

JERSEY / JUDGMENT

AG v Ellis [2020] JCA 098 (01 June 2020)

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Court of Appeal 1 June 2020 Before : Jonathan Crow, Q. C., President; David Perry, Q. C., and; Sir William Bailhache. The Attorney General -v- Ian Joseph Ellis M. T. Jowitt, Solicitor General appeared for the Attorney General Advocate P. G. Nicholls for the Respondent.

JUDGMENT

THE president:

Introduction

1. This is the judgment of the court. It arises in the context of proceedings under the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 (the "Forfeiture Law"). The background facts
2. For the purposes of this appeal, the background facts may be summarized briefly on the basis of the findings made by the Royal Court (Samedi Division), Commissioner Clyde-Smith sitting with Jurats Olsen and Dulake, in a judgment dated 22 July AG-v-Ellis

[2019] JRC 141 (the "July judgment"). 3. The Respondent was born and brought up in Scotland. About 35 years ago, he set up a successful taxi business there. He opened a bank account (the "Account") in April 1988 with the Jersey branch of Standard Chartered Bank (the "Bank"). Funds amounting in aggregate to about £42,500 were credited to the Account in the period up to 1992, including at least £18,000 in cash deposits made through various banks in Glasgow. The funds were derived partly from the Respondent's taxi business and partly from the sale of used cars: para. 39 of the July

judgment.

The funds paid into the Account accordingly derived from legitimate businesses, but the Respondent paid the money into the Account " as part of a dishonest scheme by which he under-declared the true amount of his income to the United Kingdom tax authorities ": para. 42 of the July judgment. 4. Various withdrawals were also made from the Account over time, but it has been dormant since 1992. It currently holds just under £34,000. 5. On 4 September 2001, the Respondent was convicted in Scotland of drugs offences and sentenced to 12 months' imprisonment. A confiscation order was also made against him. In the course of the confiscation investigation, the existence of the Account came to light. On 11 October 2002, the Bank made a suspicious activity report to the Joint Financial Crimes Unit ("JFCU") in connection with the

Account. Consent to operate the Account was withheld by the JFCU on 11 October 2002. Efforts were then made, both by the Bank and by the JFCU, to obtain evidence from the Respondent as to the source of the funds in the Account, but at that stage he refused to cooperate. 6. In 2003, the Respondent moved to Cyprus. He satisfied the Scottish confiscation order, but at about the same time an investigation was launched here into the source of funds in the Account. Procedural history & rulings in the court below 7. Notice was served on the Respondent under Article 10 of the Forfeiture Law on 3 December 2018 requiring him to show cause why the Account should not be forfeited. After an exchange of evidence, the matter came on for hearing in the Royal Court, at which the Respondent was represented by Counsel. 8. Under Article 11(4) of the Forfeiture Law, the burden was on the Respondent to satisfy the court that the property was not 'tainted property' within the meaning of Article 2. The Royal Court held that: "The respondent has failed to satisfy the Court that the Account is not tainted property": July judgment, para. 49(ii). [i] In particular, having described the dishonest tax-evasion scheme (quoted in para. 3 above) the Royal Court went on to say this: "The Account was used in, or intended to be used in, that unlawful conduct": para. 42 of the July judgment. This meant that "the Account falls fully within the definition of tainted property in Article 2 of the [Forfeiture Law]": para. 42 of the July judgment. 9. Nevertheless, the Royal Court refrained from making a forfeiture order at that stage. It noted the English judgment in Ahmed

v. HMRC

[2013] EWHC 2241 (Admin), where the court held that an order made under a comparable English regime had to be compatible with the right to peaceful enjoyment of possessions under Article 1 of the First Protocol to the European Convention on Human Rights ("A1. P1"). Taking that approach into account, the Royal Court in this case noted that it had "no information on the amount of tax evaded by the respondent" and decided that, since the funds paid into the Account came from "legitimate businesses" the court needed to be addressed "on whether it is proportionate to forfeit the whole of the Account or just that part that represented the taxes evaded": July judgment, para. 48. 10. A subsequent hearing before the Royal Court (Commissioner Clyde-Smith sitting alone) led to a further judgment on 31 October 2019, AG-v-Ellis

[2019] JRC 219 ("the October judgment"). The issues at that hearing were essentially threefold:

- (i) first, whether A1. P1 was a relevant consideration at all, and if so (ii) where the burden of proof lay in relation to the question of proportionality under A1. P1, and (iii) what impact A1. P1 has on the scope of any appropriate forfeiture order. 11. In dealing with the issues under appeal, it is important to understand the precise nature of the learned Commissioner's findings, and also the sequence in which he reached them: (i) First, he held that, as a matter of principle, "(i) the Forfeiture Law must be read and given effect compatibly with A1. P1; (ii) a forfeiture order which does not respect the principle of proportionality would involve a violation of A1. P1; (iii) it is incumbent on the court to provide a remedy for any such violation; (iv) the appropriate remedy lies in the duty of the court not to make an order which involves such a violation": October judgment, para. 22. (ii)

