



[2014] JMSC Civ. 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 02120

BETWEEN	THE ASSETS RECOVERY AGENCY	CLAIMANT
AND	AUDRENE SAMANTHA ROWE	FIRST DEFENDANT
AND	ANDREW SITAL ROWE	SECOND DEFENDANT
AND	CHAMEN ANDREA LEWIS	THIRD DEFENDANT
AND	BASIL JEFFREY GALLIMORE	FOURTH DEFENDANT

IN CHAMBERS

Charmaine Newsome and Susan Watson Bonner for the claimant

**Yualande Christopher Walker instructed by Yualande Christopher & Associates
for the first and second defendants**

NOVEMBER 5, 2013, JANUARY 15 and 24, 2014

**APPLICATION FOR DISCHARGE OF RESTRAINT ORDER – ABUSE OF POWER –
CIVIL RECOVERY UNDER POCA - SECTIONS 32, 33, 34, 84, 85, 86, 87, 88, 119,
120, 121 OF THE PROCEEDS OF CRIME ACT – SECTIONS 2 AND 17 OF THE
FINANCIAL INVESTIGATIONS DIVISION ACT**

SYKES J

- [1]** This is the written reasons for judgment following delivery of decision on January 15, 2014. The Assets Recovery Agency (ARA) secured restraint orders over a number of real and personal properties including a red 2002 Lexus ES 300 motorcar which has Miss Audrene Samantha Rowe (ASR) as the registered owner. In the application for the restraint order, the ARA stated that money laundering and civil recovery investigations had commenced in Jamaica in respect of the four named defendants and the properties in question. A claim form for a civil recovery order has been filed.
- [2]** Miss ASR feels hard done by and is strongly of the view that the restraint order was improperly obtained. In keeping with this view, she has applied for the order to be discharged in its entirety and if that fails, that it be varied to exclude the Lexus. The basis of this application is that she has mounting legal and living expenses and thus the car is needed to meet those expenses. The basis was not supported by affidavit evidence but simply by counsel's words. ARA, naturally, resists the application.
- [3]** In addition to the basis stated in the immediately preceding paragraph, Mrs. Christopher Walker, counsel for ASR, submitted that section 32 of the Proceeds of Crime Act (POCA) was not properly applied at the time when the restraint order was granted and thus there is a fundamental and fatal flaw which puts an end to the order. Learned counsel submitted that (a) ARA had not made out a good arguable case for the grant of a restraint order and so the order should be vacated; and (b) there was an abuse of power by ARA in that it relied on information procured under section 17 of the Financial Investigations Divisions Act (FIDA) thereby depriving Miss ASR of the protection she would have had under POCA had the information relied on been secured using a customer information order (cio) under sections 119 to 121 of POCA.

The allegations

- [4]** It is necessary to set out the allegations made by ARA when it applied for the restraint order. The evidence before the court comes from the affidavit of Mr Lincoln Johnson, an investigator assigned to the Financial Investigations Division (FID). It should be pointed out that he has exhibited statements obtained from a number of persons including Miss ASR. The narrative about to be given comes from the body of the affidavit and the statements exhibited.
- [5]** There are four main persons mentioned in the narrative. These are Mr Gauntlet Linton Gallimore (GLG), deceased (murdered on September 6, 2008 in Exchange, St Ann); Miss ASR, girlfriend of Mr GLG; Mr Basil Gallimore (BG), the father of Mr GLG and Miss. Chamen Lewis, childhood friend of Miss ASR.
- [6]** In a statement exhibited to Mr Johnson's affidavit given by Miss ASR, in the presence of an attorney at law, Miss ASR stated that she met Mr GLG sometime in 2002. A relationship commenced and he became her paramour. In 2004, she began receiving cash in the form of British Pounds Sterling from Mr GLG which she placed in an account at a financial institution, on the advice of Mr GLG, who told her he did not want to have the money placed in his name. Some of the money was physically transported, across international borders, by couriers alleged to be friends of Mr GLG, from the United Kingdom to Jamaica. Other sums came through money remittance services. According to Miss ASR, he did not say why he did not wish to have the money in his name. It appears that she did not ask.
- [7]** Miss ASR continued by saying that when the money got to a certain sum she desired to purchase a house. She communicated her desire to Mr GLG who readily agreed. Miss ASR identified the property to be bought which was in Exchange in the parish of St Ann. The sale price was £83,000.00. According to her, Mr GLG further advised that the property should be purchased in the name

of Mr Andrew Sital Rowe, brother of Miss ASR. Miss ASR added that she was advised by an agent that it would be better to have two names placed on the title rather than one. This was done. The property purchased was bought in the names of Miss ASR and her brother, Mr Andrew Rowe. It is property registered at volume 1209 folio 295 of the Register Book of Titles.

