ASSET REOVERY AND CONFISCATION: PRACTICE AND PROCEDURE

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BEING A PAPER PRESENTED ON 27TH AUGUST, 2019 AT THE WORKSHOP FOR INVESTIGATORS AND PROSECUTORS ORGANISED BY THE NATIONAL JUDICIAL INSTITUTE (NJI), ABUJA.

1.00 INTRODUCTION

1.01 Asset recovery and Confiscation aim at crime prevention also have dissuasive effect on criminal behaviour**.** Significantly, confiscation of the proceeds of crime remains a global issue as criminals continue to move monies through financial systems with effortlessness and to procure legitimate assets across the world. In the context of corruption and fraud, which necessitated this paper, and to put the problem into perspective, the World Bank announced that in one year alone over $1 trillion were paid in bribes. This statistic does not even represent the cost of large scale fraud or embezzlement from public funds[1]. At a country level, the Nigerian Economic and Financial Crimes Commission puts Nigeria's own corruption and theft at approximately USD 420 billion since independence in 1960 – more than the total amount of development aid provided to all of Africa by Western governments between 1960 and 1997. The knock on effect of this crime is that now an estimated 25% of the world's costs on government procurement is the result of corruption on a large and systematic scale. In 2007, Transparency International suggested that of the $4 trillion spent on government procurement annually, approximately $400 billion will be siphoned off in corruption, usually in the form of bribes. This is monies lost to public projects such as roads, schooling and the construction of hospitals. Even where the projects are commenced they often lead to the building of unnecessary infrastructure or infrastructure that is of dangerously poor quality. Nigeria is the 144 least corrupt nation out of 175 countries, according to the 2018 Corruption Perceptions Index reported by Transparency International. Corruption Rank in Nigeria averaged 121.48 from 1996 until 2018, reaching an all-time high of 152 in 2005 and a record low of 52 in 1997**.**

For this reason, efforts to prevent corruption, the wholesale plundering of state assets, systematic fraud and the manner in which the proceeds of such criminal activities move through financial centres have recently assumed a high international profile attracting great political interest. The answers to such problems are complex,

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transcending legal and political boundaries, and require an enormous effort in both the developing countries where the assets were stolen and the financial centres of the world where they reside, or once resided.

2.00 HISTORICAL BACKGROUND

2.01 It is no debate that corruption is an endemic killer disease in the wheel of Africa's economic development. Corruption, apart from distorting key macroeconomics indices, it ensures that basics such as Medicare, pipe borne water, schools, good roads and other infrastructures are unavailable. It is no brainer that Karl Kraus opined corruption thus,

> **"*Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.*"**

2.02 The perspective of Karl Karus of corruption is the truism of the Nigeria circumstance. It is so true that when you are in public office and you do not steal the resources of the state you become unpopular amongst the governed. Normatively, the order of the day is to do everything to get in into a public office and then plunder it to inertia. It is a malaise that has eaten into the rubrics of the people of Nigeria and its institutions. It has indeed deferred all world known antidote. Sadly, the world is watching. The negative ricochets transcends into an unbearable stench oozing out of us anywhere we go in the world, and a world that would want nothing to do with us as a country.

2.03 At no time in the history of Nigeria has so much been demanded from single institution or agency of Government like the expectations from the Economic and Financial Crimes Commission. The Commission has assumed a larger than life status and has evolved to be apparent in the eyes of Nigerians as a panacea to all malfunctions, even those outside its mandate. The reason for these misplaced expectations may not be unconnected with institutional catastrophe in Nigeria. This is simply why the insignia of any developed economy is credulously dependent on its institutional fecundity. Mathematically, institutional failure in any nation of the world equals economic descendency.

Hence, Corruption cannot be fought effectively if the perpetrators are permitted to retain the proceeds of his crime during and after trial as this will encourage him as well as others to continue in their criminality. Confiscation, attachment and forfeiture orders are means of recovering the proceeds of crime from the offender so as to discourage him. It also helps to deter the intending criminals from engaging in criminal act. In **R .v. Sekhon**[2] Lord Woolf CJ said:

> ***"One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offenders is to ensure that if the offenders are brought to justice, any profit which they made from their offending is confiscated. Regrettably, a series of cases have come before the courts recently which reveal that the prosecuting authorities, including the advocates appearing for them, have been attaching far too little significance to ensuring that confiscation proceedings are effective."***

2.04 Historically, the creation of the Economic and Financial Crimes Commission derives its recognition from the late 1980's of the exigent necessity to create a special interventionist agency to investigate economic and financial crimes. At this time, the menace of advance fee fraud, with its attendant negative vibes on Nigeria had been predominant. At the same time, it was recognized that the sophistication of economic crimes were such that there might be need for special commission to grip its investigation and prosecution as opposed to the regular law enforcement agencies.[3]

2.05 By 2002, Nigeria found its way into the financial action task forces list of Non-Cooperative Countries and one of the conditions for being taken off that list was compliance with recommendation 26 of the FATF's then 49 recommendations, which required the creation of Financial Intelligence Unit. Accordingly, EFCC was created in 2002 and Nigeria's Financial Intelligence Unit domiciled therewith. The Statute creating the EFCC was first enacted in 2002 and

[2] (2003) ALL ER page 508 at 510

[3] DR. Farida Waziri, 'The economic and financial crimes commission's (EFCC) Critical Role in Growing the Economy Category' (paper presented to the Nigeria-British Chamber of Commerce on 7th may, 2011).

subsequently re-enacted in 2004. The EFCC kicked off its operations in 2003. The enabling statute of EFCC by its section 6[4] vested it with duties to wit: a) investigate and prosecute economic and financial crimes, b) national coordinator for anti-money laundering, c) be the designated Nigerian Financial Intelligence Unit and implement the provisions of the Advance Fee Fraud Act, failed banks degree, money laundering act and the banks and other Financial Institutions Act.

2.06 From a practical point of view, the EFCC sees its mandate as the provision of financial security for the Nigerian economy. It implements the mandate by tackling economic crimes such as official corruption, tax evasion, bank fraud, Advance fee fraud, illegal bunkering and several other shades of crimes that can distort key economic indices and inhibit growth. It also seeks to create a level playing field for all stakeholders within the economy.

Indeed, the Economic and Financial Crimes Commission is a Nigerian law enforcement agency that investigates crimes such as advance fee fraud (419 fraud) and money laundering.

2.07 The practice of Confiscation all over the world, is to deny, albeit temporarily an accused person the enjoyment of the proceeds of his criminal activity pending his prosecution. Perhaps, one major reason behind the practice is to ensure that an accused person does not dissipate or fritter away the assets before the determination of the charges against him. In some jurisdictions, the Police are empowered to approach the Court after an offender has been apprehended and obtain an order seizing the property believed to have been acquired by the offender with the proceeds of crime pending the determination of the charge against the offender. This is usually referred to as '*Mareva injunction'*. In Nigeria, there are statutory provisions relating to recovery and confiscation of assets allegedly acquired with proceeds of crime. The focus of this paper is to discuss the practice and procedure enunciated for Asset Recovery and Confiscation (or Forfeiture) of Proceeds of Crime

[4] Section 6(a-c) of the Economic and Financial Crimes Commission, 2004.

3.00 Conceptual Clarifications

3.01 *Asset Recovery*

3.02 Asset recovery is defined according to the United Nations Convention against Corruption as 'recovering the proceeds of corruption, rather than broader terms such as asset confiscation or asset forfeiture which refer to recovering the proceeds or instrumentalities of crime in general'.[5] Asset recovery refers to "the legal process of a country, government and/or its citizens to recover state resources stolen through corruption by current and past regimes, their families and political allies, or foreign actors".[6] **Asset Recovery** is the process by which the proceeds of corruption are recovered and returned to the country of origin[7].

3.03 The definitions below are drawn from the existing European and other international standards; they provide an integrated understanding of the key terms used throughout the study. Where diverging definitions or interpretations are found between international and European standards, or where none are provided by either, these have been indicated.
"Asset recovery" is acknowledged as a four-phase process:[8]

i) Pre-investigative or intelligence gathering phase, during which the investigator verifies the source of the information, initiates the investigation, and determines its authenticity. If there are inconsistencies in the intelligence, or incorrect statements and assumptions, then the true facts must be established;

ii) Investigative phase, during which proceeds of crime are located and identified in the pre-investigative phase

[5]https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjS0t3ZyfXjAhVhRBUIHR4fARUQFjAAegQIAxAC&url=https%3A%2F%2Fwww.unodc.org%2Fdocuments%2Fbrussels%2FUN_Convention_Against_Corruption.pdf&usg=AOvVaw3A5jgneVLVYCfRUToE7IgQ

[6] Transparency International 2009.