Second, he held that " as a matter of construction " of the Forfeiture Law " it would be disproportionate for the entire Account, comprising, as it does, the respondent's legitimately earned moneys, to be forfeited ", adding that " As the Court found in *Ahmed v. HMRC* , the forfeiture order should be limited to that part which represents the evaded tax and, arguably, penalties and interest ": October judgment, para. 23. (iii) Third, he held that, since the Attorney-General is the applicant in proceedings under Article 10 of the Forfeiture Law, the burden is on him " to satisfy the Court that the forfeiture order he is seeking is proportionate" : October judgment, para. 28. 12. Being dissatisfied with the learned Commissioner's rulings on (i) the application of A1. P1 and (ii) the burden of proof, the Attorney General wished to appeal. It is common ground that the October judgment was an 'interlocutory judgment' within the meaning of Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 (the "1961 Law"). As a result, the Attorney General needed leave to appeal. That led to another ruling from the learned Commissioner, dated 4 November 2018, AG-v-Ellis

[2019] JRC 220 ("the November judgment") in which he dealt with two issues: (i) First, he considered whether the Attorney General could satisfy the test for permission to appeal, as laid down in *Crociani v. Crociani*

[2014] (1) JLR 426. So far as that is concerned, he said that he was " provisionally of the view " that permission should be granted, because (i) this is the first time the court has been asked to construe the Forfeiture Law, and (ii) a decision of the Court of Appeal on the two issues raised by the Attorney General would be to the public advantage: para. 4 of the November

judgment.

(ii) He then considered whether the Attorney General had any right of appeal in relation to an interlocutory ruling made in forfeiture proceedings under Article 11 of the Forfeiture Law. So far as that is concerned, he held that it was " arguable " that the Attorney General did not have a right of appeal: paras. 8 & 9 of the November judgment. Although he expressed himself in this qualified way, he must be taken to have concluded that there was no right of appeal, because he held that the Attorney General had to demonstrate to this court that he has a right of appeal: para. 10 of the November judgment. 13. The matter then came before Bailhache JA, sitting as a single judge of this court, on 27 February 2020. He directed the permission application to be referred to the full court. That is what is before us, together with the substance of the appeal if permission is granted. The issues on appeal 14. By his Notice of Appeal, the Attorney General seeks an order from this court - (i) that the burden in relation to proportionality under A1. P1 is on the Respondent; (ii) that, since the Respondent had filed no evidence on proportionality and did not raise the issue at trial, the issue did not arise; (iii) that there be a forfeiture order in relation to the full amount standing to the credit of the Account, less a suitable sum in respect of costs. 15. There are accordingly four issues that need to be resolved: (i) first, whether this court has jurisdiction to hear an appeal by the Attorney General against an interlocutory ruling under the Forfeiture Law; (ii) if so, whether permission to appeal should be granted in this case; (iii) if

so, whether the Royal Court dealt correctly with the issue under A1. P1; (iv) if not, what order this court should make. Issue (1): jurisdiction 16. The issue on jurisdiction arises in this way. Article 16 of the Forfeiture Law provides as follows: "16 Appeals against forfeiture orders (1) Any party (other than the Attorney General) to proceedings in which a forfeiture order is made (whether under Article 11 or Article 15) may appeal to the Court of Appeal against the making of the order. (2) On an appeal under paragraph (1) the Court of Appeal may order the release of so much of the property in question as it considers appropriate to enable the appellant to meet legal expenses in connection with the appeal. (3) Any person who is not a party to proceedings described in paragraph (1), but is affected by such proceedings, may appeal with the leave of the Court of Appeal against the making of a forfeiture order. (4) On hearing an appeal under this Article the Court of Appeal may make such order and give such directions as it considers appropriate" (emphasis added). 17. In the November judgment, the learned Commissioner observed that an application under Article 11 involved summary proceedings, and since Article 16(1) expressly prevents the Attorney General from appealing against a substantive forfeiture order " it must be arguable that the greater includes the lesser" and that "there can be no right of appeal against interlocutory decisions made by the Court in the process leading up to the making of a forfeiture order ": para. 9 of the November judgment. 18. In our judgment, this court does have jurisdiction to hear an appeal by the Attorney General (and, for the avoidance of doubt, by a respondent) against interlocutory judgments in proceedings under the Forfeiture Law. 19. The starting point for any discussion about this court's jurisdiction must always be Article 12 of the 1961 Law. Under Article 12(2), this court has jurisdiction to hear and determine appeals from " any judgment or order " of the Royal Court " when exercising jurisdiction in any civil cause or matter " (emphasis added in both cases). The October judgment in this case is plainly a judgment of the Royal Court in a civil cause or matter. As such, this court undoubtedly has jurisdiction to hear the Attorney General's appeal, unless that jurisdiction has been excluded by some other legislative provision. The possibility of such exclusion is expressly contemplated by the opening words of Article 12(2): " Subject as otherwise provided in this Law or in any other enactment ..." . 20. The question under this heading is, accordingly, whether the effect of Article 16 of the Forfeiture Law is to deprive this court of its jurisdiction. In answering that question, the court will need to find clear legislative language before concluding that its jurisdiction has been excluded: see *In the Matter of the Désastre of Blue Horizon Holidays*