[8] Miss ASR stated that Mr GLG at one point had a blue BMW 6 series motorcar registered in the name of Miss Chamen Lewis. This is how it came to be registered in Miss Lewis' name. This account is from the statements of Miss Lewis and Miss ASR. Miss Lewis is a self-employed hairdresser with her business place in Morant Bay, St. Thomas. Miss Lewis stated that she did not receive any money to conduct any business relating to the blue BMW and neither did she use any of her money to clear the car from the wharf. In other words, she did not contribute to the acquisition, importation and clearance of this motorcar. At no time did she meet Mr GLG in person. She spoke to him by phone when Miss ASR attended her beauty salon as a customer. It was during these hair-styling visits that Miss Lewis would exchange pleasantries, via the phone, with Mr GLG who would be speaking to Miss ASR when she was at Miss Lewis' salon.

[9] Miss Lewis stated that sometime in 2007, she was asked by Miss ASR to clear a car from the wharf. She went to the wharf with Miss ASR and signed a number of documents. About two months later Miss Lewis went with Miss ASR to the Morant Bay Collector of Taxes and completed an application form for the blue BMW to be registered in her name. Miss Lewis, in early 2008, used the BMW as collateral for a loan from the Bank of Nova Scotia. She alleges that she has been servicing the loan in accordance with her legal obligations.

[10] Miss Lewis filed an affidavit on January 7, 2013, stating that she has not attended court on previous dates because she has no desire to participate in the proceedings to contest the claims of ARA because (a) she cannot afford an attorney and (b) she has no interest in the car since she did not purchase the car with her own money and has no money invested in it.

[11] In respect of the Lexus, the information is that it was imported into Jamaica by PG Investments Limited of 224 Mountain View Avenue, Kingston 6 and was registered to Miss ASR. The supporting documentation suggests that the Lexus was imported into the island sometime in 2006 and it was purchased by Miss ASR from PG Express, presumably a separate entity from PG Investments Limited.

[12] In respect of a grey BMW 3 series motor car, the registered owner is Mr BG. Mr BG stated, in his statement, that he was asked by his son to clear this car for him. He added that he tried to tell his son that he was not interested in getting involved with clearing the car but his son prevailed on him and he, reluctantly, cleared the car. Mr BG indicated that he used his TRN, driver's licence and other documents to clear the car and register it in his name. Mr BG stated that he did not purchase the car in the United Kingdom, he did not use his own money to pay the duties and neither did he use his own money to licence and insure the car. All the monies were provided directly or indirectly by his son. Mr BG filed an affidavit on January 7, 2013 stating that he is not contesting ARA's action against the grey BMW and he does not wish to participate in the court proceedings.

[13] The investigations led to information that caused ARA to believe that Mr GLG was involved in a car-stealing enterprise. According to ARA it is believed that Mr GLG and others would steal high-value motor vehicles in the United Kingdom and ship them to Jamaica using fraudulent documentation.

[14] Mr GLG was not convicted in Jamaica or in any other country for larceny of motor vehicles. He was convicted, in the United Kingdom, of tampering with a motor vehicle and possession of false identity documents. He was deported to Jamaica on March 14, 2008.

[15] To summarise ARA's case, Mr GLG had his last known employment in Jamaica as a cook in Brown's Town, St Ann. He entered the United Kingdom illegally in or around the year 2002 and because of his illegal entry he was not entitled to work and so was not issued with a National Insurance Number. There is no legitimate source of income which would explain Mr GLG's ability to purchase the real property and any of the three vehicles mentioned above. ARA is asking the court at this stage to infer that the unlawful conduct is the car-stealing enterprise and from that activity monies were used to purchase the vehicles and the real estate.

