they were doing their best to preserve Rooney's interests unless and until he could be

persuaded to settle. *The judge ought to have explained to the jury that this was the relevance of the proceedings, which he did not. Rather*, he used it to illustrate his strongly expressed view that the sales were unlawful, and *he failed to tell the jury that the judgment was not directly binding or enforceable on the appellants.* The evidence was not, however, inadmissible.'

42. This statement by the Board had obvious implications for the present case. Unfortunately, they were not appreciated, as appears from the following.

43. During the prosecution's opening speech, the jury were told:

[EB/167]

> '[A] court in America considered this and annulled this whole agreement. They said it's null and void you're not allowed to do that. We'll come to those documents in a moment but the point about this is this had been done without Mr Rooney being consulted at all and in fact while we just consider that because this is what [the Respondent] wanted to do to have control of the property just go forward please all the way forward to page 248 it's headed in the circuit court for Fairfax county. It's a civil action top right and it's an order and all I'm going to take you to is this. Look at paragraph (a) count 1 declaratory relief Cassell and Cassell & Lewis purchase of Walter Wood's 60% interest in the shares in Providence Estate Ltd is null and void. So as I told you a little earlier that purported transfer for understandable reasons was declared by a court null and void. It wasn't legal and that was a decision in due course that took place. But it seems that hadn't stopped Mr Cassell in terms of his plans.'
>
> (Transcript, page 32, lines 13 to 27.)

At no point during the opening speech were the jury told that the US court's decision was not binding on the Respondent. On the contrary, it is submitted that they were given the clear impression that it *was* binding on him—'you're not allowed to do that', '[i]t wasn't legal'—but that he had simply chosen to defy it.

[EB/227]
[EB/263]
[EB/279]
[EB/297]
[EB/299]

44. The prosecution's evidence was full of references to a court having declared the transfer 'null and void' (see the transcript at page 92 lines 17 to 22, page 128 lines 1 to 7, page 144, lines 16 to 20 (as already mentioned above), page 162 line 20 to page 163 line 3, page 164 line 2), all of which merely reemphasised the impression given in opening.

45. The judge did nothing to counter this impression. He told the jury in his summing up, without any qualification, that 'Rooney becomes aware of that purported transfer […] [and] immediately begins litigation in a court in Virginia and the court rules that the transfer from Wood to Cassell is null and void' (transcript, page 246 lines 7 to 9). **[EB/381]**

46. When the Respondent, during a break in the summing up, asked the judge to tell the jury that the judgment had not been binding on him, and indeed referred the judge to the very paragraph of the Board's judgment quoted above, the prosecution objected (*ib.*, page 251 line 9 to page 252 line 27). The judge appears to have accepted this objection, **[EB/386]** for the judgment was not mentioned again in the summing up.

47. It is respectfully submitted that the judge went seriously wrong. Given that this second prosecution was, like the first, based on the Respondent's alleged dishonesty, it was essential to make the jury aware, as the Board had explained, of the true relevance of the US court's ruling, namely that it was relevant to show that the Respondent knew of Mr Rooney's objections to Mr Wood's share transfer, but that it was *not* binding on the Respondent.

(14.4.9) Whether the Judge directed the jury fairly as regards what needed to be established by the Appellant if the Respondent were to be convicted.

48. In large part this issue goes hand in hand with the issues concerning the indictment, for the judge essentially accepted the prosecution's erroneous case (as it is respectfully submitted that it was) regarding what needed to be proved on a charge under section 33(1)(a) of the Act. This is clearest from the passage in which the judge followed a 'route to verdict' document with which he had been provided by the prosecution:

> 'Members of the jury that $855,380.54 becomes criminal property and would represent the proceeds of criminal conduct if all or part of it was transferred as a result of the fraudulent conduct of the defendant and fraudulent conduct really means criminal conduct, deception, dishonesty. In this case the conduct is said to be fraudulent in the following ways, four ways. Cassell acted dishonestly when he held himself out as a legitimate director of PEL, when he represented that he was legally entitled to sell land in Providence Estate, when he filed a change of directors application at the Compan[ies] Registry regarding PEL and fourthly when he received funds into the account of Cassell & Lewis from the

sale of lands of Providence Estate. These four acts I've said this before are set out disjunctively. That is to say proof of any one of them would be sufficient to indicate that the funds were indeed the proceeds of criminal conduct. As long as you are satisfied the act in question amounted to fraudulent conduct and that in doing so the defendant acted dishonestly.'

(Transcript, page 253, lines 14 to 26; and see also page 247, lines 17 to 22.) **[EB/388] [EB/382]**

For the reasons outlined in connection with the invalidity of the amended indictment, it is respectfully submitted that this was a plain misdirection.

49. This was, however, not the only misdirection. The summing up was replete with them. The following, it is submitted, were also enough to render the Respondent's conviction unsafe:

a. 'This case depends on the veracity of the documents; that's what this case depends on - the veracity of the documents. Are the documents that the prosecution produced true documents[?]' (Transcript, page 240, lines 7 to 10.) **[EB/375]** This suggested that the jury need only be satisfied of the veracity of the documents in order to convict.

b. 'If the money was transferred into his account that amounted for the purposes it was concealed for the purposes of avoiding prosecution. There is no confiscation order involved here so the only other reason it could be is to avoid prosecution. So yes it may not have been hidden but it was transferred and that is sufficient.' (*Ib.*, page 247, lines 24 to 28.) **[EB/382]** This effectively directed the jury that all that was required to establish concealment was the transfer of money from sales of PEL's property into Cassell & Lewis Inc's bank account.

c. 'Do we think that Mr. Cassell acted dishonestly when those shares were being transferred? You may very well think Members of the Jury he is a practicing lawyer and that [i.e. the existence of the right of pre-emption] is something he ought to know but at the end of the day he must be judged as a professional person, average professional person. […] As I said before Cassell is a practicing attorney and he ought to know, we call it the right of preemption and you may very well find that he knew or he ought to have known that that purported

transfer was illegal.' (*Ib*., page 248 lines 5 to 7 and page 250, lines 12 to 15.) This is same error as that identified in the Board's earlier judgment at para 22: 'To mix them up [i.e. to mix up 'know' and 'ought to know'] as if either would do was a striking misdirection.'