[7] https://www.oecd.org/cleangovbiz/toolkit/assetrecovery.htm. Accessed 5/8/2019

[8] ICAR (2009). Tracing Stolen Assets: A Practitioner's Handbook, pp. 20-21.

and evidence of ownership is collated covering several areas of investigative work in more formal processes, e.g., through the use of requests for mutual legal assistance, to obtain information relating to off-shore bank accounts and other records, and financial investigations to obtain and analyze bank records. This phase involves substantiating the veracity of the intelligence and information and converting it into admissible evidence. The result of this investigation can therefore be only a temporary measure –e.g., seizure – in order to later secure a confiscation order through the court;

iii) **Judicial phase**, during which the accused person/defendant is convicted (or acquitted), and the decision on confiscation is determined;

iv) **Disposal phase**, where the property is actually confiscated and disposed of by the jurisdiction in accordance with the law, whilst taking into account international asset-sharing obligations, where applicable and in appropriate cases, as well as compensation for victims and determination of what to do with the confiscated assets.

3.04 I hold the view that asset Recovery is the governmental process or task aimed at recovery of assets or the repatriation of proceeds of crime. Such assets may include monies in bank accounts, real estate, arts and artifacts and precious metals.

CONFISCATION OF THE PROCEEDS OF CRIME

3.05 It is pertinent in this paper to conceptualize the term ‘confiscation’ vis-à-vis a depiction of the term ‘forfeiture’. This is more so because the two terms are interchangeable used in the Act and even in our case laws.

Confiscation and Forfeiture

3.06 The term *confiscation*, which includes forfeiture where applicable, means the permanent deprivation of funds or other assets by order

of a competent authority or a court.[9] Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to be transferred to the State. In this case, the person(s) or entity (ies) that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture loses all rights, in principle, to the confiscated or forfeited funds or other assets. Confiscation or forfeiture orders are usually linked to a criminal conviction or a court decision whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law.[10] Confiscation is to appropriate property to the use of the state. To adjudge property to be forfeited to the public treasury; to seize and condemn private forfeited property to public use. Ware v. Hylton, 3 Dull. 234, 1 L. Ed. 5GS; State v. Sargent, 12 Mo. App. 234.[11]

Extended confiscation is when a court, based on specific facts, finds that the property has been derived from the criminal activities of the convicted person during a period prior to conviction, which is deemed reasonable by the court in the circumstances of the particular case, or where the court is convinced, to the requisite legal standard, that the value of the goods are disproportionate to the known income of the convicted person.[12]

3.07 Formerly, it appears, this term was used as synonymous with "forfeit" but at present the distinction between the two terms is well marked. Confiscation supervenes upon forfeiture. The person, by his act, forfeits his property; the state thereupon appropriates it, that is, confiscates it. Hence, to confiscate property implies that it has first been forfeited; but to forfeit property does not necessarily imply that it will be confiscated. "Confiscation" is also to be distinguished

[9] *www.fatf-gafi.org/recommendation.* International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations. Accessed on 6TH August, 2019.

[10] Ibid, footnote 7.

[11] Bryan A. Garner, Black's Law Dictionary, (8th edition) at page 677.

[12] P .G. Pereira, 'Asset Recovery a Comparative Analysis of Legislation and Practice Bulgaria, Croatia, Moldova and Romania' published by Publisher Regional Anti-corruption Initiative (RAI) Organisation for Security and Co-operation in Europe (OSCE).

from “condemnation” as prize. The former is the act of the sovereign against a rebellious subject; the latter is the act of a belligerent against another belligerent. Confiscation may be effected by such means, summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings in rem. but confiscation recognizes the title of the original owner to the property, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership.[13]

CRIMINAL CONFISCATION

3.08 Criminal confiscation requires a criminal conviction by trial establishing guilt “beyond a reasonable doubt” or sufficient to “intimately convince” the judge, or following a guilty plea by the defendant. Once a conviction is obtained, a final order of confiscation can be ordered by the court, often as part of the sentence. In some jurisdictions, confiscation is a mandatory order; in others the court (or jury) has discretion in imposing an order of confiscation.5 In some jurisdictions, the standard of proof for confiscation will be the lower “balance of probabilities” standard of proof; other jurisdictions require the higher “beyond a reasonable doubt” or “intimate conviction” standard.

3.09 Due to the necessity for a conviction, there can be difficulty in confiscating assets using this procedure when the target has died, fled the jurisdiction or is a fugitive. Some countries have incorporated absconding provisions which declare that the target is “convicted” for confiscation purposes once it is established that the target has fled the jurisdiction.

NON CONVICTION BASED CONFISCATION (NCB)

3.10 NCB confiscation, sometimes referred to as “in rem confiscation”, “objective confiscation” or “extinction de domino”, authorizes the confiscation of assets without the requirement of a conviction. As it is typically a property-based action against the asset itself, not against the person with possession or ownership, NCB confiscation

[13] Winchester v. U. S., 14 Ct. Cl. 48.

generally requires proof that the asset is the proceeds or instrumentalities of crime. In addition, a conviction is not required.[14]

3.11 NCB confiscation most often takes place in one of two ways. The first is confiscation within the context of criminal proceedings but without the need for a final conviction or finding of guilt. In these situations, NCB confiscation laws are incorporated into existing criminal codes, anti-money laundering acts or other criminal legislation, and are regarded as "criminal" proceedings to which the criminal procedural laws apply. The second is confiscation through an independent statute which introduces a separate proceeding that can occur independently of, or in parallel to, related criminal proceedings, and is often governed by the rules of civil procedure (rather than criminal procedure laws). In jurisdictions applying civil procedure, a lower "balance of probabilities" or "preponderance of the evidence" is often the standard of proof required for confiscation.

3.12 NCB confiscation is useful in a variety of contexts, particularly when criminal confiscation is impossible or unavailable, such as when: (1) the offender has died, fled the jurisdiction or is immune from prosecution; (2) an asset is found and the owner is unknown; (3) there is insufficient evidence to seek a criminal conviction or criminal proceedings have resulted in an acquittal (applies in jurisdictions which apply a lower standard of proof). NCB confiscation may also be useful in large and complex cases where a criminal investigation is in progress and there is a need to freeze and confiscate the assets before a formal criminal charge is brought.

FORFEITURE

3.13 The word "*forfeiture"* according to Kekere-Ekun JSC in **Abacha .v. Federal Republic of Nigeria[15]**

> ***"Means the divestiture of property without compensation. The loss of a right, privilege or property because of a crime, breach of obligation or neglect of duty. It goes on to say "title is instantaneously transferred to another such as the government, a corporation or a private***

[14] Module 5 Asset Recovery Process and Avenues for Recovering Assets (adopted from the Handbook for Practitioners on Asset Recovery under STAR Initiative)

[15] (2014) 6 NWLR (pt.1402) page 122

person". Therefore, forfeiture connotes punishment for a crime committed and its effect is instantaneous."

3.14 In the same vein, Black's Law Dictionary[16], forfeiture means:

> **"*The divesture of property without compensation. The loss of right, privilege, or property because of a crime, breach of obligation or neglect of duty. Title is instantaneously transferred to another, such as government, a corporation, or a private person. Something (esp. money or property) lost or confiscated by this process; a penalty… Civil forfeiture, an in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity. Criminal forfeiture, a governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior"***

3.15 There are basically two broad methods by which assets of a suspect or criminal can be forfeited under the law, which are –

a. Conviction based forfeiture: This type of forfeiture is contingent upon the finding of guilt or the proof of any offence against the owner of the property.

b. Civil forfeiture: this type of forfeiture is not contingent in the finding of guilt or proof of any offence. This is more common and popularized in country like the United State and the United Kingdom

3.16 It can be seen from the above that the main distinction between the two forms is that civil forfeiture is not contingent upon the finding of guilt, it being essential proceedings against property as distinct from the person or the owner. In the United Kingdom, the proceeds of crime Act regulates civil forfeiture. This civil recovery was used in the United Kingdom in **R (on the application of Alamieyeseigha) v. Crown Prosecution Service[17]**. Alamieyeseigha absconded from the United Kingdom and his criminal trial could not continue. After

[16] Bryan A. Garner, Black's Law Dictionary, (8th edition) at page 677.