[16] Miss ASR admitted in the statement that the money to purchase the house was provided by Mr GLG. The investigation so far suggests that Miss ASR has no source of legitimate or even illegitimate income that would explain her ability to purchase the real estate or any of the vehicles in questions. Mr BG has said that in respect of the car it was his son who provided the money to clear, insure and licence the grey BMW 3 series motorcar. He has also said he does not wish to participate in this action any more.

[17] Miss Chamen Lewis, likewise, has distanced herself from the purchase, shipping, clearing, licensing and insuring the blue BMW 6 series motorcar. The moneys were provided by Miss ASR.

[18] Mr Andrew Sital Rowe has no known source of employment or income. There is no evidence of any registered business bearing the name of Mr Andrew Sital Rowe which could provide a source of income. On the face of it Mr Andrew Rowe has no means to acquire the property in his name.

SECTIONS 32, 33 AND 34 OF POCA

[19] Section 32 of POCA authorises the court to grant a restraint order if any of the conditions stated in that section is satisfied. Section 33 empowers a judge of the Supreme Court to make a restraint order on a without notice (or ex parte)

application by the Director of Public Prosecutions or ARA if any of the conditions stated in section 32 (1) are satisfied. Section 34 authorises the court to vary or discharge a restraint order on the application of the person who applied for the order or any person affected by the order.

Should the restraint order have been granted?

[20] The restraint order in respect of the motor vehicles was granted by Sykes, J on a without notice application on May 28, 2012. Beckford J granted a restraint order in respect of the real property on July 20, 2012 and her Ladyship also granted a restraint order in respect of the same three motor vehicles which were already restrained by Sykes J.

[21] As far as has been determined the same information was before Sykes J and Beckford J. The affidavits filed by Mr BG and Miss Chamen Lewis were not before the judges at the time of the application for the restraint order but are now before the court.

[22] ARA, at the time of applying for the restraint orders, had filed a claim form seeking a civil recovery order under section 58 of POCA. Section 32 (1) (d) authorises a restraint order to be granted when an application has been made under section 58 of POCA and that application has not been determined.

[23] The case against Mr GLG, in substance, was that he was involved in unlawful conduct in the United Kingdom and that conduct was a crime in Jamaica and the property restrained came from that activity. It would be unlawful criminal conduct because of the definition of section 55 (1) of POCA which defines unlawful conduct in the following manner:

unlawful conduct means

(1) conduct that occurs in, and is unlawful under the criminal law of, Jamaica;

or

(2) *conduct that –*

- (a) *occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and*
- (b) *if it occurred in Jamaica would be unlawful under the criminal law of Jamaica*

[24] For present purposes, paragraph (b) is the relevant definition. It imposes a dual criminality requirement, that is, the conduct must be criminal, in this case, under United Kingdom law, and criminal under Jamaican law. Car-stealing, by whatever label is theft or larceny. The essence of it is taking the car without lawful justification and without the consent of the owner or the person entitled to immediate possession. The dual criminality requirement has been met. ARA is alleging that the properties in question are recoverable property because they were obtained from unlawful conduct. On this premise, the cars and the real property fall within what is called in POCA, recoverable property and therefore can be restrained for the purpose of making a civil recovery order.

[25] Mrs. Christopher Walker submitted that ARA has failed to make out a good arguable case for the grant of a restraint order. The expression 'good arguable case' is not found in section 32 of POCA. Learned counsel turned to regulation 6 of regulations made under POCA for assistance. The specific regulation deals expressly with the appointment of an interim receiver. This case is not dealing with the appointment of an interim receiver but rather the grant of a restraint order. Sections 32 – 34 deal with restraint orders and it is there that the court must start its enquiry. There is no need, therefore, to consider regulation 6 and nothing more will be said about it. However, that does not mean that the expression is of no value. It would seem to this court that there must be a good arguable case that the property in question should be restrained. This test strikes the right balance between ARA and the defendants in that it is greater than suspicion but does not rise to the level that would be required to be at trial.