[1997] JLR 124 , at 132, and Gosselin

v. Minister of Social Security

[2017] JCA 074 , at para. 12. 21. There is no such language in Article 16. Starting with the heading, the indication is that the whole Article is dealing with " Appeals against forfeiture orders " not " Appeals against interlocutory judgments " or " Appeals generally ". (Headings form part of the legislation and they are capable of being taken into account as an aid to construction under English law (see for example *R v. Okedare*

[2014] EWCA Crim 1173 ,

[2014] 1 WLR 4088 , at para. 23), and we see no reason why the law of this jurisdiction should not take the same approach.) 22. The conclusion that Article 16 is dealing with appeals against substantive forfeiture orders, and nothing else, is reinforced by the language of its operative provisions. In short, they say nothing at all about interlocutory appeals. 23. The argument in favour of interpreting Article 16 as excluding this court's jurisdiction is accordingly founded only on inference. In our judgment, that cannot satisfy the applicable test under *Blue Horizon and Gosselin* . A mere inference which is said to be drawn by implication from the terms of the Forfeiture Law cannot constitute 'clear legislative language'. By definition, it does not constitute 'language' at all: rather, it is an implication. And it is not 'clear': rather, it is debatable. 24. Indeed, even without the strictures of the test laid down in *Blue Horizon and Gosselin* , we would not draw the inference that Article 16 impliedly excludes the jurisdiction of this court. As noted above, that inference is said to be derived from (i) the summary nature of the proceedings, which imply that no interlocutory appeals should be allowed, and (ii) the 'greater includes the lesser' argument which appealed to the learned Commissioner (see para. 17 above). Dealing with those two points in turn: (i) Article 16 applies not only to summary proceedings under Article 11 but also to proceedings brought under the 'general procedure' pursuant Article 15, which is not summary. It is therefore false logic to suggest that interlocutory appeals must be excluded by implication in order to serve the summary nature of the process. (ii) The 'greater includes the lesser' argument is flawed because it proceeds on the assumed basis that a forfeiture order will necessarily be made in every case. That is not a sound assumption. 25. More generally: (i) The court's function in conducting any exercise of legislative interpretation is, first and foremost, to construe the words used by the legislator: see by analogy the English approach expressed in *Wilson v. First County Trust* (No. 2)

[2004] 1 AC 816 , at para. 56. Taking that approach, there are no words in Article 16 which can be interpreted as producing the result for which the Respondent contends. Accepting the suggestion that the Attorney General is precluded from bringing interlocutory appeals would involve judicial legislation, not interpretation. (ii) Turning from the language of the Article to a more purposive approach, it is impossible to see why the legislator would have wanted to exclude interlocutory appeals altogether. Even if Article 16 applied only in relation to summary proceedings (which it does not) the requirement for leave under Article 13(1)(e) of the 1961 Law would provide a sufficient control mechanism for preventing unnecessary interlocutory appeals. By contrast, a blanket prohibition on all interlocutory appeals would preclude this court from addressing potentially important issues, such as those raised in this very case, which the learned Commissioner himself recognized would benefit from a decision of this court. 26. It was pointed out in the course of argument in this court that, although Article 16(2) provides for the release of funds to cover the costs of an appeal against a forfeiture order, no equivalent provision is made in respect of the costs of appeals against interlocutory

orders.

That omission might be taken to support the implication that no such interlocutory appeals were contemplated. We acknowledge that that is an oddity in the legislation, but it is nowhere near strong enough to raise an inference that the unstated effect of Article 16 is to preclude all interlocutory appeals. 27. The final point that needs to be addressed under this heading is the suggestion made in argument that, if Article 12(2) of the 1961 Law confers a right of appeal, and if Article 16(1) of the Forfeiture Law does not preclude interlocutory appeals by the Attorney General, then Article 16(1) is entirely otiose. Its only express effects on that analysis would be (i) to confer a right of appeal on parties who already have that right by virtue of Article 12(2) of the 1961 Law, and (ii) to deny a right of appeal to the Attorney General in relation to the making of a forfeiture order, which he would never want to appeal anyway because the forfeiture order would presumably have given him precisely what he was seeking. 28. In this context, there was some debate before us as to whether Article 16(1) would preclude the Attorney General from appealing against the scope of a forfeiture order. The question might arise in this case, for example, if in due course a forfeiture order is made in relation to part only of the credit balance in the Account. In that eventuality, would an appeal by the Attorney General be precluded under Article 16(1), being an appeal "against the making of the order" (as the Respondent would contend)? Or would it be allowed under Article 16(1), being an appeal not against the forfeiture order that was made, but against the court's refusal to make a forfeiture order against the balance standing to the credit of the Account (as the Attorney General would contend)? 29. At the permission hearing on 27 February, the single Judge expressed provisional agreement with the argument on behalf of the Attorney General. The issue does not strictly arise and does not need to be decided for the purpose of this appeal. For that reason, we will not express a concluded view on it. However, having heard fuller argument than was possible at the hearing before the single Judge, if we had had to decide the point, we would have been minded to accept the Respondent's argument instead, and hold that, if a forfeiture order is made, the Attorney General is not entitled to appeal against the quantum. Nevertheless, for the purpose of this appeal it is sufficient to note that, on our interpretation of Article 16(1), it is plainly not otiose: it has the express effect of precluding the Attorney General from appealing "against the making" of "a forfeiture order", and the exact scope of that prohibition will be a matter for final determination in another court on another day when the issue needs to be decided. Issue (2): Permission to appeal 30. Having established that this court has jurisdiction to hear an appeal, the next question is whether permission to appeal should be granted. This was not seriously contested by the Respondent. In our judgment, all three of the criteria in *Crociani* are satisfied:

- (i) the appeal has a real prospect of success; (ii) it raises questions of general principle; and (iii) it also raises issues of law on which a decision of this court would be to the public advantage.
- Issue (3): The disposal of the substantive issues in the appeal

Introduction

31. As noted above, there are essentially two issues in the substantive appeal:

- (i) First, what role, if any, does A1. P1 play in this case? (ii) Second, which party bears the burden of proof in relation to the issue of proportionality under A1. P1? 32. In addition to the cases already discussed above, the parties cited in argument a considerable body of case-law drawn from this jurisdiction, from England and also from the European Court of Human Rights (the "ECtHR"): R
- v. Harvey (Jack)
- [2017] AC 105 ; In re Doraville
- [2016] (2) JLR 44; Doraville Properties Corp v. Attorney General
- [2017] (1) JLR 64; Gogitidze
- v. Georgia
- (2016) 62 EHRR 14 ; Veits
- v. Estonia (App. № 12951/11, 1 June 2015); AGOSI v. UK
- (1998) 25 EHRR CD 141; Džinić v. Croatia (App. № 38359/13, 17 May 2016); Telbis & Viziteu v. Romania (App. № 47911/15, 26 June 2018); Balsamo v. San Marino (Apps № 20319/17 & 21414/17, 8 October 2019; Philips v. UK (App № 41087/98, 5 July 2001); Grayson & Barnham v. UK (Apps № 19955/05 & 15085/06, 23 December 2008); Air Canada v. UK (Apps № 456/94 & 537/94, 26 April 1995); Yildirim v. Italy (App № 38602/02); Ismayilov v. Russia (App № 30352/03, 6 November 2008); Boljević v. Croatia (App № 43492/11, 31 January 2017); Barnes v. Eastenders Cash & Carry Plc
- [2015] AC 1 ; AXA General Insurance Ltd v. HM Advocate
- [2012] 1 AC 868 ; R v. Waya (Terry)
- [2013] 1 AC 294 ; Arthur v. AG
- [2020] JCA 016 ; and R v. Fulton
- [2019] EWCA Crim 163 . With one exception (mentioned below) it is unnecessary and undesirable to discuss these authorities in any detail, partly because the legal principles are clear, and partly because it can be dangerous to try drawing too much guidance from judicial decisions dealing with comparable, but not identical, legislative regimes in other jurisdictions. A1. P1 and proportionality 33. The starting point is the Human Rights (Jersey) Law 2000 (the "2000 Law"). Under Article 4(1), principal and subordinate legislation must be read and given effect, so far as it is possible to do so, in a way which is compatible with Convention rights. Under Article 7(1), it is unlawful for a public authority (which includes a court) to act in a way which is incompatible with a Convention right. 34. By virtue of Article 1(1) of the 2000 Law, A1. P1 is a 'Convention right'. Both the terms of A1. P1 itself and also the case-law of the ECtHR make clear that it does not confer an absolute right. In other words, an interference with the peaceful enjoyment of a person's

possessions can be justified if it pursues a legitimate public interest, it does so in accordance with the law, and the interference is proportionate to the public interest that is being pursued. It is accordingly trite law under the jurisprudence of the ECtHR that the test of proportionality is one of the tools used for ascertaining whether there has been a violation of the right protected by A1. P1. It is also clear that the application of the test in any given case depends on an accurate identification of the precise public interest which the legislation seeks to pursue. 35. On that basis, we would express our full agreement with the findings of the learned Commissioner in para. 22 of the October judgment (outlined in para. 11(a) above), subject to one small refinement. To recap, he held that