[17] **(2006)** criminal LR 669

he had absconded, criminal confiscation of English assets on conviction was no longer possible. Alternative mechanisms were necessary. The assets that have been frozen comprised cash, properties and bank balances. The cash was straight forward: forfeiture proceedings under proceed of crime Act was successfully used as a Metropolitan Police applied for the confiscation of cash and the Nigerian Government intervened to seek an order as victim for its return. Nigeria does not have similar provision that permits civil forfeiture of assets and an accused person who absconds from Nigeria cannot have his property forfeited finally in Nigeria because he has not been convicted of any crime. Nigerian Government similarly used the same procedure to initiate proceedings in the United Kingdom for the recovery of the assets of General Sanni Abacha without any criminal conviction secured. It is a pity that the Nigeria Government that has relied on the law of other nations to repatriate proceeds of crime back to Nigeria from other Nations failed to enact similar legislations. It is important to note that civil forfeiture is now recognized internationally. Article 54 (1) (c) of the United Nations Convention against Corruption urges State Parties to consider permitted non-conviction based forfeiture of assets when the offender cannot be prosecuted. It is disheartening to note that when the proceeds of Crime Bill was presented before the National Assembly, its position was that Nigeria was yet to develop to that level. This is most unfortunate when nations whose corruption indexes are not as high as ours have embraced and/or enacted legislations that permit civil forfeiture. It is high time Nigeria reconsidered its position on civil forfeiture.

3.17 The implication of our moribund law is that we remain at the stage where forfeiture could only be obtained where the owner is charged to Court and convicted for the offence relating to the property. This was the position in England as at 1981. In a case known as "Operation Jullie" cited as **R .v. Cuthbertson**[18], it was held that the forfeiture provisions then in force could not be applied to any property which was not directly an instrumentality of the crime which the defendant had been convicted. Since the defendant in that case was convicted of conspiracy to supply drugs, and the conspiracy itself did not involve any instrumentality, it was not possible to forfeit his substantial assets despite his own admission that they had been generated by drug dealing over many years. The regime was

[18] (1981) AC 470

strengthened over the years with the enactment of the Proceeds of Crime Act 2002 (POCA). UK law now provides that the Crown Court must proceed to confiscation if either the prosecutor asks or the Court deems it appropriate to do so of its own motion, and if the defendant is convicted of one or more of specific types of criminality, the court is effectively required to presume that he is a professional criminal and that everything which is currently in his possession and which has passed through his hands in the six years before his arrest was derived from some form of criminal activity.

3.18 The primary target of confiscation or forfeiture was the assets of professional criminals rather than the recovery of losses for victims. The confiscation regime has developed in ways which often yield the potential to impede rather than promote the recovery by victims of their losses. POCA introduced a regime for the civil forfeiture of assets generated through criminal activity for the first time in English law. **Prior to that, it was held that the title of a thief**, although fragile, was good against the whole world except for someone with a better title and, since the state had no title to the goods whatever, it was not permissible to order the expropriation of property even from someone who had stolen it. The new "civil recovery" regime bites in rem, so that even the victim of a fraud will be denied recovery of their losses if they cannot show that the property lost was not itself derived from criminal activity. The nearest we have in Nigeria to civil forfeiture is Section 17 of the Advance Fee Fraud and other Fraud Related Offences Act which section empowers the Court to make an order of forfeiture without conviction. I believe this section is limited to the case of Advance Fee Fraud and where a property is abandoned by the Defendant. Therefore, it has a very limited scope.

3.19 Now on conviction based forfeiture, three trends are now noticeable under our law. They are –

1. **Confiscation and Forfeiture of proceeds of a specified offence or assets acquired through proceeds derived from the offence of conviction**. There is a wide range of statutes that permit this kind of forfeiture. Such statutes include:-

a. Administration of Criminal Justice Act, 2015 – Part 34

b. The Criminal Code, Section 17 thereof

c. Criminal Procedure Act. Sections 263 – 266 thereof. See **Ogunlana .v. State** (1995) 5 NWLR (pt.395) 266. **Onwudiwe .v. FRN** (2006) 10 NWLR (pt.988) 382.

d. See Penal Code. Section 68 thereof

e. Criminal Procedure Code.

f. National Drug Law Enforcement Agency (Establishment) Act Cap N30 LFN 2004. See Sections 27 – 37 thereof.

g. Corrupt Practices and Other Related Offences Act, Cap C31, LFN 2004.

h. Economic and Financial Crimes Commission (Establishment) Act, 2004. Sections 27 – 34 thereof.

i. Terrorism (Prevention) of Act No.10, 2011 (as amended) in 2013. Sections 12, 13, 14, 15, 16 and 17 thereof

j. Miscellaneous Offences Act, Cap M17, LFN 2004. Section 17 (b) thereof.

k. Advance Fee Fraud and Other Fraud Related Offences Act. Section 17 thereof.

(Please note that this list is not exhaustive.)

2. Where the statute imposes pecuniary penalties or authorizes the forfeiture of assets equivalent to the penalty or any benefit derived by the convict from the offence, any property of the convict may, under this process, be liable to forfeiture in order to satisfy the penalty. A variation of the approach is found in the UK where upon proof that the convict has a criminal life style all benefits attributable to his criminal activities are recoverable. See sections 20 – 23 of Corrupt Practices and Other Related Offences Act. See also sections 6 and 75 of UK Proceed of Crime Act.
3. Apart from the two forms enumerated above, an extreme form of forfeiture, which is in Nigeria and exhibits strong strains of the old writ of attainder is to subject to forfeiture all traceable assets of the convicted person. Some have argued that it is arbitrary in its nature

and can lead to disproportionate penal measures, which go beyond civilised standards of punishment. While others have argued that the absence of discretion in determining the range of assets affected by a forfeiture order may unduly prejudice innocent third parties. See sections 18 and 25 of National Drug Law Enforcement Agency Act and section 15 of the Prevention of Terrorism Act, 2011.

3.20 There are many legislations governing forfeiture and some of those legislations have their distinct and separate objectives but the recent legislation dealing with drug trafficking corruption and terrorism have the same or similar objectives which is, to a large extent, to deprive the perpetrators of this crime, access to the proceeds of the crime. The forfeiture under those legislations permits final order of forfeiture to be made as well as the interim order of forfeiture during investigation and prosecution. These legislations, to a very large extent, made no provision or adequate provision in respect of the interest of third parties who may have interest in the forfeited assets.

4.00 PROCEDURE FOR ASSET RECOVERY AND CONFISCATION/FORFEITURE OF PROCEEDS OF CRIMINAL ACTIVITY

4.01 There is no general procedure for the forfeiture order that is applicable to all the enabling statutes referred to above in Nigeria as contained in the Proceeds of Crime Act, 2002 of the United Kingdom. However, the National Drug Law Enforcement Agency and Economic and Financial Crimes Commission have a common procedure for obtaining interim confiscation and forfeiture order as well as the final confiscation and forfeiture order. We shall enumerate the procedure for obtaining interim forfeiture order under the EFCC Act which is impari material with the National Drug Law Enforcement Agency and also the interpretation of the Act by our courts.

MANDAOTRY DISCLOSURE

4.02 By virtue of Section 27 of the EFCC Act 2004, when a person is arrested by the EFCC (the Commission) in relation to an offence, he is mandated to make a full disclosure of all his assets and properties. Section 27(1) of the Act provides as follows:[19]

[19] Economic and Financial Crimes Commission Act, 2004

"Where a person is arrested for committing an offence under this Act, such person shall make a full disclosure of all his assets and properties by completing the Declaration of Assets Form as specified in Form A of the Schedule to this Act."

4.03 Subsection 3 makes it a criminal offence punishable with at most five years imprisonment for any one arrested under the Act to make a false declaration or fails to make a full disclosure in the Declaration of Assets Form.