[26] The reason for adopting this test of good arguable case is that section 56 of POCA states that the standard of proof to be used when deciding whether any matters alleged to be unlawful criminal conduct is on a balance of probabilities. It follows that the test for a restraint order is unlikely to be on a balance of probabilities because a finding that some fact is found to exist on a balance of probabilities is an assessment made at trial when the evidence is sifted, weighed and analysed and not at the interlocutory stage of proceedings. At the restraint order stage the allegations while not treated as conclusive are taken as prima facie true and unless there is something that shows that the allegations should not be accepted. In the instant case there is nothing to suggest that the allegations are untrue. It should be noted that Miss ASR has not presented any affidavit evidence to counter the allegations. This means that the task for Mrs. Christopher Walker would be even more difficult since she would have to show that conclusion desired by ARA was not supported by the material presented to the court. This has not been shown.

[27] Thus the allegations made against Mr GLG are taken as prima facie true and on that basis, the properties in question are recoverable property since they appear to be from unlawful criminal conduct. In coming to this conclusion the court is fully aware that a restraint order does not confer any property right on ARA and neither does it take any property right, legal or equitable, from anyone. The test of good arguable case forces ARA to move beyond suspicion to setting out allegations that do suggest that the property is property from unlawful criminal conduct and thus can be properly made the subject of a restraint order. On the face of it, Sykes and Beckford JJ properly granted restraint order.

[28] The court needs to address what appears to be a misconception on the part of counsel. Counsel submitted that ARA has not made any specific allegations of money laundering against Miss ASR. Respectfully, sections 55, 56, 57, 58 and 84 – 89 do not require that Miss ASR herself commits any money laundering offence. If such proof exists it makes the case stronger but it is not an

indispensable requirement of a recovery order under section 58 of POCA to show that any of the holders of the property allegedly derived from unlawful conduct committed any crime. Once the property can be traced and shown to be obtained through unlawful conduct then it can be made the subject of a civil recovery order unless the exceptions stated in section 88 can be established. Thus the holder of recoverable property need not have committed any crime from which the property came. He or she need not be a part of the criminal enterprise which engaged in the unlawful criminal conduct. The key is to keep one's eyes on what the statute actually says and not what it ought or should have said. This point is explored further below when dealing with the submission on lack of particulars.

Abuse of power

[29] Mrs. Christopher Walker sought to say that a production order should not have been granted under section 17 of FIDA. When it was pointed to her that this court could not consider that question and has to proceed on the basis that the learned judge who granted the production order acted properly, counsel quickly abandoned that position and submitted that it was an abuse of power to use that provision in order to evade the protection of section 121 of POCA.

[30] Learned counsel stated that by virtue of the Jamaican Court of Appeal's decision in **In the matter of an application for Customer Information Order Pursuant to section 119 of the Proceeds of Crime Act, 2007** [2013] JMCA Civ 34, there must be a conviction for an offence before ARA can secure a customer information order (cio). This is an order requiring financial institutions to hand over information about an account to ARA and this information may be used for a number of things including obtaining a restraint order. The argument was that the information secured under section 17 of FIDA was similar to or identical to information that could have been secured by a cio issued under POCA. Since the civil recovery order was an order obtainable under POCA then the investigative

powers under POCA must be used to obtain information for the for the civil recovery application and not other statute can be used. If ARA had used powers under POCA then it would have had to meet the legal standard enunciated by the Court of Appeal which was that there had to be a conviction before a cio could be granted. Since there is no conviction then it follows that ARA could not have obtained the order. With this realisation, ARA went to FIDA which had the consequence of evading the prior-conviction standard and thus abused its power. Since none of the defendants in the instant case has been convicted of any offence then a cio could not be obtained. In effect, counsel was submitting that POCA was a self-contained statute and once ARA embarked on its investigations under that statute it cannot use the powers under another statute to get a restraint order under POCA. To do otherwise would amount to an abuse of power and this is what has happened here. This court, it is said, should not countenance such conduct.

[31] Finally, on this point, Mrs. Christopher Walker submitted that section 17 of FIDA was directed at compelling the target of the investigation and not third parties to produce information and records. This is a difficult submission to sustain. The court has examined section 17 and looked at it in context of the entire statute and there is no reason to conclude that 'a person' in subsection (1) has the restricted meaning being suggested by counsel. The entire provision and the whole statute strongly suggest the contrary.