- (i) the Forfeiture Law must be read and given effect compatibly with A1. P1. That is plainly true by virtue of Article 4 of the 2000 Law. He also held that (ii) a forfeiture order which does not respect the principle of proportionality would involve a violation of A1. P1. That too is plainly true on basis of the ECtHR case-law. He also held that (iii) it is incumbent on the court to provide a remedy for any such violation, and (iv) the appropriate remedy lies in the duty of the court not to make an order which involves such a violation. We would respectfully repackage these two latter findings into a single proposition. It is not so much a question of the court remedying a violation of A1. P1. Rather, the fact that the court is a public authority under Article 7 of the 2000 Law means that it cannot do otherwise than make a forfeiture order which is compatible with the Convention rights, including A1. P1, in the first place. It does that by (among other things) applying the test of proportionality. 36. This analysis disposes of one of the Attorney-General's arguments. Paragraph (b) of his Notice of Appeal sought to contend that " no issue of proportionality arose in this case " because the Respondent " had not adduced any evidence supporting any finding of disproportionality and had not raised it at the trial ". In our judgment, that submission is untenable. Article 7 of the 2000 Act imposes an obligation on the court not to act in violation of Convention rights. The court cannot be exonerated from that express legislative obligation simply because one party or the other has failed to raise the issue expressly or failed to adduce evidence in relation to it. In any situation where the court is being asked to make an order which impacts on a party's rights under A1. P1, the court must consider whether the order would or would not be proportionate, and if the parties do not raise the point themselves the court should do so of its own motion. 37. There is an entirely separate question of how the court sets about ensuring that its decisions are compatible with Convention rights. The answer to that question in any given case may indeed be informed by the quality and the source of the evidence before it. But it would be wrong to say, as a matter of principle, that proportionality did not arise in this case simply because the Respondent did not raise the issue or adduce any evidence capable of supporting a finding of disproportionality. Indeed, it would also be wrong as a matter of fact to say that the Respondent adduced no such evidence. Irrespective of his subjective intentions in putting forward his affidavit and documentary evidence, and irrespective of the legal purpose for which that evidence was in due course deployed in argument by his lawyers, the fact is that the Respondent did put forward evidence about the origin of the funds in the Account. That

material provided an evidential basis on which the court could have made a ruling on whether any particular forfeiture order would or would not have been proportionate. That ruling may or may not have been perfectly informed, given the limited evidence provided by the Respondent, but if one side or the other chooses to withhold from the court evidence which is available to him, he runs the risk that the court will make an adverse order which it might not otherwise have made. 38. That leads into a consideration of where the burden lies in relation to the issue of proportionality. Before turning to that question, however, we would first deal with one other aspect of the October

judgment.

Fact-finding & proportionality 39. Having held (rightly) that proportionality was a relevant test, the learned Commissioner then said this in para. 23: " I conclude that ... it would be disproportionate for the entire Account ... to be forfeited ", adding that " As the Court found in *Ahmed v. HMRC* , the forfeiture order should be limited to that part which represents the evaded tax and, arguably, penalties and interest ". This wording indicates that (i) the learned Commissioner was making a concluded finding of principle as to the outcome of the test of proportionality and the resultant scope of the appropriate forfeiture order, and (ii) in doing so, he regarded himself as following the decision in *Ahmed*. It was only after reaching these conclusions that he proceeded, in paras. 24 - 29, to consider where the burden of proof lay in relation to the test of proportionality. 40. In our judgment, this approach involved two related errors in relation to the learned Commissioner's application of the test of proportionality: (i) Before deciding what form of order would satisfy the test of proportionality, the learned Commissioner should first have resolved the question of where the burden of proof lies. In any situation, the question whether any particular order would or would not be proportionate is fact-based. It is not a question of legal principle, or of binding precedent. The court must accordingly conclude its fact-finding function first, before addressing the issue of proportionality. And, in order to complete its fact-finding function, the court must first determine where the burden of proof lies. (ii) The language quoted in para. 39 above indicates that the learned Commissioner regarded himself as following the English decision in *Ahmed* in holding that the forfeiture order in this case should be limited to that part of the money standing to the credit of the Account which represents the evaded tax (and, arguably, penalties and interest). In our judgment, *Ahmed* is not in any sense a precedent which should be followed. That is not because it is merely an English decision, nor because we consider it to have been wrongly decided in its own terms. Rather, it was a decision on the facts of that case, applying the relevant English legislation. It did not proceed on the basis of any principle, other than the general proposition that forfeiture orders must be proportionate. The facts of this case are different, and the legislation here is different. The question in this case (as in all cases that arise here under the Forfeiture Law) is whether, in the particular circumstances of the case in hand, the order sought by the Attorney General is proportionate. The answer to that question will always be supplied by a consideration of the available evidence, in light of the specific provisions of the Forfeiture Law. Other decisions in other jurisdictions applying other law to other facts are liable to be of very limited use in