4.04 After the Declaration of Assets Form has been satisfactorily filled by a person arrested, the Commission shall immediately trace the assets and properties of the alleged offender and shall administratively attach the properties acquired as a result of the said economic and financial crimes. The Commission shall thereafter apply to the Court for an interim order of attachment of the assets and properties of the arrested person.[20]

TRACING OF ASSETS

4.05 Tracing of assets is the first requirement in any asset recovery case. A high degree of expertise, resources and cooperation between multiple intelligence and law enforcement agencies is essential for successful tracing. Assets must be followed not only to their final hiding place but causality must be established between the asset and the criminal activity. This poses a particular challenge when dealing with developing countries that are cash-based societies where monies often do not flow through the recorded financial system.

Modes of tracing-methodology adopted are Searches, Anton Pillar orders, and additionally, suspicious activity reports filed with National Financial Intelligence Units can often uncover connections that can expose cases of grand corruption.

FREEZING OF BANK ACCOUNTS

[20] ibid

4.06 The Section which provides for freezing orders empowers the Commission to apply to the Court ex-parte for freezing orders to be served on banks or other financial institutions is Section 34. The Section provides as follows:[21]

> ***"(1) Notwithstanding anything contained in any other enactment or law, the Chairman of the Commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the commission of an offence under this Act and or any of the enactments specified under section 7 (2) – (a) – (f) of this Act, apply to the Court ex-parte for power to issue or instruct a bank examiner or such other appropriate regulatory authority to issue an order as specified in Form B of the Schedule to this Act, addressed to the manager of the bank or any person in control of the financial institution where the account is or believed by him to be or the head office of the bank, or other financial institution to freeze the account.***
>
> ***(2) The Chairman of the Commission, or any officer authorized by him may by an order issued under subsection (1) of this section, direct the bank, other financial institution or designated non-financial institution to supply any information and produce books and documents relating to the account and to stop all outward payments, operations and transactions (including any bill of exchange) in respect of the account of the person.***
>
> ***(3) The manager or any other person in control of the financial institution shall take necessary steps to comply with the requirements of the order made pursuant to subsection (2) of this section.***

4.07 By virtue of Section 34 (1) of the Act, the Chairman of the Commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the Commission of an offence under the EFCC Act, the Money Laundering Act, the Criminal Code, the Penal Code, the Advance

[21] ibid

Fee Fraud, etc. apply to the Court ex-parte for power to issue or instruct a bank examiner or such other appropriate regulatory authority to issue an order addressed to the Manager of the bank or any person in control of the financial institution to freeze the account. It is clear from the provision of Section 34(1) that an order of Court is required before a bank could be instructed to freeze an account. Under subsection 2 of section 34, the Chairman can also rely on the ex-parte order to direct the bank or other financial institutions to supply any information or produce books.

4.08 The Commission also has the power to trace monies domiciled in banks which it reasonably suspects has been made through the commission of crimes. In effect, the Commission can equally apply vide an ex-parte application for an order freezing all operations on the bank account pending the determination of the alleged offence. The bank account of a person that has been reasonably suspected to have committed an economic crime under the Act also qualifies as property. The Commission can therefore apply vide an ex-parte application for such accounts to be frozen pending the determination of the substantive Charge.

INTERIM ORDER

4.09 The Commission can proceed to apply for an interim order of forfeiture of the assets and properties of the alleged offender to the Federal Government of Nigeria. This is vide an ex-parte application to a High Court of a State or Federal High Court. If the Court is satisfied that the application is meritorious, it shall order that the properties and assets of the accused person be forfeited to the Federal Government pending the determination of the criminal charge against the suspect. For ease of reference, Section 29 of the Act is reproduced as follows:

"Where-

a. The assets or properties of any person arrested for an offence under this Act has been seized; or

b. Any assets or properties have been seized by the Commission under this Act, the Commission shall cause an ex-parte application to be made to the Court for an interim order forfeiting the property concerned to the

Federal Government and the Court shall, if satisfied that there is prima facie evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government."

4.09 The word 'interim attachment' is used in Section 28 of the Act while 'interim forfeiture' is used in Section 29. The Black's Law Dictionary defines these key words as follows:

Interim:

"Done, made, or occurring for an intervening time, temporary or provisional."

Attachment:

"The seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment."

CONFISCATION/FORFEITURE:

4.10 It must be noted that from the above definition and series of attachment/forfeiture/confiscation orders that have been made by the Court, "attachment" and "confiscation/forfeiture" are used interchangeably to mean "seizure of property or loss of right in a property". However, when the nature of the order of seizure made by a Court is temporal, it is called an 'Interim Order of Attachment/Forfeiture/Confiscation'. A final order of seizure is called Final Attachment/Forfeiture/Confiscation order. The latter order can only be made after an accused person has been tried and convicted.

4.10 Instructively, it is apt to state that an interim order of attachment/forfeiture is a preservative order. Its essence is to preserve the assets and properties of an accused person that is undergoing trial pending the determination of the substantive criminal charge against him. In Chief Constable **of Kent v. V. & Anor[22],** Lord Denning M.R. expounded the legal principle as follows:

[22] (1982)3 All ER 36 at pa41,

"I turn therefore to the crucial question in this case, has the Chief Constable sufficient interest to apply for an injunction? We considered the position of the Police in R v. Metropolitan Police Commissioner ex-parte Blackburn (1968) 1 All ER at 768 where I said:

"I hold it to be the duty of the Commissioner of Police as it is of every Chief Constable to enforce the law of the land. He must take steps so as to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace" To this I would now add that it is the duty once he knows or has reason to believe that goods have been stolen or unlawfully obtained to do his best to discover and apprehend the thief and to recover the goods. Corresponding to that duty, he has a right or at any rate an interest on behalf of the public to seize that goods and detain them pending the trial of the offender and to restore them in due course to the true owner. In pursuance of that duty and of that right and interest, he can apply to the Magistrate for a search warrant and to a High Court for an injunction."(Underlining for emphasis)

4.11 This authority has been adopted in Nigeria in the case of **Esai Dangabar .v. FRN**[23], **Akingbola .v. Chairman, EFCC**[24]**.**

Interim forfeiture order or attachment can be likened to mareva injunction which is also granted in deserving cases to preserve proceeds of crime in the public interest.

4.12 It must also be noted that when a person is arrested for an offence under the EFCC Act, the person is merely a suspect. After the arrest, the alleged offender is required under section 27(1) of the EFCC Act to make a full disclosure of all his assets by completing/filling the Declaration of Assets Form. Under subsection 2 of Section 27,[25] the EFCC has a duty to investigate all the assets declared in the form.

[23] (2014) 10 NWLR (pt.1422) 575

[24] (2012) 9 NWLR (pt.1306) 475 at 500 – 502

[25] EFCC ACT, 2004

4.13 By virtue of Section 28 of the Act, where a person is arrested for an offence under the Act, the EFCC shall immediately trace and attach all the assets and properties of the person which he acquired as a result of the economic and financial crime. It would appear that the administrative tracing and attachment are condition precedent to obtaining an interim order of attachment from the Court. This is because under Section 28[26], it is after the assets have been traced and attached that the Commission can cause to be obtained from the Court, an order of interim forfeiture or attachment. For ease of reference, Section 28 of the EFCC Act provides as follows:

> ***"Where a person is arrested for an offence under this Act, the Commission shall immediately trace and attach all the assets and properties of the person acquired as a result of such economic or financial crime and shall thereafter cause to be obtained an interim attachment order from the Court,"*** (underlining for emphasis)

4.14 The provision of Section 28 was considered by the Court of Appeal in **Nwaigwe .v. FRN[27]** where the Court had the following to say:

> ***"Under Section 28 of the EFCC Act, the Commission is empowered not only to arrest any person suspected to have committed an offence under the EFCC Act but also to trace and attach all the assets and properties of the accused person or persons suspected to have been acquired as a result of such economic or financial crime and subsequently cause to be obtained an interim attachment order from the Court. Section 28 therefore confers a ready-made license to the EFCC to attach or seize any property suspected by it to have been acquired by committing any offence under the EFCC Act. This is the one single method provided for in the EFCC Act for immediate attachment or seizure of any property suspected to have been acquired through any means constituting an offence under the EFCC Act."***

[26] ibid

[27] (2009) 16 NWLR (Part 1166) 169 at 190 – 191

4.15 From the decision of the Court of Appeal in Nwaigwe's case, the Commission or the EFCC must first of all trace and attach administratively, all the assets and properties of the person acquired as a result of the economic and financial crime before it can proceed to Court to obtain an interim order of attachment or forfeiture. The practical question here is – in the event that the Commission is unable to trace any property immediately the Defendant is arrested and before filing a charge in Court, would that preclude the Commission from continuing in the exercise of tracing and attaching the assets which were subsequently discovered during the trial of the Defendant? Some have argued that once the Commission is unable to trace the assets before the filing of a charge or information, it can no longer embark on the exercise during trial. I am of the respectful view that this argument will defeat the whole essence of the provisions of sections 28 and 29 of the EFCC Act. The intendment of the legislature in enacting those sections is to preserve the property pending the final determination of the criminal charge. It is my opinion that in order not to defeat the essence of the legislation, the need to preserve proceeds of crime must be guaranteed and maintained.