[32] In respect of the Court of Appeal's decision cited by counsel two difficulties arise. The first conceptual and the second practical. To deal with the first difficulty. If Mrs. Christopher Walker is correct that a conviction is necessary before a cio can be obtained under section 119 of POCA (when the cio is needed to secure information to facilitate a civil recovery order application) then what this would mean is that at the investigative stage, the criminal standard is required (because a conviction is indeed based on the highest burden of proof known to Anglo-Jamaican law) in a context where the final order (the civil recovery order)

only needs to meet the civil standard of proof. It is not common for a statute to require the criminal standard to be satisfied before an investigative tool (eg search warrants, production orders, monitoring orders and such like). It is not common in civil proceedings to require a standard of proof at the interlocutory stage that is higher than that required for a final order.

[33] In further support of this conceptual difficult reference is made to sections 55 (2) (g) and 56. Section 55 (2) (g) of POCA states that:

references to proving any matter or satisfying any Judge or court of any matter shall be construed as references to proof or satisfaction, as the case may require, on the balance of probabilities.

[34] Section 56 states:

(1) This Part has effect for the purpose of

(a) enabling the enforcing authority to recover, in civil proceedings before the Court, property which is, or represents, property obtained through unlawful conduct;

(b) ...

(2) The powers conferred by this Part are exercisable in relation to any property (including cash), whether or not any proceedings have been brought for an offence in connection with the property.

(3) The court mentioned in subsection (1) (a) or (b) shall decide on a balance of probabilities whether it is proved that

(a) *any matters alleged to constitute unlawful conduct have occurred; or*

(b) *any person intended to use any cash in unlawful conduct.*

[35] Two things are clear from these provisions. The civil recovery order is a civil proceeding and second, the standard of proof for the final order is on a balance of probabilities. From this premise it is extremely unlikely that POCA is to be read as requiring proof that someone has been convicted of an offence in order to secure a cio as part of investigations leading to an application for a civil recovery order. This court concludes that on a reading of the statute in its entirety and looking at various orders that can be made (investigative and confiscatory (including forfeiture orders)), the statute did not intend to confer any protection of the type suggested by counsel where a cio is applied for in support of a civil recovery order. If such protection exists (that is that there must be proof of a conviction of someone), then it may only exist in relation to applications for a cio in respect of forfeiture and money laundering investigations. Forfeiture proceedings are conviction based and money laundering is a crime under POCA. There is no rational reason for requiring a conviction before a cio or indeed any investigation tool in support of a civil recovery order should have a criminal conviction a precondition.

[36] If Mrs. Christopher Walker is correct then the practical outcome of her submission is that sections 119 – 121 of POCA could never ever be used to secure a cio where the only known person who has committed the criminal offence is not amenable to criminal process because he has died or cannot be brought before the court. There would never ever be a conviction. This would mean that the impossibility of securing a conviction would have the consequence

that ARA could never get a cio even if there is clear and irrefutable evidence that a crime has in fact been committed and the property has clearly and directly come from the crime. Worse, it may be argued that in these circumstances ARA could not rely on section 17 of FIDA. Thus all that would be necessary to bring civil recovery proceedings to a halt forever and a day is for the alleged criminal to fake his death or put himself beyond the reach of prosecution.

[37] In the case relied on by Mrs. Christopher Walker the Court of Appeal itself pointed out at [27], the appeal was limited to an application for a cio in forfeiture and money laundering investigation. In this case it was needed for a civil recovery application. The Court of Appeal approved the reasoning of the first instance judge which was to the effect that since it was a money laundering and forfeiture investigation that was being carried out then the 'suspect' should either be convicted or prima facie shown to have committed an offence. It has already been pointed out that in respect of a civil recovery order, there is no suspect but rather property that is targeted and so there is no requirement that any suspect be identified. On this basis the present case can be distinguished and so the necessity to have a conviction of someone is avoided. Finally, it is unlikely that the Court of Appeal was suggesting that a conviction for an offence was needed before a cio could be obtained in a civil recovery investigation.