providing guidance in any cases here. 41. The facts under consideration in Ahmed bore certain similarities to the facts of this case. There, the respondent had hidden substantial quantities of cash in his home with a view to evading tax, but the source of the cash was a legitimate business. In the event, the court held that (i) the cash was 'recoverable property' (which was the applicable concept under the English legislation) only to the extent of the unpaid tax: *ibid*, at paras. 53 & 60, and (ii) it would be disproportionate to make a forfeiture order other than in relation to the unpaid tax. That was the outcome which the learned Commissioner appears to have regarded himself as following in this case. 42. However, the fact that that was the outcome in Ahmed does not logically lead to the conclusion that the same outcome should necessarily follow in this case. The possibility of reaching a different outcome resulting from an application of the test of proportionality in this case from that in Ahmed can be illustrated by considering carefully the legislative regime under consideration, and the reasoning in the judgment. In doing so, it is important to understand the rationale for each of the two separate stages in the judgment in Ahmad. 43. The court dealt first with the hard-edged question of classification, i.e. whether the money was 'recoverable property', as defined in the English legislation. In that context, the court noted that the stated purpose of the legislation was to enable cash " which is, or represents, property obtained through unlawful conduct " (emphasis added) to be forfeited: *ibid.*, at para. 17. In other words, it was dealing only with the proceeds of crime. As a result, the operative provision in the Act which enabled the court to make a forfeiture order in relation to 'recoverable property' applied only to " property obtained through unlawful conduct ": *ibid*, at para. 19 (emphasis added). The ratio of the case was that the English legislation " properly construed " meant that " only that part of the sum obtained by the appellant that represented evading tax or evaded tax was property obtained through unlawful conduct ": *ibid*, at para. 53. Accordingly, the answer to the question of classification was expressly dictated by an application to the facts of the specific definition of 'recoverable property' under the English Act. 44. Separately, the court in Ahmed also considered whether it would have been proportionate in any event to make a forfeiture order in relation to the full amount of cash, or only the unpaid tax element (assuming, for the sake of argument, that the full amount had been 'recoverable property'). In that context, as noted above, A1. P1 required the court to consider whether there was a reasonable relationship of proportionality between the order sought and the purpose of the legislation. Accordingly, when the court in Ahmed came to consider whether it would be proportionate to make a forfeiture order in respect of the full amount of the cash or only in respect of the unpaid tax, it had to take into account " the purpose of the Act, which was to remove from criminals the pecuniary proceeds of their crime , rather than deterrence ": *ibid*, at para. 42 (emphasis added). Since the source of the cash was a legitimate business, that led the court to conclude that it would be disproportionate to make a forfeiture order in respect of the full amount: *ibid*, at para. 54. 45. By contrast, both the avowed purpose and the operative provisions of the Forfeiture Law are different and much broader. The preamble describes its purpose as including " the seizure and forfeiture ... of cash and other assets suspected to be property ... intended to be used in unlawful conduct " (emphasis added). As a result, the definition of 'tainted property' under Article 2 of the Forfeiture Law includes property " which is or, by the Attorney-General ... is reasonably suspected to be or have been (a) used in ... unlawful conduct " (emphasis added). In other words,

the application of the Forfeiture Law is not confined merely to the proceeds of crime, but extends also to property used in unlawful conduct (what is sometimes referred to as 'instrumentalities', as opposed to 'proceeds'). These features need to be taken into account in any case where a forfeiture order is being sought. 46. In this context, it is also important to emphasise the relevant stage in the analysis where proportionality needs to be considered. Any court which is asked to make a forfeiture order will need to proceed in two distinct stages, applying a different legal test at each stage. It is important not to elide the distinction between these two stages, or to conflate the applicable legal tests: (i) The first step is to identify the tainted property. This is a pure exercise of classification, involving an application of the statutory definition in Article 2 of the Forfeiture Law to the facts under consideration. In this connection, we would mention one point in the interests of clarity. There was some discussion, particularly in the court below, whether the Forfeiture Law needs to be 'read down' under Article 4(1) of the 2000 Law in order to ensure that it is compatible with Convention Rights. In our judgment, that is unnecessary. To say that legislation needs to be 'read down' to ensure Convention compatibility is to say that, on its face, the legislation is incompatible, and that its ostensible meaning needs to yield. That approach is unnecessary and would be wrong in relation to the interpretation of 'tainted property'. Concluding that an asset is tainted property involves no interference with any Convention rights. Accordingly, there is no basis for suggesting that the definition of tainted property is not Convention compliant, and hence no basis for suggesting that that definition requires to be read down. The only stage at which any potential arises for interference with Convention rights is when the court comes to decide the scope of any forfeiture order. That is the next step. (ii) Having correctly identified the tainted property in any given case, the second step is for the court to decide what forfeiture order to make. Built into the Forfeiture Law is a recognition of the fact that the court will not necessarily make a forfeiture order in respect of the whole amount of tainted property in every case. Article 11(4) specifically provides that, unless a respondent satisfies the court that the property is not tainted, the court shall, on the application of the Attorney General, " make a forfeiture order in relation to the property specified in the notice or any part of it " (emphasis added). This wording clearly confers on the court a discretion, to be exercised rationally and fairly by reference to all the relevant circumstances of each case. The provision was no doubt included in the legislation at least in part because it was recognized that the definition of 'tainted property' is drawn extremely broadly, and it might not be proportionate to forfeit all of it in every case. Having said that, proportionality will plainly not be the only relevant test when it comes to the exercise of the court's discretion. However, as noted above, in so far as the court is exercising its discretion by reference to the test of proportionality, this is the stage where it will need to consider the relationship of proportionality between the order sought by the Attorney General and the purpose of the legislation. 47. In the interests of clarity, we would only add this. Although one element in Article 11(4) involves the exercise of a discretion, the provision as a whole is expressed in mandatory terms: " Unless the respondent satisfies the Court that the property is not tainted property, the Court shall ... make a forfeiture order in relation to the property specified in the notice or any part of it " (emphasis added). This wording raises a question of interpretation as to whether the court, having decided that there is tainted property, could, in exercise of the discretion conferred by the last five words ("or any part of it"),