4.16 Another ridiculous argument being canvassed in some quarters is that the clause "shall immediately trace and attach all assets and properties" in section 28 of the EFCC Act means that the Commission must, immediately, before a charge is preferred against the Defendant, trace the assets and obtain an interim order of attachment or forfeiture. This argument is also intended to defeat the essence of the provisions of sections 27 – 34 of the EFCC Act. These sections empower the Court to make a preservative order on any proceed of crime which the Commission traced and discovered and where the Defendant is convicted, the Court can make a final forfeiture order in respect of the proceed of crime under the provision of section 30 of the EFCC Act.

4.17 It is important to note that the Court of Appeal in Nwaigwe's case held that Section 29 of the EFCC Act as it relates to forfeiture order is unconstitutional but that the provision of section 28 of the same Act is constitutional in that interim attachment of property is permissible under the Constitution. The decision of the Court of Appeal is that Section 29 imposes punishment on a person who is merely accused of having committed a crime. Section 29 of the EFCC Act provides as follows:

"Where-

a. The assets or properties of any person arrested for an offence under this Act has been seized; or

b. Any assets or properties have been seized by the Commission under this Act, the Commission shall cause an ex-parte application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is prima facie evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government."

4.18 I am unable to agree with the construction placed on Section 29 of the EFCC Act by the Court of Appeal. The contention of the Court of Appeal is that the word 'forfeiture' is punitive and that it would be unconstitutional to punish a person who has merely been suspected of committing a crime. It is important to note that under Section 28, the drafter of the Act employs 'interim attachment' and under Section 29, 'interim order of forfeiture' is employed by the legislature. The Court of Appeal would appear not to have paid attention to the word 'interim' used in both sections. Earlier, I have quoted the definitions of the words '*interim', 'attachment'* and *'forfeiture'* as defined in the Black's Law Dictionary. The word *'interim'* means '*temporary*' or '*provisional*'. Attachment means '*the seizure of a person's property'* and forfeiture means, *'the loss of a right, privilege, or property because of a crime'*. It must also be noted that both the attachment and forfeiture referred to under Sections 28 and 29 are to be done in the interim i.e. pending the conclusion of the prosecution of the accused person. The effect of interim attachment or forfeiture of a property is that the accused person loses his right, albeit, temporarily in respect of that property. If the Court of Appeal had considered the effect of the interim order of attachment provided for under Section 28 and the interim order of forfeiture as prescribed under Section 29, its decision as to the constitutionality of Section 29 would have been different.

4.19 Contrary to the decision of the Court of Appeal that Section 29 is unconstitutional, I am of the respective view that the section is in line with both Sections 36(5) and 44(1) of the Constitution. Section 29

only empowers the Commission to apply for an order of interim forfeiture which is different from final order of confiscation and forfeiture. An order of interim forfeiture inures until the end of the substantive case or until the interim forfeiture order is discharged by the Court. If at the end of the case, the accused person is discharged and acquitted, the interim forfeiture order shall be revoked and the assets and property of the acquitted person shall be released to him forthwith.

4.20 It is my humble opinion that the essence of an interim forfeiture order is not to deprive a suspect or an accused person of his assets and property, but to preserve the property from being wasted and dissipated by the suspect or accused person, so that the judgment of the Court will not be rendered nugatory.

4.21 The Black's Law Dictionary,[28] defines an interim order *as "one made in the meantime, and until something is done."*

4.22 The Court of Appeal in the case of **Environmental Dev. & Anor. Construction .v. Umara Associates Nigeria** defines the term 'interim decision' or order as follows:

> ***"The term "interim decision" presupposes that a final decision is forthcoming. In the present case, the heading by the Dispute Resolution Sub-Committee of their decision as interim presupposes that they had not made their final decision."***

4.23 Interim forfeiture therefore presupposes that there would be a final order and it cannot therefore be interpreted as a 'final forfeiture' as, erroneously posited by the Court of Appeal in the case of **FRN .v. Nwaigwe** (supra).

4.24 Section 29 of the EFCC Act cannot be said to be unconstitutional in the light of the position of the Supreme Court in **7up Bottling C. Ltd v. Abiola & Sons Ltd[29]**, where it was held that:

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[28] (6th Edition) at page 814

[29] (1995) 3 NWLR (Part 383) 257 at 285

"In both criminal and civil proceedings, there are certain steps to be taken which are incidental or preliminary to the substantive case. Such steps include motion for direction, interim or interlocutory injunction. The time available for taking the steps may be too short or an emergency situation may have arisen. It, therefore, becomes necessary to take quick action in order to seek remedy for or arrest the situation. It is in respect of such cases that provisions are made in court rules to enable the party affected to make ex-parte applications. The orders to be made by the court, unlike final decision, are temporary in nature, so that they do not determine the 'civil rights and obligation' of the parties in the proceedings as envisaged by the Constitution." (underlining for emphasis)

See **E.S. & C.S. Ltd. .v. N.M.B. Ltd.**

4.25 Notably, the Court of Appeal would appear to have reconsidered its decision in Nwaigwe's case. In fact, the Court of Appeal has held that Sections 28 and 29 of the EFCC Act are constitutional. The Abuja Division of the Court of Appeal in **Esai Dangabar .v. FRN** (2014) 12 NWLR (pt.1422) 575, at pages 29 – 30 of its Judgment held as follows:

"The pertinent question at this junction is whether the practice of temporarily depriving the accused person from dealing with the assets suspected to the proceeds of crime pending the final determination of the criminal case against him is unconstitutional. There is no doubt that pursuant to sections 43 and 44 of the 1999 Constitution of the Federal republic of Nigeria (as amended) all citizens of this country have the right to acquire and own property anywhere in Nigeria and their property should not be compulsorily acquired without payment of compensation. However, there is a caveat, this right to property is no absolute. Section 44 (2) (k) of the said constitution create exception and it states as follows:

"Nothing in subsection (1) of this section shall be construed as affecting any general law; (k) relating

to the temporary taking of possession of property for the purpose of any examination, investigation or inquiry.

The above stated provision showed the intention of the law maker is to validate any law such as Sections 28 and 29 of the EFCC Act which allows temporary taking over of assets of the accused persons pending the hearing and determination of a criminal case that has been pending against him….In my own view, the intention of sections 28 and 29 of the EFCC Act is merely to get a preservative order on the property suspected to be proceeds of crime so as to prevent the accused person or suspect from dissipating the assets and thereby create a situation of a fait accompli upon his conviction"

4.26 In **FRN .v. Ikedinwa** (2013) LPELR-21120 (CA), the Court of Appeal interpreted the provisions of sections 35 and 36 of the NDLEA Act which are impari material with the provisions of sections 28 and 29 of the EFCC Act and held as follows:

"As the situation stand, can one say that the power to seize any property or assets suspected to be connected with the Commission of an offence under the NDLEA Act is in conflict with the 1999 Constitution of the Federal Republic of Nigeria (as amended)? I do not think so in view of the provision of section 44 (2) (k) of the 1999 Constitution (as amended) which states that:- "44 (1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things – (2) "Nothing in subsection (1) of this section shall be construed as affecting any general law - (k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or inquiry.

