[2013] JMSC CIV 113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 03440

IN THE MATTER OF AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR A CIVIL RECOVERY ORDER PURSUANT TO SECTION 57 OF THE PROCEEDS OF CRIME ACT, 2007

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**ANDREW HAMILTON**	**FIRST RESPONDENT**
AND	**DOROTHY HAMILTON**	**SECOND RESPONDENT**
AND	**ANDRE HAMILTON**	**THIRD RESPONDENT**
AND	**ANDREW HAMILTON CONSTRUCTION LIMITED**	**FOURTH RESPONDENT**
AND	**ANDREHAN SEAFOODS COMPANY LIMITED**	**FIFTH RESPONDENT**
AND	**DEVON CLEARY**	**SIXTH RESPONDENT**

AND **JANET RAMSAY** **SEVENTH RESPONDENT**

AND **PAULETTE HIGGINS** **EIGHTH RESPONDENT**

AND **ANNMARIE CLEARY** **NINTH RESPONDENT**

IN CHAMBERS

Ian G Wilkinson QC and Shawn Wilkinson instructed by Wilkinson & Co first, second, third, fourth and seventh respondents

Anthony Pearson and Dawn Satterswaite for the sixth and ninth respondents

Roxann Mars instructed by Knight, Junor and Samuels for fifth and ninth respondents

Nateline Robb Cato, Suzanne Watson Bonner and Charmaine Newsome for the Assets Recovery Agency

July 9, 10 and 31, 2013

WHETHER ASSETS RECOVERY AGENCY IS A LEGAL ENTITY – WHETHER AGENCY HAS LEGAL AUTHORITY TO LITIGATE IN COURT – SECTIONS 2, 3 AND PART IV OF PROCEEDS OF CRIME ACT – SECTION 4 OF FINANCIAL INVESTIGATIONS DIVISION ACT

SYKES J

[1] The Asset Recovery Agency ('ARA') has secured without-notice restraint orders in respect of property alleged to be the proceeds of crimes committed in the United States of America. It further alleged that the property is located in Jamaica and in that

regard, ARA restrained property which the defendants have some interest in or over. The matter was set down for inter partes hearing. When the matter came on for hearing, the point was taken by Mr Ian Wilkinson QC that ARA was not a legal entity and therefore it could not be a party to proceedings in its own right. In this he was supported by Mr Anthony Pearson, Miss Dawn Satterswaite and Mrs Roxann Mars.

[2] Learned Queen's Counsel cited a number of cases in which the courts have held that a litigant must have legal personality in its own right before it can litigate (**The Junior Doctors and others v The Attorney General of Jamaica** SCCA No 60 of 2000) (unreported) (delivered February 19, 2001); **Regina v The Principal of the Norman Manley Law School, Ex Parte, Janet Mignott** Suit No M 9 of 2002 (unreported) (delivered May 17, 2002); **Cable and Wireless Limited (trading as LIME) and Oceanic Digital Jamaica Limited (trading as Claro) v Digicel (Jamaica) Limited** HCV 00036 of 2009 (unreported) (delivered June 9, 2010).

[3] Queen's Counsel further submitted that this principle applies to the instant case. The submission was to the effect that there is a distinction between the creation of a legal entity and the recognition of a created entity. He stated that sections 2 (1) and 3 of the Proceeds of Crime Act, 2007 ('POCA') did not create ARA. These provisions assumed that the ARA already existed. The statute conferred powers on ARA to do a number of things including applying for restraint orders, bringing and defending claims in respect of property being dealt with under POCA. The fact that POCA conferred powers on the ARA was of no moment because POCA was acting on the assumption that such a legal entity existed and since it does not exist then no amount of recognition or conferring of powers can bring it into being.

[4] For Queen's Counsel, the only way this could be done other than by incorporation under the Companies Act was by way of a statute from the legislature. The statute must have the magic words (or similar words) 'it is hereby established' an entity which shall be known as the Assets Recovery Agency. Then once established, legislation can give to this agency any powers it wishes.

[5] Counsel also submitted that when one examines section 3 of POCA one sees that it refers to the Financial Investigation Division ('FID') of the Ministry of Finance and Planning and that division is not a legal person. It is simply a department with in a government ministry; an administrative creation.

[6] Mr Wilkinson went further to say that when one looks at other statutes such the Administrator General's Act, the Children (Adoption) Act, the Executive Agencies Act, one sees language that leaves no doubt that the particular entity has legal status and is able to sue and be sued. This has not happened in the case of ARA.

[7] Learned counsel concluded by saying that there is no statute creating ARA and it has not been designated an executive agency under the Executive Agencies Act.