choose not to make any forfeiture order at all. Nothing in this judgment should be read as expressing any view on the correct answer to that question. It does not arise in this case, we have not heard argument on it, and we do not need to decide it. 48. In this case, Royal Court properly recognized the two separate stages outlined in para. 46 above. In the first stage, we understand it to have concluded that the full amount of money standing to the credit of the Account (i.e. not just that part representing the unpaid tax) is tainted property: see the passages quoted in para. 8 and footnote 1 above. In our judgment that is an entirely sound conclusion. The Account was opened for the purpose of committing unlawful tax evasion. That purpose was achieved not simply by withholding the tax that was due but by hiding the funds in the Account from the UK tax authorities. The money (all of it) was paid into the Account for that purpose, and hence the money (all of it) was 'used in' the Respondent's unlawful conduct within the meaning of Article 2. As the Royal Court said in its July judgment, " the Account " (i.e. the continuing contractual relationship between the Respondent as customer and the Bank as banker) was a facility " used in ... unlawful conduct ". As such, it is not merely the unpaid tax that is tainted property. Rather, it is the entire balance standing to the credit of the Account from time to time. That was why the Royal Court then considered it necessary to consider the extent to which forfeiting the full amount in the Account would be proportionate. 49. It was at the second stage of the analysis that the learned Commissioner fell into error. He formed his assessment of proportionality in this case, at least in part, by avowedly following Ahmed . The problem with that approach is that the purpose of the English legislation is different. The proportionality of forfeiting the full amount of money standing in the Account must be assessed by reference to the purpose of the Forfeiture Law, not by reference to the purpose of any English legislation. As noted above, the purpose of the Forfeiture Law (unlike the purpose of the English legislation considered in Ahmed) is not confined to confiscating the proceeds of crime. Rather, it extends also to forfeiting property which is 'used in' unlawful conduct. If, as appears to be the case, the Royal Court concluded that the full amount standing to the credit of the Account was used in the Respondent's unlawful conduct, then it would serve the purpose of the Forfeiture Law for the full amount to be forfeited. We are not suggesting that the Royal Court was constrained to find that a forfeiture order in respect of the full amount standing to the credit of the Account would necessarily be proportionate. Nor are we suggesting that the Royal Court would have been constrained to make a forfeiture order in respect of the full amount in the Account purely because it would serve the purpose of the legislation in a proportionate manner to do so. As noted above, the court has a discretion under Article 11(4), and the discretion must be exercised rationally and fairly by reference to all the circumstances of the case, not solely by reference to the test of proportionality under the 2000 Law. But we are saying that the Royal Court was wrong to conclude that it was disproportionate by reference to the decision in Ahmed . 50. In our judgment, the learned Commissioner also fell into error in reaching a firm conclusion on proportionality before deciding where the burden of proof lay in relation to that issue. That is the final question under this heading. The burden of establishing proportionality 51. The Forfeiture Law makes express provision as to the burden of proof on the question whether property is, or is not, 'tainted property'. Article 11(4) expressly provides that " Unless the respondent satisfies the Court that the property is not tainted property " (emphasis added) the court shall make a

forfeiture order. The burden in relation to that issue is, therefore, plainly on a respondent. 52. The Forfeiture Law makes no express provision as to the burden in relation to the issue of proportionality. In our judgment, however, it is abundantly clear that the burden again lies on a respondent. This conclusion is based on an accumulation of factors: (i) First, there is very nature of the inquiry. As noted above, the test of proportionality requires the court to make an assessment of the extent to which there is a fair balance between the impact of the proposed forfeiture order on a respondent and the public interest which the legislation seeks to pursue. Once it has been established, in any given case, that the property in question is tainted property, the purpose of the legislation would by definition be served by making a forfeiture order in respect of that property. If, in those circumstances, a respondent wishes to persuade the court to make some lesser order, it should logically fall on him to persuade the court accordingly. (ii) Closely related to that is a purely practical consideration, which would have been clearly in the mind of the legislator when the Forfeiture Law was being drafted and enacted. Any relevant evidence as to the severity with which a forfeiture order would impact on a respondent will almost inevitably be entirely in the hands of that respondent. That being the position, it would impose an impossible burden on the Attorney General if the legislation required him to prove (for example) how much tax this Respondent evaded by setting up and depositing cash in the Account nearly twenty years ago. The test of proportionality is not simply an indulgence afforded to respondents. Rather, it involves a balancing exercise, giving due weight both to private and public interests. Accordingly, the Forfeiture Law must not be construed as throwing onto the Attorney General, representing the public interest, an insuperable obstacle to satisfying the test of proportionality. (iii) Third, there is the overall structure of the summary procedure: (a) The Attorney General can only initiate the summary procedure by serving a notice under Article 10(1) if he has reasonable grounds to believe that money held in a bank account is tainted property, and if a 'consent request' (as defined in Article 10(3)) has been made and has been refused more than 12 months before the notice is to be served: Article 10(2). In other words, it is only available in respect of suspect funds in dormant accounts. (b) The notice under Article 10 then provides the account holder with the opportunity of persuading the court under Article 11(4) that the funds in the account are not tainted property. Although that is a separate question from the issue of proportionality in terms of the applicable legal test, there is a close connection between the two in terms of the relevant evidential material which the court will need to consider in any given case. (c) The legislation allows the court to make a forfeiture order in respect of the whole of the tainted property. That is the order the Attorney General will generally be seeking. Given the overall context of the summary procedure, as outlined above, the starting point in any given case must be that there is a working assumption that a forfeiture order is likely to be appropriate in respect of the entire balance in the account. That assumption would need to be rebutted, if at all, by the respondent. (d) Taking into consideration the relevant stage in the process when the question of proportionality will be engaged, it is again logical to infer that the burden would be on the respondent. If he has failed to disprove that the property is tainted, but nevertheless wishes to try persuading the court not to make a forfeiture order in respect of the entirety of the tainted property, the logic of the regime requires him to make his case in that regard. (e) For these reasons, in our judgment it goes with the grain of the legislation to conclude that the