[38] For these reasons, this court does not share learned counsel's view that a person must be convicted before a cio can be obtained where the claim before the court is for a civil recovery order. If this is correct, then had sections 119 to 121 been used the prior-conviction standard would not arise and so thus there would be no protection in existence which would be denied Miss ASR.

[39] The matter, however, does not end there. The question of misuse of powers under a statute was considered by the House of Lords in **Regina v Southwark Crown Court, Ex parte Bowles** [1998] AC 641. The issue was whether the police could use powers under statute A to conduct enquiries into offences under statute B. In the factual circumstance of that case it was found that the police had

used statute A in order to carry out a purpose under statute B and therefore there was an abuse of power. It is important to see what principles emerged from the case. A number of principles can be derived from the reasoning and analysis of the House. These are:

- (1) the general rule is that where a statute grants powers to the police or an investigative body then the statute cannot be used for a purpose not covered by the statute;
- (2) if it turns out the particular statute can serve two more purposes then the court needs to be clear that the dominant purpose is that of the statute which is being utilised;
- (3) if the true and dominant purpose of the statute is being met then the fact that it may facilitate or further an objective outside the statute is not a sufficient reason for denying the authorities use of the statute under which they are acting;
- (4) if, on close examination, it turns out that the true and dominant purpose of relying on one statute is to use the information under another statute then the authorities should be prevented from using the statute under which it purports to act.

[40] Miss ASR cannot derive any support from these propositions because there is no evidence to suggest that ARA acted improperly. The production order was not placed before the court so that it could be determined which court issued it and as noted above no affidavit from any of the respondents was placed before the court in support of Miss ASR's application. It is not entirely clear from the submissions whether the section-17 order was made by a judge of the Supreme Court or a Resident Magistrate (either court may make an order under section 17 of FIDA). If the order was made by a judge of this court, then the further question

would be whether the complaint here should be pursued by way of an appeal or is it sufficient to rely on the fact that the order was made without notice and in that sense was provisional only. It is the view of this court that the nature of the challenge to section-17 order can only be pursued by way of an appeal. It is not being said that the information presented to secure the production order under section 17 of FIDA was inaccurate, misleading or incomplete. It is not being said that there are now additional facts which if known at the time would have led to a different order given that the application was made ex parte. This court has to proceed on the basis that the judge of the Supreme Court, if the order was granted by the Supreme Court, acted in accordance with legal principles outlined in **Southwark** and was satisfied that the order should be granted. The same assumption has to be made if the order was granted by a Resident Magistrate. If the order was made by the Resident Magistrate then the matter can only be addressed by judicial review since the Resident Magistrate would be subject to the supervisory jurisdiction of the Supreme Court. The challenge based on abuse of power fails.

Lack of particulars

[41] Mrs. Christopher Walker submitted that the allegations of car-stealing lacked specificity. In particular it was said that the following was absent:

- a. dates and times and manner by which Miss ASR committed money laundering offences;
- b. the maker of the 'information' on which ARA relies;
- c. the names of the several persons who were arrested in Jamaica for their involvement in a motor car stealing ring;
- d. the dates of arrest and the charges laid or convictions of these persons;

- e. details and documentary evidence of the car stealing ring alleged;
- f. whether the motor cars alleged to have been stolen are the same cars which form the subject matter of the claim for civil recovery;
- g. full details of where the cars were stolen in the United Kingdom;
- h. details and copies of the fraudulent documentation used to ship the vehicles to Jamaica.

[42] This submission ignores the definition of 'property obtained through unlawful conduct' in section 55 (1) of POCA and does not take account of how the civil recovery system is intended to work. The definition of 'property obtained through unlawful conduct' is

'property obtained directly or indirectly by or in return for or in connection with unlawful conduct, and for the purpose of deciding whether any person obtains property through unlawful conduct –

(1) it is immaterial whether or not any money goods or services were provided in order to put the person in a position to carry out the conduct;

(2) it is not necessary to show the particulars of the conduct.