[8] Mr Anthony Pearson adopted the submissions of Mr Wilkinson so far as they benefitted his clients. He further submitted that it is not clear which entity could be described as ARA. Section 3 (1), he submitted, said that it could be either FID or any entity so designated by the Minister.

[9] Mrs Roxann Mars also adopted the submissions and added that the issue is not so much whether powers have been conferred by POCA on ARA but rather whether ARA was properly established by statute.

[10] These submissions were stoutly resisted by Mrs Nateline Robb Cato. Her submission was to the effect that it is not true to say that ARA must be established in the way suggested by Mr Wilkinson before it can act. What is required is that there is some entity that can fill the definition, so to speak, of ARA and once that is done then the entity, using the name ARA can exercise the powers under POCA.

[11] Mrs Robb Cato also submitted that whatever might have happened in times past, where we are now in 2013 is that the Financial Investigations Agency is now a legal entity under the Financial Investigations Divisions Act ('FIDA'). This being so, the FID (there is an 's' added to 'Investigations' under FIDA which is absent from section 3 (1)

(a) of POCA) is now the ARA under POCA. She also submitted that under POCA, ARA has power to sue and be sued and can exercise all the powers given to it.

The relevant provisions of POCA

[12] Section 2 (1) of POCA states that 'Agency' means the Asset Recovery Agency referred to in section 3. Section 3 (1) says that 'Assets Recovery Agency' means (a) the Financial Investigation Division of the Ministry of Finance and Planning; or (b) any other entity so designated by the Minister by Order.

[13] None of these provisions, it is said, stated that it is hereby established an agency known as the Assets Recovery Agency which is a corporate sole or shall have the power to do a number of things consistent with it being a legal person.

The relevant provisions of Financial Investigations Division Act, 2010

[14] On March 31, 2010, FIDA received the assent of the Governor General. It came into force on April 19, 2010. Sections 2 (1) and 4 have important definitions. Section 2 (1) states that division means the Financial Investigations Division established under section 4. Section 4 says that it is 'hereby established for the purposes of this Act, a department of Government to be known as the Financial Investigations Division.' Whatever might have been the position before April 19, 2010, the fact is that the Financial Investigations Division is now a statutory entity. Parliament can give that entity powers under any statute subject, as always, to the Constitution.

The connection between POCA and FIDA

[15] As far as is known this division is under the Ministry of Finance and Planning. POCA states in section 3 (1) that the ARA is the Financial Investigation Division or any other entity so designated by the Minister. There is no evidence that the Minister has

designated any other entity so that means that under POCA, the only entity which can be called ARA is the Financial Investigations Division established by FIDA.

[16] The entity described under POCA to recover assets is ARA. That is its nomenclature. Parliament has said that the ARA can be the FID. Under POCA, ARA can apply for forfeiture orders (section 5) and apply for pecuniary penalty orders (section 5). ARA is also the enforcing authority for the purposes of applying for civil recovery orders under Part IV of POCA.

[17] It seems to this court that the legislature opted for the ARA name and determined that it would apply to any entity acting under POCA. Thus once the entity is acting under POCA then it is called ARA regardless of what it is otherwise called.

[18] The current application for restraint orders was brought in 2013, three years after FIDA came into force. It is difficult to contend in 2013 that the FID is not now a legal entity. It has statutory footing and has been authorised to do many things that a legal or natural person can do.

[19] When acting under POCA, ARA has significant powers. When one looks at the First and Third Schedules to POCA it is obvious that the legislature intended that whichever entity is designated as ARA, then that entity should be able to borrow money, sell property, start, carry and defend legal proceedings in respect of property, enter into a compromise or other legal arrangement in connection with property and manage property generally.

[20] The proposition that ARA is not a legal entity is to misunderstand the statute. The statute was not creating ARA. What it was doing was giving power to any entity that met the label of either being the FID or any other entity designated to use the powers under POCA. Parliament may have chosen an unusual way to go about achieving its purpose. That does not make it bad. What is important is to determine whether what has been enacted can be sensibly interpreted. We are long past the era of the seventeenth to the nineteenth centuries where judges thought that the common

law was adequate and only to be tinkered with by the legislature occasionally. This judicial conception of the law and the role of the legislature led to a very restrictive interpretation being given to statutes. Judges saw the legislature as an interloper who should be chased off the legal common law reservation or at least kept within a narrow area of the reservation.

