8 June 2020

PRESS SUMMARY

Williams (Appellant) v The Supervisory Authority (Respondent) (Antigua and Barbuda) [2020] UKPC 15

On appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

JUSTICES: Lord Kerr, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lord Sales

BACKGROUND TO THE APPEAL

The appellant was charged with possession of a controlled drug with intent to supply to another and also with possession with intent to sell to another. On 26 May 2008, the appellant was convicted by a magistrate of the charge of possession with intent to sell and sentenced. The magistrate reprimanded and discharged the appellant in relation to the charge of possession with intent to supply on the basis that this lesser offence was included in the greater offence of possession with intent to sell. The appellant unsuccessfully appealed against his convictions and sentence.

On 17 March 2009, the Supervisory Authority applied without notice to the High Court for a freeze order under the Money Laundering (Prevention) Act 1996 (as amended) ("the MLPA") in respect of two properties owned by the appellant, on the basis that the appellant had been convicted of possession with intent to supply, a money laundering offence as defined in the MLPA. This was an error because the appellant had not been convicted by the magistrate of that offence (rather, he had been reprimanded and discharged). At the time the offence was committed, the offence of possession with intent to sell (for which the appellant had been convicted) was not a defined money laundering offence. Nevertheless, the High Court granted the freeze order. On 5 June 2009, the Authority, having realised it was proceeding on an erroneous basis, applied to withdraw its application. The existing freeze order was discharged.

On 9 June 2009, the Authority issued a new application without notice for a freeze order. This application was based on a different provision in the MLPA which allows the court to grant a freezing order where a person is suspected of having engaged in money laundering activity. On 7 July 2009, the High Court made the new freeze order, which was subsequently extended. The appellant's application to discharge the order was unsuccessful and the High Court confirmed the freeze order by judgment dated 14 October 2009. The Authority applied for a civil forfeiture order, which forfeits to the state the property that is subject to the freeze order. On 10 September 2015, the High Court made the order. The appellant appealed to the Court of Appeal, which dismissed the appeal by a judgment dated 13 July 2017. The appellant appeals to the Judicial Committee.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the appeal should be dismissed. Lord Sales gives the advice of the Board.

REASONS FOR THE JUDGMENT

The Board considers the issues in the following order: (1) the operation of the combined regime in the MLPA; (2) the challenge to the lawfulness of the freeze order made on 7 July 2009; (3) the civil or

criminal nature of the combined regime and the application of section 15 of the Constitution of Antigua and Barbuda ("the Constitution"); and (4) the application of sections 3 and 9 of the Constitution **[48]**.

The freeze order provisions and the civil forfeiture provisions of the MLPA are intended to operate in combination as an integrated regime, which contains protections for defendants to such proceedings. A freeze order is directed against particular property rather than purely against a person. The relevant ground on which a freeze order can be made requires the applicant to produce evidence to explain why it suspects the defendant of having engaged in money laundering activity as defined in the MLPA. The regime is treated as a civil law regime relating to private law property rights (and the MLPA expressly states that proceedings for a freeze order and a civil forfeiture order are civil in nature) **[49]-[57]**.

The Board considers that there is no valid challenge to the freeze order made on 7 July 2009. The judge found that it was proved on the evidence that the appellant had the drug in his possession with intent to sell it, which includes having possession of the drug with intent to supply it, which was within the definition of money laundering activity in the MLPA **[58]-[61]**.

The appellant submits that a civil forfeiture order can only be made upon a finding that the defendant has engaged in money laundering activity, an allegation which constitutes a criminal charge under section 15 of the Constitution and therefore requires the application of a criminal standard of proof. The immediate difficulty for the appellant is that the magistrate did find the appellant guilty of the relevant conduct to the criminal standard, so even if the appellant were correct, there would be no breach of section 15. Nevertheless, the Board provides guidance that may assist in other cases. The combined regime in the MLPA is explicitly stated to be civil in nature, its operation does not depend on conviction of any offence, and it is directed to determination of private law rights. The regime does not lead to the imposition of any criminal penalty. The practical effect of a finding that a defendant has engaged in money laundering activity is to put the defendant to proof that the relevant property is not related to unlawful activity. This is a significant effect, but it is not in the nature of a penalty for a criminal offence of which the defendant is convicted. The MLPA establishes a general principle essentially of private law that good title to property cannot be derived from the proceeds of money laundering activity. Therefore section 15 of the Constitution has no application **[62]-[82]**.

Section 3 of the Constitution provides protection for the enjoyment of property and for a right to the protection of the law. Section 9 provides for protection against the state compulsorily taking property without payment of compensation, subject to certain qualifications. The Board considers that section 3 requires that: (i) legal proceedings must be procedurally fair; and (ii) laws should not be immeasurable, arbitrary or oppressive. The Board agrees with the Court of Appeal that there has been no breach of the procedural aspect of section 3 in this case. On the substantive aspect, the Board takes the view that the combined regime must be proportionate to protect a legitimate public interest, so as to strike a fair balance between the rights of the individual and the interest of the general community. Appropriate respect should be given to the assessment made by the legislature, which should be afforded a margin of appreciation. The combined regime in the MLPA is potentially severe in its effect, since a civil forfeiture order can be made on the basis of a low threshold condition, namely proof on the balance of probabilities that money laundering activity has taken place in the relevant period. However, in the Board's view, generally the application of the regime is compatible with the constitutional rights of defendants. It has been enacted with an important legitimate aim, to try to ensure that persons who engage in money laundering activity do not profit from it, and it is reasonable for the burden of proof to be placed on the defendant, who can be expected to know the source of his income and assets **[83]-[97]**.

The Court of Appeal was also right to dismiss a further complaint based on section 7 of the Constitution, as the application of the MLPA does not involve inhuman or degrading punishment **[98].**