[43] This provision anticipated the submissions made by learned counsel. There is no need for ARA to prove the particulars as would be required in a criminal prosecution. It was held by Sullivan J in **Director of the Assets Recovery Agency v Green** [2005] EWHC 3168 (Admin), under similar legislation in England, that the director need not prove or allege the commission of any specific criminal offence. This position applies equally to the legislation in

Jamaica. In addition, there is the case of **Serious Organised Crime Agency v Gale** [2009] EWHC 1015; [2010] Lloyd's Rep FC 39 where Griffith Williams J held that notwithstanding the discontinuance of criminal proceedings in Spain and the defendants acquittal in Portugal, it is was permissible to proceed with the civil recovery application in the United Kingdom. Griffith Williams J granted the order. It was upheld by the Court of Appeal [2010] 1 WLR 2881 and the House of Lords [2011] 1 WLR 2760; [2012] 2 All ER 1. The Court of Appeal expressly stated that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. The statute in question expressly provided for this and so too does the Jamaican statute. It was also pointed out that the civil recovery proceeding is directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof. This last finding from the English Court of Appeal describes precisely how the civil recovery system under POCA in Jamaica is intended to work. ARA need not prove a criminal conviction of anyone. All ARA has to do is to establish on a balance of probabilities unlawful conduct occurred and that the property targeted was 'property obtained through unlawful conduct.'

[44] Another case that indicates how the civil recovery system is intended to work is that of **Director of the Assets Recovery Agency v Szepletowski** [2007] EWCA Civ 755; [2008] Lloyd's Rep FC 10 Moore-Bick LJ held at para 106:

When deciding what the Director must prove it is important to bear in mind that the right to recover property does not depend on the commission of unlawful conduct by the current holder. All that is required is that the property itself be tainted because it, or other property which it represents, was obtained by unlawful conduct. ... It is important, therefore, that the Director should be required to establish clearly that the property which she seeks to recover, or other

property which it represents, was indeed obtained by unlawful conduct.

And at para 107:

In order to do that it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances, and that the property was obtained by or in return for it. *In my view Sullivan J. was right, therefore, to hold that in order to succeed the Director need not prove the commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion. Nonetheless, I think it is necessary for her to prove that specific property was obtained by or in return for a criminal offence of an identifiable kind (robbery, theft, fraud or whatever)... (emphasis added)*

[45] The point then is that ARA need not give or prove particulars of any specific crime but must adduce, at trial, evidence of criminal activity, that is to say, conduct which constitutes an offence and such proof is on a balance of probabilities. When the evidence is adduced then the court making the final adjudication will decide whether the conduct in fact and law constitutes an offence and this is done without proof of specific dates, specific times and specific persons. If this is so at the final hearing for a civil recovery order then clearly a higher standard could not be required at the application for a restraint order at the pre-hearing stage of proceedings.

Should the restraint order be varied?

[46] It is important to observe that a restraint order does not deprive the holder or registered owner of property of any of his rights in or over the property until the

final hearing takes place and a ruling is made in favour of the state. Despite the apparent strength of ARA's case, it has not been tested by cross examination or subjected to close scrutiny that would be expected in a final hearing. It follows that the court cannot treat ARA's case as conclusive of the case.

[47] Miss ASR has not filed any affidavit outlining what her expenses are. It is true that section 33 (4) of POCA states that the order may make provision for reasonable living expenses and reasonable legal fees. It is difficult to vary the order in the absence of information on the issue of reasonable living expenses or reasonable legal fees. Based on the information presented, Miss ASR lives in the United States of America and it appears that she has been there for some time. This would suggest that she has the means of maintaining herself while there.

[48] Until shown otherwise, the court has to assume that she is there legally and has the means to sustain herself. From all appearances, given the absence of any affidavit from her, it appears that Miss ASR can meet her expenses, legal and living and consequently it appears that she has a source of income from some source which must be presumed to be legitimate until shown otherwise.

[49] The case for varying the restraint order has not been established. The fact that a restraint order does not deprive the property holder of any right in or over the property does not mean that an application for variation is granted as a matter of course. The restraint order is to preserve the asset so that it is available to meet any order made by the court. There ought not to be any variation where there is a strong suggestion that the applicant is capable of meeting the living and legal expenses from other sources.

Disposition

[50] The application to discharge the restraint order is dismissed. The alternative application to vary the restraint order is dismissed. It is declared that the use of

section 17 of FIDA in the context of this case is not an abuse of power. Leave to appeal granted.