evidential burden is on the respondent in respect of the issue of proportionality. 53. We have used the expression 'evidential burden' because we consider it inappropriate, in this context, to talk in terms of a legal 'burden of proof' for two reasons. (i) The test of proportionality involves a judgmental exercise, balancing the degree of interference with a respondent's peaceful enjoyment of his possessions against the public interest objective pursued by the legislation. That being the nature of the exercise, it does not lend itself to 'proof' one way or the other. (ii) The need to satisfy the requirement of proportionality arises by virtue of the obligation which is imposed on the court by s. 7 of the 2000 Law. As such, it is not in any ordinary sense an 'issue' which arises between the parties, to be 'proved' by one and contested by the other. 54. Para. 52(c) (iii) above speaks of a working assumption that a forfeiture order will be made in respect of all the tainted property. That is the logical starting point where the onus is on a respondent. For the avoidance of doubt, however, it is only a starting point for the exercise of the court's discretion under Article 11(4). It is a working assumption, not a legal presumption, and it can be rebutted in any case by a respondent adducing suitable evidence. No doubt, it will be difficult for a respondent to persuade the court not to forfeit the proceeds of crime; but, in cases involving instrumentalities, the question whether all or some of the tainted property should be forfeited (or potentially none of it, depending on the answer to the question identified in para. 47 above) will depend on the particular facts of the case, taking into account for example the degree of proximity between the property and the unlawful conduct in question. 55. In conclusion, for the reasons set out in this judgment, the correct interpretation of the Forfeiture Law is that the evidential burden in relation to proportionality is plainly on the Respondent. Issue (4): disposal of the appeal 56. For the reasons outlined above, the learned Commissioner fell into error (i) in reaching a concluded view on the appropriate scope of the forfeiture order before considering where the burden lay in relation to proportionality, (ii) in reaching that conclusion ostensibly on the basis of Ahmed which does not provide any relevant guidance, and (iii) in concluding that the burden is on the Attorney General in relation to proportionality. 57. As noted above, the Attorney General invites us to make a forfeiture order. We do not consider that to be appropriate. No forfeiture order has yet been made by the Royal Court, so there is nothing in respect of which we can substitute our own judgment. 58. In the circumstances, there is no alternative to remitting the matter for further consideration by the Royal Court in light of this judgment. We do so with considerable reluctance, because there will now have to be a fourth hearing before the Royal Court in what is meant to be a summary process. It would have been fully within the Royal Court's discretion to reach a concluded and final view on all issues, including proportionality, on the basis of the evidence which the parties had chosen to deploy at the hearing which led to the July

judgment.

59. Looking to future, although we cannot dictate the outcome of any case-management decisions the Royal Court may need to take before finally disposing of this case, we would nevertheless express the clear view that the Respondent should have adduced all the evidence he wished the court to consider before the hearing that led to the July judgment.

Proceedings under Article 11 are meant to be summary, and it would plainly be preferable if all relevant issues could be determined at a single hearing. Adjourning the case for further evidence and/or further argument would be an indulgence to a respondent. In the present case, if the Respondent now makes an application for leave to put in further evidence, the Royal Court will no doubt require a satisfactory explanation of why the evidence was not adduced earlier and why it will make a difference to the substantive outcome. *Authorities Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018. AG-v-Ellis*

[2019] JRC 141 . *Ahmed v HMRC* [2013] EWHC 2241 (Admin) *AG-v-Ellis*

[2019] JRC 219 . *Court of Appeal (Jersey) Law 1961 AG-v-Ellis*

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[2015] AC 1 . *AXA General Insurance Ltd v. HM Advocate*

[2012] 1 AC 868 . *R v. Waya (Terry)*

[2013] 1 AC 294 . *Arthur*

v. AG

[2020] JCA 016 . R v. Fulton

[2019] EWCA Crim 163 . Human Rights (Jersey) Law 2000 [i] Similar wording also appears in para. 43 of the July judgment, and again in para. 28 of the October judgment, discussed below, where the learned Commissioner again said that "The respondent has failed to satisfy the Court under Article 11(3) [sic - it should read 11(4)] that the Account is not tainted property". Page Last Updated: 08 Jun 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 26 October 2026 · Esheria