A careful reading of the record of appeal in particular, the affidavit before the trial Court and the exhibit attached to it which showed that the property is in the name of Godfrey Ikedinwa or Don Godfrey Ikedinwa who is on the run, it would be clear that the findings of the trial Judge that the

property be released to the 1st Respondent while the said Godfrey Ikedinwa remains on the run from justice is against public policy. Any person who has committed an offence or acquired property illegally should not be allowed to use his escape from justice to continue to keep such ill-gotten property.

4.27 The learned Justices continued at pages 21120 thus:

"The learned trial Judge relied on section 269 of the Criminal procedure Act, when he ordered the release of the property under consideration to the 1st Respondent. But it must not be forgotten that there is a special legislation put in place to take care of situation as in this case, that is, the NDLEA Act Cap. N30, Laws of the Federation of Nigeria, 2004. It is my humble view that trial Court has a duty to ensure that where there exists a special legislation to check a particular criminal behavior, such legislation should be applied instead of a general legislation to enable such a policy succeed. See Okoro .v. FRN (Supra). The NDLEA Act was enacted to ensure that persons who involve themselves in the offence of drug trafficking are dispossessed of their ill-gotten gains according to the summary of the contents of the affidavit in support of the application for an order of interim attachment and forfeiture, the property under consideration belongs to Godfrey Ikedinwa who is on the run for drug related offences. Consequent upon the foregoing, it is my view that the order of the trial Court which released the property under consideration to the 1st Respondent has resulted in miscarriage of justice."

4.28 The Court of Appeal in its two other decisions has also held that the process of forfeiting property in the interim is constitutional. See **Akingbola .v. Chairman, EFCC** (2012) 9 NWLR (pt.1306) 475 at 500 – 502, **Felimon Ent. Ltd.v. The Chair, EFCC & Anor** (2013) 1 BFLR 94 at 105 – 106. The Supreme Court, in the case of **A. G. Ondo State .v. A. G. Fed.** (2002) 9 NWLR (pt.772) 22 at 308 – 309 while construing section 37 of the ICPC Act which permits the ICPC in the interim to attach or forfeit property pending trial, held that the provision was not contrary to section 44 (2) of the 1999 Constitution.

See also **Nwude .v. Chairman, EFCC** (2005) ALL FWLR (pt.276) 740:

4.29 The Court of Appeal further referred to Section 44 (2) (k) of the Constitution in Dangabar's case. The said Section provides thus:

> ***"Nothing in subsection (1) of this Section shall be construed as affecting any general law; (k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or inquiry."***

4.30 The reasoning of the Court of Appeal in **Esai Dangabar V. FRN** is therefore very apt and Sections 28 or 29 cannot, by any stretch of imagination be unconstitutional. In fact, Section 44(2) (k) of the Constitution of the Federal Republic of Nigeria is a proviso which empowers the Commission to temporarily take possession of any property pending investigation and inquiry.

4.31 ELIMON ENTERPRISES LTD v. THE CHAIRMAN, EFCC & ANOR (2018) 7 NWLR (PT 1617) 56 @ 66 where it held thus,

> "The respondent's stand is that the EFCC Act has no provision for the discharge or setting aside of the interim order of attachment once made. The relevant provisions of the Economic and Financial Crimes Commission Act also briefly labelled EFCC Act Sections 26, 27, 28 and 29 provide thus:- "26-(1) Any property subject to forfeiture under this Act may be seized by the commission in the following circumstances. (a) The seizure incidental to an arrest or search:- (b) In the case of property liable to forfeiture upon process issued by the Court following an application made by the Commission in accordance with the prescribed rules. (2) Whenever property is seized under any of the provisions of this Act, the commission may - (a) place the property under seal; or (b) remove the property to a place designed by the Commission. (3) properties taken or detained under this section shall be deemed to be in the custody of the Commission, subject only to an order of a Court, 27(1) where a person is arrested for an offence under this Act, the commission shall immediately trace and attach all the assets and properties of the person acquired as a result of such illegal act and shall thereafter cause to be obtained an interim attachment order by the Court. 28-(1) where a person is arrested for committing an offence under this Act, it shall be obligatory for such person to make

a full disclosure of all his assets and properties by completing the declaration of Assets form as specified in Form A of the Schedule to this Act. (2) The declaration of Assets form shall be forwarded to the commission for full investigation by the General and Assets Investigations unit of the Commission. (3) Any person who- (a) Knowingly fails to make full disclosure of his assets and liabilities ; or, (b) Knowingly makes a declaration that is false; or (c) fails to answer any question; (d) fails, neglects or refuse to make a declaration or furnishes any information required, in declaration of Assets Form, commits an offence under this Act and is liable on conviction to imprisonment for a term of ten years, (4) subject to the provisions of Section 4 of this Act, whenever the assets and properties of any person arrested under this Act are attached, the General and Assets Investigation unit shall apply to the Court for an interim forfeiture order under the provisions of this Act. 29- Where- (a) the assets or properties of any person arrested for an offence under this Act has been seized; or (b) any assets or property has been seized by the commission under this Act, the commission shall cause an application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall if satisfied that there is pima facie evidence that the property concerned is liable to forfeiture. Make an interim order forfeiting the property to the Federal Government. It is not in dispute that there is no provision in the EFCC Act for the setting aside of interim orders of attachment that however cannot be taken as a blanket principle that once the attachment or seizure has been made, it became irrevocable. I say so because, Firstly the attachment under the relevant Sections, 27 28 and 29 of the EFCC Act is done upon an ex-parte interim order. That is outside the knowledge of the contending party and so when circumstances are thrown up which would impel the Court for a re-visit of that order, it behoves the Court of trial that made the interim order in the first place to take a second judicial and judicious look at the matter to see whether or not a need for setting aside or refusing to set aside exist. These are within the discretionary powers of the Court subject of course to the availability of sufficient facts and materials to do so. It follows therefore that where that discretionary power to set aside was wrongly applied the appellate Court should remedy the anomaly. I am encouraged in this position by what this Court per Uwaifo JSC stated in A. G. Ondo State v. A.G. Federation and Ors (2002) 9 NWLR (Pt.772) 22 at 420 wherein he stated thus:- "Section 37 (identical to Section 25 of the EFCC Act) empowers the ICPC

(kindred or sister anti corruption agency of the EFCC) to take custody of any movable or immovable property if it has reasonable ground to suspect that it is the subject matter or evidence of an offence committed under the Act. There is nothing unconstitutional in this. As always, if there is an improper seizure or taking of custody of any such property that may be a matter for contention, as appropriate to be decided by judicial process." What I am labouring to put across is that while the EFCC Act has made provisions for the forfeiture or attachment of the properties albeit by an interim order obtained ex-parte, the fact that there are no black and white provisions for a reversal does not foreclose the appellant's constitutional right to cry out that the earlier order was wrongly made and a reversal should be put in place. For this later situation to apply however, the appellant must provide the material supporting the Court's change of heart to discharge that interim order or setting aside. See Kasunmu v Shitta-Bey (2006) 17 NWLR (Pt.1008) 422; Abacha v state (2002) 11 NWLR (Pt.779) 437; Itauma v. Akpe-Ime (2000) 12 NWLR (Pt.680) 168 at 180. In this case at hand, the 1st respondent had in counter affidavit averred inter alia thus:- "Para 8: our investigation further revealed that the said Mr. Francis Atuche in a bid to conceal the true ownership of the assets and properties in question, employed different individuals and entities, including the applicant, as fronts to disguise the true ownership of the said assets and properties. As revealed by the amended charge in charge No.FHC/L/369c/09... Para 9: Felimon Enterprises Nig. Limited (the Applicant) and Felimon Nigeria Enterprises are one and the same entity and or owned and controlled by the same individual(s) acting as their alter ego as revealed by the Exhibit attached to the further affidavit filed on behalf of the applicant on 23rd March, 2010." Those relevant paragraphs of 1st respondent stated that the assets in question are owned indirectly by 2nd respondent, Francis Atuche using different entities including the appellant. The appellant did not effectively debunk those assertions and present to the Court a contrary persuasive position on which the Court could reverse itself and so since the trial Court, Court below and even the Supreme Court cannot make a consideration or pronouncement in vacuo without reference to peculiar facts with which the particular Court has been confronted, the Court has no option than to leave the situation as it was when this new application was brought before it. I rely on Clement v Iwuanyanwu (1989) 3 NWLR (Pt.107) 39 at 54. A recourse to the Court of Appeal findings and conclusion per Rita Pemu JCA is instructive. She stated thus:- "Regarding the issue of