[21] In the modern world, judges now recognise and accept that a democratically elected Parliament in a constitutional democracy is empowered to pass laws for good governance and provided that they are compatible with the constitution, then judges should employ a purposive interpretation in order to give effect to the policy reflected in the statute. There are many areas now governed by legislation that were unknown to the common law. The common law was largely predicated on application to matters within the geographical boundaries of the country. The modern world now requires legal powers to deal with matters such as international organised crime and its links with criminals in the geographical boundaries of any particular state. This reality requires the modern nation state to pass laws and introduce concepts unknown to the common law. Judges no longer look for flaws in order to neuter the statute. The purposive interpretation authorises judges to apply common sense to ensure that the statute works provided of course that the words used are capable of carrying out the objective of the statute. Sometimes the objective is clear but the wrong words were used. That is not the case here.

[22] What was done here is no different from what was done under the Mutual Assistance (Criminal Matters) Act where an entity referred to as the Central Authority is authorised to carry out a number of statutory functions. That statute did not say that there shall be a body called the Central Authority or use words of establishment or even called it a body corporate. What that statute did was to say that the relevant Minister or any other person designated by him could conduct the activities required under that statute.

[23] This way of legislating is to give the political executive greater flexibility in managing the affairs of the country. Gone are the days when every single thing must

be spelt out in primary legislation which could only be changed by an Act to amend that legislation. Increasingly, because of the increased complexity of governance and the need to respond to developments quickly, a statute may establish that an entity designated under a statute may exercise specific powers and leave it to the relevant Minister to say which entity will bear the name stated in the legislation and enforce or operate the statute. This is faster and more efficient.

[24] Mr Wilkinson sought to say that the legislature should have or may have followed the English POCA which says that the similar agency is a 'corporate sole.' In view of this court that was not necessary and it very much depends on what powers the legislature intended to give to ARA. Under the Jamaican Interpretation Act to say that an entity is a body corporate is shorthand for giving it all the powers listed in section 28 of the Interpretation Act. It may be that the legislature did not wish to give ARA the full set of powers involved in designating an entity as a body corporate. Parliament had a choice. It may have said that the entity is established and then identify the specific powers given to it. It may have said the entity is a body corporate but cannot carry out some functions and list what they are. It may, as was the case here, indicate that ARA has certain powers under POCA and which entity is designated as ARA shall have these powers when litigating as ARA.

[25] Indeed when looking at section 3 (1) of POCA it is entirely possible that the Minister may designate a body other than FID as ARA. This does not create the spectre of multiple ARAs as suggested by Queen's Counsel. Indeed the internal logic of the statute and the Schedules to the statute do not contemplate more than one ARA at any point in time.

[26] The First Schedule says that the Director of ARA is to exercise his functions best calculated to contribute to the reduction of crime. There is provision for a seal. It could hardly be contemplated that there would be multiple contemporaneous ARAs each with its own seal. ARA is also given powers to borrow money, prepare annual accounts and submit them to the relevant Minister. Clearly, the legislature could hardly

have contemplated that these functions would be carried by multiple entities at one and the same time.

[27] Mr Wilkinson even suggested that if the court were to order costs or a person wished to bring contempt proceedings against ARA there would be great difficulties because it would not be known who would be the person to be held accountable. That problem has been solved. Section 3 (2) of POCA states that the Chief Technical Director of FID or if there is any other entity then the person in charge of the operations of that entity is the Director of ARA. There is an identifiable office holder who is in charge of ARA. In addition, ARA is given power to litigate. It must necessarily follow that ARA can be subject to contempt proceedings and where necessary the person in charge held accountable. There is no accountability gap.

[28] Finally, learned Queen's Counsel raised the issue of the name under which FID is litigating. There is no problem here for the court. If FID is using powers under POCA then it is ARA. If using powers under FIDA then it is FID. Having said this, the court recognises that section 3 (4) of POCA states that ARA shall have all functions conferred by POCA or any other enactment. Section 3 (4) goes further to say that ARA may do anything 'that is appropriate for facilitating or is incidental to, the exercise of its functions.' The aim here is to say that all powers necessary for ARA to function are implied where those powers are not explicitly stated in POCA or any other enabling statute.

[29] The current application for restraint orders was brought in 2013, three years after FIDA came into force. It is difficult to contend in 2013 that the FID is now not a legal entity. It has statutory footing and has been authorised under POCA to enforce that statute. It therefore can do many things that a legal or natural person can do. These matters are spelt out in the statute and will also include any unstated power provided that that power is necessary to enable it to carry out its statutory duties. This latter point applies even if section 3 (4) was not present in POCA. Section 3 (4) was simply designed to stop the mouths of naysayers arguing that a particular power was not expressed so ARA does not have that power.

Disposition

[30] The real issue is not whether the legislature could have gone about the matter differently but rather whether what was done is legally sufficient. This court has concluded that it is and the preliminary point is dismissed.