[EB/383]
[EB/385]
[EB/2333]

50. For all of these reasons, it is respectfully submitted that the summing up was seriously flawed.

51. This leaves for consideration the grounds on which the Court of Appeal allowed the Respondent's appeal against conviction.

(14.1.1) Whether there was a procedural flaw in the manner in which the documentary evidence was admitted; and

(14.1.2) If so, whether the Court of Appeal was correct in ruling that this amounted to a 'material irregularity' in the conduct of the trial; and

(14.1.3) Whether the Court of Appeal was correct in ruling that the learned trial judge ought to have acceded to the submission of no case to answer as a result.

52. These issues may conveniently be taken together. In summary, the Respondent submits that the Court of Appeal was right to allow his appeal for the reasons it gave.

53. The starting point, it is respectfully submitted, is that the Board will 'usually defer to the view of the Court of Appeal on an issue where its superior understanding of local practice and conditions is relevant' (*Campbell v The King* [2024] UKPC 6, [2024] 4 W.L.R. 51 at para 60 *per* Lord Lloyd-Jones). The present issues, being concerned with the practical mechanics of how documentary evidence is introduced into a criminal trial in the Eastern Caribbean Supreme Court, lie squarely in that territory. When the Court of Appeal, in a constitution comprising experienced judges (indeed, Price Findlay JA, who gave the only judgment, now serves as the acting Chief Justice of the Eastern Caribbean Supreme Court), opines unanimously that the practice adopted by the trial judge was 'highly irregular', this view is entitled to considerable deference.

[EB/2322]

[EB/1146]

54. In any event, it is submitted that the Court of Appeal was plainly right when it stated the following at para 67 of Price Findlay JA's judgment:

> 'It is trite law that all documents, photographs and reports used as evidence must satisfy the requirements of the law to be admitted as evidence. During a trial, each piece of evidence should be marked and formally admitted. Such exhibits must be marked and formally admitted into evidence before they can be considered by the judge and jury.' **[EB/1136]**

55. Far from being a 'dangerous precedent for the administration of criminal justice' (Appellant's Case at para 40), this was no more than a description of the conventional process by which documentary evidence has historically always been introduced into evidence during a criminal trial. As Dickson C.J. explained in *R v Schwartz* [1988] 2 SCR 443 (citations omitted): **[EB/1052]** **[EB/2467]**

> '58. First, it must be authenticated in some way by the party who wishes to rely on it. This authentication requires testimony by some witness; a document cannot simply be placed on the bench in front of the judge. Second, if the document is to be admitted as evidence of the truth of the statements it contains, it must be shown to fall within one of the exceptions to the hearsay rule […] These are two distinct issues […]. How does the document get admitted into evidence?
>
> 59. One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for *viva voce* by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.'

56. The use of a 'jury bundle', prepared in advance and handed to the jury either at the start of the prosecution's opening address or at the start of the oral evidence, is plainly much more convenient than documents being provided to the jury one by one as the case unfolds and new documents are tendered, admitted into evidence and marked up (along with any real evidence) as exhibits. But this convenient practice necessarily depends on the parties' consent, since otherwise the jury will be given documents for the admission of which no basis has yet been established. There can self-evidently be no *right* for the

prosecution (or the defence, for that matter) to hand documents to the jury at any moment of its choosing.

57. It follows, it is submitted, that in the present case the Respondent was entitled to object to the prosecution's wish to hand out bundles to the jury during the opening speech, and that that objection ought to have been upheld. The Court of Appeal was right so to hold at paras 71 and 77 of Price Findlay JA's judgment. **[EB/1137]**

58. The basis on which the judge allowed the jury bundles to go to the jury over the Respondent's objection appears to have been counsel's confirmation (transcript, page 17, lines 6 to 8) that '[t]he purpose of handing them out at this stage is simply to refer and not a question of admission into evidence at this stage.' Even if the judge had been correct to allow the bundles to go to the jury during the opening, this made it quite clear that none of the documents had actually yet been admitted into evidence. It followed that something else needed to happen for that to occur. **[EB/152]**

59. Nothing further did happen, however. By and large, witnesses were simply asked to turn up particular pages in the jury bundle and to answer questions relating to the relevant document, as if this were a civil trial with an agreed documents bundle.

60. In these circumstances it is respectfully submitted that the Court of Appeal was entitled to hold, as it did at paras 80 to 85, that the prosecution had put no documentary evidence before the jury. **[EB/1139]**

61. Moreover, the Court of Appeal was entitled (and right) to hold (at para 85) that: **[EB/1140]**

> 'Shorn of this documentary evidence, it left the Crown with no evidence with which to show that the appellant had done anything which would satisfy the various components of the wrongdoing with which he was charged.'

62. The Appellant argues to the contrary (Case at paras 48 to 58), but this is to overlook the central elements of the prosecution's case which depended solely on properly admitted documentary evidence. These included: **[EB/1053]**

    a. The contention that Mr Wood had had no right to transfer his majority shareholding to Cassell & Lewis Inc without first offering them to Mr Rooney, which depended on PEL's articles of association being admitted into evidence.