Felimon Enterprises Nigerian Limited and Felimon Enterprises, I agree with the learned trial judge, as observed at page 34 of the judgment (page 324 of the record of appeal), where he rightly in my view observed inter alia ".... as a matter of fact, the name Felimon Enterprises features prominently in count 38 of the criminal charge. I will only say that it is at the stage of the trial that it will be ascertained whether Felimon Enterprises and Felimon Enterprises Nigeria Limited are one and the same. It is also at that stage that it will be determined whether the company is in any way involved in the alleged criminal charge levelled against Mr. Francis Atuche." That decision of the Court of Appeal sound as it is and affirming what the trial Court did makes it difficult for me to interfere with it. The reason is that the 1st respondent, EFCC having satisfactorily shown prima facie evidence that the property is a likely proceed of the commission of crime and may ultimately be liable to forfeiture, the appellant then had the burden or onus to show that the assets were rightly acquired by him and not within the purview of the criminal allegations and as I had earlier said the appellant failed in that bid. The expression 'Prima Facie' has been held to mean "at first sight "; "on the first appearance"; "on the face of it"; "so far as it can be judged from the first disclosure", clearly there is the presumption that the fact presumed to be truth can only be debunked or disproved by some evidence to the contrary. See Trade Bank Plc v Chami (2003) 13 NWLR (Pt.836) 198; Shata v FRN (2009) 10 NWLR (Pt.1149) 411; Onagoruwa v State (1993) 7 NWLR (Pt.303) 49. For a fact, the appellant has not produced a superior argument or material upon which this Court can assume the powers pursuant to Section 22 of the Supreme Court Act to do that which the two Courts below should have done. There is no basis to interfere with the concurrent findings of the two Courts below as they stemmed from what was presented before them and were in no way from a perverse angle or from a miscarriage of justice." Per PETER-ODILI, J.S.C. (Pp. 66-69, Paras. A-C).

4.32. In an unreported case between FRN v Patience Jonathan and ORS suit no.FHC/L/CS/620/18, EFCC brought an ex-parte application asking for final forfeiture order against Mrs Patience Jonathan and some companies. The Court granted the application for a final order of forfeiture and also directed that the humongous funds should be forfeited to the Federal Government on the grounds that they were proceeds of crimes as Mrs Jonathan and the firms could not legitimately account for the ownership of the funds.. The Federal High Court held that “There is no reason

provided in the affidavit to convince the court or to show cause why the monies should not be forfeited to the Federal Government of Nigeria.
"There is no evidence to reasonably show, beyond doubts, that the monies were legitimately earned."

5.00 FINAL ORDER OF CONFISCATION AND FORFEITURE OF PROCEEDS OF CRIME

5.01 Section 30 of the Act imposes a duty on the Commission to apply to the Court for an order of Confiscation and forfeiture of the assets of a person convicted under the Act. The section provides as follows:

> ***"Where a person is convicted of an offence under this Act, the Commission or any authorized officer shall apply to the Court for the order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime subject to an interim order under this Act."***

5.02 The purport of the above section is that, it is after an accused person has been convicted of the charge preferred against him that the Commission can approach the Court for a final order of forfeiture or attachment of the assets and properties of the accused person which are already subjects of interim order of attachment/forfeiture. Reading the provision of section 30 strictly, it would appear that the final order of forfeiture cannot be made in respect of any property that is not subject to an interim order of forfeiture or attachment. It would also appear that the final order could only be made over a property that is "subject to an interim order under the Act. However, if the Act is read as a whole, it would be clear that properties in respect of which interim order of forfeiture or attachment has not been made can be finally forfeited and attached after conviction. Section 20 of the Act makes it abundantly clear that a person convicted under the EFCC Act shall forfeit to the Federal Government, the following assets:

a. All assets or properties "which may or are the subject of an interim order of court after an attachment by the Commission as specified in section 26 of the Act".

b. Any asset or property confiscated or derived from any proceeds the person obtained directly or indirectly as a result of such offence not already disclosed in the Asset Declaration Form specified in Form A of the Schedule to this Act or not falling under paragraph (a) of this subsection.

c. Any of the person's property or instrumentalities used in any manner to commit or to facilitate the commission of such offence.

5.03 It can be seen from section 20 (1) (a) of the EFCC Act that a property which may have been the subject matter of an interim order of forfeiture but was not actually made the subject of that order can be forfeited to the Federal Government. Similarly, under section 24 of the EFCC Act, the categories of the properties are listed and they are subject to forfeiture order include any real or personal property which represents the gross receipt a person obtained directly as a result of the violation of the Act irrespective of whether there is an interim order of forfeiture on it. It is therefore my humble submission that if the entire enactment is read as a whole, it would be clear that it is not necessary for there to be an order of interim forfeiture or attachment on a property before the Court can make a final order of confiscation and forfeiture of the property acquired or obtained as a result of which the person is convicted. See the unreported case between FRN v Patience Jonathan and ORS suit no.FHC/L/CS/620/18, where EFCC brought an ex-parte application asking for final forfeiture order against Mrs Patience Jonathan and some companies. The Court granted the application for a final order of forfeiture and also directed that the humongous funds should be forfeited to the Federal Government on the grounds that they were proceeds of crimes as Mrs Jonathan and the firms could not legitimately account for the ownership of the funds.. The Federal High Court held that "There is no reason provided in the affidavit to convince the court or to show cause why the monies should not be forfeited to the Federal Government of Nigeria.

"There is no evidence to reasonably show, beyond doubts, that the monies were legitimately earned."

5.04 Upon final forfeiture, the said assets and properties shall be disposed of. The Secretary to the Commission is empowered under Section 31(2) to take steps to dispose of the property by sale or otherwise. Where the property is sold, the proceeds thereof shall be

paid into the Consolidated Revenue Fund of the Federation. By Section 33(3) of the Act, where the property in respect of which a final order has been made is money in a bank account, the Commission shall serve a copy of the final forfeiture order on the Manager of the bank and the Manager shall forthwith pay over the money to the Commission. Thereafter, the Commission shall pay the money into the Consolidated Revenue Fund of the Federation.

5.05 Section 32 of the Act prescribes offences in relation to forfeiture orders. The Section provides as follows:

> ***"(1) Any person who, without due authorization by the Commission, deals with, sells or otherwise disposes of any property or asset which is the subject of an attachment, interim order or final order, commits an offence and is liable on conviction to imprisonment for a term of five years without the option of a fine.***
> ***(2)Any Manager or person in control of the head office or branch of a bank, other financial institution or designated non-financial institution who fails to pay over to the Commission upon the production to him of a final order, commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than one year and not more than three years, without the option of a fine."***

5.06 By virtue of the provision of Section 32 which is reproduced above, it is an offence to deal with, without due authorization by the Commission, assets and properties which are subject to a final order of confiscation and forfeiture or an interim attachment/forfeiture order. Furthermore, it becomes an offence punishable with a term of imprisonment for an officer of a financial institution or bank to refuse or neglect to honour the final order of the Court as regards monies domiciled in such bank.

5.07 If the alleged offender is convicted of the substantive offence, the Bank shall abide by the terms of the final order of the Court and shall pay the money to the Commission. Where the bank fails to do so, the officer in charge will be guilty of an offence punishable by a term of imprisonment.

5.08 Section 33 (3) of the Act[30] makes it mandatory for the Court to vacate the interim order of attachment/forfeiture/freezing order(s) on the assets and properties or bank accounts of a person who has been acquitted by a court of competent jurisdiction. In effect, all the assets and properties of the person which were subject to the interim order shall be released to him.

If however, the person is merely discharged by the Court, the Court has the discretion to either attach the assets and properties of the person or not.

5.09 IMPEDIMENTS OF ASSET RECOVERY AND CONFISCATION IN NIGERIA

i) Lack of political will and/or political influence

The issue of political will and legitimate commitment on the part of originating jurisdictions often represents an important challenge to overcome. In many cases, in response to international or domestic pressure, countries end up submitting MLA requests without having the intention to seriously prosecute the officials involved and no further steps are taken to ensure the freezing and subsequent confiscation of illegal assets.

ii) Lack of technical capacity

Asset recovery requires skilled professionals and access to special investigative techniques to follow the money trail (Arab Forum on Asset Recovery 2013). Egypt, Tunisia and Libya face several challenges to undertake corruption investigations and are even more constrained when it comes to pursuing asset recovery.

They lack professionals with expertise in this type of investigation and with knowledge of asset recovery processes or the legal systems of the requested countries. The international community has made significant efforts in providing training and technical assistance to these countries. Requested countries have also sent experts to work in the region in an attempt to facilitate the process and share expertise (OECD 2014). For instance, in 2013, the UK posted a Regional Asset Recovery Advisor to Egypt to provide technical and legal assistance to countries in the region (G8 2013).

[30] Section 33(3) Economic and Financial Crimes Commission Act, 2004

In addition, asset recovery processes also require a great deal of diplomatic skills in communicating and requesting assistance from different countries.

iii) Lack of coordination
Lack a coherent asset recovery policy. Additionally, the multitude of bodies responsible for the investigation and prosecution of corruption in these countries pose significant coordination challenges to the effective investigation and prosecution of corruption and consequently for the recovery of stolen assets.

(iv) Limited use of informal channels for investigations
Indeed, a significant amount of information needed to build a case for confiscating and repatriating assets is held by countries where the assets are located, but requesting countries should make use of informal channels to collect as much evidence as possible before submitting a formal request for assistance. The sharing of information before the mutual legal assistance stage is considered instrumental for successful asset recovery (Conference of the States Parties to the UNCAC 2013).

v) Difficulties to identify the beneficial owner of the assets to be seized
The existence of bank accounts and other assets in off-shore territories makes it extremely difficult to investigate criminal assets due to the challenge in obtaining information from those territories. Usually the owner of the assets is hidden behind a complex chain, including companies established in tax havens. Authorities in requesting countries may request information regarding the ultimate beneficial owner of companies registered in off-shore jurisdictions. A proper response however will depend on the tax haven's willingness to cooperate.

vi) Difficulties in establishing an evidential link between assets capable of being confiscated and the crimes. Considering that corruption usually occurs behind closed doors, it is extremely difficult to find evidence of wrongdoings. In addition, in Egypt, Libya and Tunisia, the individuals now investigated have been in power for an extensive period of time and with little or no oversight from other state institutions, making the collection of evidence an even more daunting task. Additionally, in many of these countries, the separation between the public and private behaviour of ruling elites is often blurred.

vii) Lack of independence of law enforcement bodies
Law enforcement agencies and judges suffer from undue influence and do not have the necessary levels of autonomy to conduct investigations and punish corrupt officials or simply provide the cooperation that is necessary for the confiscation and the return of assets obtained by criminal means.

viii) Limited pro-active role of requested countries
Countries where the assets are hidden can play a more prominent role in launching investigations in their own jurisdictions, based on suspicious transactions or media reports. In fact, according to the OECD, countries with general success in asset recovery cases have law enforcement agencies that have been proactive, launching their own prosecutions for foreign corruption or money laundering (OECD 2014).

6.00 CONCLUSION

6.01 In order to ensure that financial investigations and asset recovery lead to meaningful results, State cooperation is paramount, as all of the relevant information lies mostly within domestic jurisdictions.
The notion of recovering stolen assets is no new phenomenon, even though discrepancies in the monies that continue to be made by criminals through corruption, fraud and other offences and the monies recovered by law enforcement agencies remain dramatic.[31] But the development of asset recovery systems has now advanced far beyond the original criminal conviction based confiscation processes and now incorporate structures that are often outside of what is normally considered to be the criminal process, such as non-conviction based and even taxation based systems which are proving to be useful weapons in the armory of law enforcement. These procedural advancements are supported by a wealth of international policy initiatives (For example, G8 and the 2004 Justice and Home Affairs Ministers Declaration on Recovering the Proceeds of Corruption and recent OECD and G20 declarations on tax havens) through to the international Conventions.

[31] The legal and procedural processes that enable investigators and prosecutors the world over to pursue such proceeds have been honed over the last 20 years or more through efforts in the US (to defeat drugs traffickers) and Italy (to combat organized crime), to quote just two obvious examples, which are now mainstreamed in many of our own jurisdictions.

6.02 And yet, the corrupt officials and organized crime groups that we have touched upon in this paper continue to build large and complex international networks and amass substantial profits with seemingly little prospect of being caught. There is no doubt that the ability of the victim state to strip these individuals of those assets is critical if those networks are to be disrupted and the financial markets of the world are to be protected from the scourge of money laundering.

6.03 On the international stage there is little doubt that UNCAC now represents the standard by which many countries will wish to be judged, even if it does not represent a conceptual revolution, rather a consolidated framework of ideas and practices that go some considerable way to providing an effective machinery in which to recover the proceeds of corruption. But ultimately what is emerging is the notion that success rests upon the will of these countries that do develop a genuine yearning to recover their stolen monies and have the good luck to manage to trace, freeze, confiscate and try to repatriate them from a country that is willing to employ clever legal practices to assist.

RECOMMENDATIONS

- The need to establish a Financial Service Commission for the purpose of tracing, repatriation and forfeiture of proceeds of crimes.
- The assets forfeiture unit of the EFCC should be an independent commission. In the United Kingdom, the Proceeds of Crimes Act (POCA) establishes the Assets Recovery Agency (ARA) for the recovery of proceeds of crimes by way of an action in the High Court.

i) Knowledge and skills in areas relevant to the asset recovery process

Strengthening the capacities of national law enforcement authorities, prosecutors and judges in obtaining the necessary skillset for implementing the asset recovery process, or updating such skillset through continuous training is essential for the effective and efficient seizure and confiscation of the proceeds and

instrumentalities of crime. The initial and continuous trainings should include:

• Evidentiary thresholds required for obtaining both the seizure and confiscation of property;

•Application of specific confiscation mechanisms, particularly extended, third-party and non-conviction based confiscation and their impact on procedural guarantees and fair trial;

• Civil and commercial tools and practices, particularly in relation to different types of properties, legal entities and services which may be used by the perpetrator(s) to launder the proceeds and instrumentalities of crime;

• Assessment of the value of property subject to seizure of confiscation during the asset recovery process;

• Assessment of the amount of damage resulting from the commission of a corruption-related offence.

ii) International co-operation

The study has established a need to strengthen the ability of law enforcement agencies, prosecution services and judicial bodies to implement international cooperation mechanisms into the asset recovery process, thereby ensuring the collection of evidence, as well as the seizure and confiscation of property beyond national borders. Targeted technical assistance and capacity-building measures in the area of international co-operation should specifically focus on:

• The different types of and options in international co-operation used in the asset recovery process; • Application of available tools and mechanisms within the asset recovery process vis-à-vis international co-operation;

• Drafting requests for mutual legal assistance to obtain evidence, and to seize and confiscate property abroad;

• Peer-to-peer learning.

iii) Knowledge of financial investigation techniques

The study identified a need to strengthen the capacities of law enforcement agencies and prosecution services to systematically conduct financial investigations in parallel to criminal investigations, as the effectiveness of seizure orders and confiscation judgements is correlated with the ability to trace, identify and locate the proceeds and instrumentalities of crime. Specific issues that such comprehensive capacity building should focus on include:

- Capacity to systematically conduct financial investigations with a view to establishing the true nature, origin and ownership of the proceeds and instrumentalities of crime;
- Application of specific financial investigation techniques and theories, available in the context of the asset recovery process;
- Ability to conduct a financial investigation seeking to determine the apparent disproportion of property in the context of a criminal proceeding.

iv) Recording of key statistics and use of common terminology in the asset recovery process

The study has established a need for the collection of specific datasets which would enable a better assessment of the effectiveness and efficiency of the asset recovery process, as well as fulfilling international obligations of data collection in the field of seizure and confiscation of assets. Specific issues that such comprehensive technical assistance should focus on include:

- Harmonisation of terminology at the national, subnational (where applicable) and transnational levels in the context of the asset recovery process in general, and the seizure and confiscation of proceeds and instrumentalities of crime in particular;

•Designing a common regional methodology for the collection of statistics relevant to the asset recovery process.