



[2014] JMSC Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV 04018

**IN THE MATTER OF AN APPLICATION BY
THE ASSETS RECOVERY AGENCY FOR A
RESTRAINT ORDER PURSUANT TO
SECTION 32 & 33 OF THE PROCEEDS OF
CRIME ACT, 2007**

BETWEEN	ASSETS RECOVERY AGENCY	APPLICANT
AND	CONROY ROSE	FIRST RESPONDENT
AND	KHARLA ROSE	SECOND RESPONDENT
AND	LOLA BENNETT	THIRD RESPONDENT

Charmaine Newsome and Susan Watson Bonner for the applicant

**Marva Hanson Bennett instructed by Althea McBean and Co for the third
respondent**

January 23 and February 6, 2014

RESTRAINT ORDER – SECTION 32 OF THE PROCEEDS OF CRIME ACT

SYKES J

- [1] The application by the Assets Recovery Agency ('ARA') to extend the restraint order was dismissed and leave to appeal refused. On January 23, 2014 oral reasons were given with a promise to provide written reasons. These are the written reasons.
- [2] In July 2012 the Supreme Court, acting under section 32 of the Proceeds of Crime Act ('POCA') granted a restraint order in respect of accounts held at two financial institutions in Jamaica. No claim form was filed at the time and none has been filed since. The matter was thereafter fixed on various dates for further consideration.
- [3] ARA's case is that Mr Conroy Rose and Mrs Kharla Rose were charged with possession of criminal property and money laundering in Canada. Mr Rose has pleaded guilty to drug related charges. It is believed that the Roses were taking money derived from drug trafficking in Canada and depositing it in Jamaican financial institutions. It is also believed that Mrs Rose was the actual courier of the money and she would deposit sums of money into the accounts on her visits to Jamaica.
- [4] ARA states in its supporting affidavit that the money in Jamaica is 'deemed to be recoverable property' (para. 20 of affidavit). The wording suggests that ARA is not contemplating any conviction-based method of taking the money. If this is correct then it means that the restraint order cannot be maintained on the basis of section 32 (1) (a), b or (c), which requires that there be either a conviction or a criminal investigation into an offence in Jamaica or that proceedings for the offence have commenced in Jamaica and are not concluded. This leaves section 32 (1) (d) which is based on either an application for a civil recovery order or there is a basis for the court to believe that such an application will be made.

- [5] In respect of a possible civil recovery order application, the additional information was placed before the court. Mr Conroy Rose was charged in February 2008 with possession of and trafficking in cocaine as well as possession of the proceeds of crime. He was convicted in 2009. His subsequent appeal was dismissed.
- [6] In July 2010 Mr Rose was charged with trafficking in cocaine and possession of the proceeds of crime. In February 2011 he pleaded guilty to drug related offences and was sentenced.
- [7] In October 2010, Mr Rose was charged with three counts of possession of the proceeds of crime.
- [8] In August 2010 the Roses were charged with one count of possession of the proceeds of crime and money laundering.
- [9] To summarise, Mr Rose charged with either drug related offences or possession of the proceeds of crime for times between 2008 and 2010. In respect of two of the four times he was charged, he pleaded guilty twice.

The analysis

- [10] While section 32 grants the power to issue a restraint order, section 32 (3) says that the requirements of section 32 (1) (d) are not met if there is undue delay in continuing the application. This is one of the built in mechanisms by which the processes of the statute are policed.
- [11] A restraint order is not a cause of action. It is ancillary relief in support of an ultimate goal which is either a conviction-based pecuniary penalty order or a civil recovery order. Having regard to the allegations and all the circumstances there is no suggestion that ARA is thinking of prosecuting the Roses in Jamaica and so section 32 (1) (a), (b) and (c) cannot be relied on for the continuation of the restraint order.

[12] So far as section 32 (1) (d) is concerned no claim has been filed. It is now nearly two years since the restraint order was granted. Miss Newsome submitted that ARA intends to file a claim form seeking a civil recovery order and the court should grant more time. It was also submitted that there is a current trial involving the Roses in Canada that is nearing completion and the court should await that determination. It was also said that since this case transcends international borders and there is active cooperation between Jamaica and Canada, the restraint order should be extended to facilitate further dialogue which should produce more information. Finally it was suggested that no time limit was stated in the statute so there is really no statutory basis for saying there has been undue delay even though, admittedly, there has been some delay.

[13] The court disagrees with counsel. As noted earlier the grant of a restraint order is not an end in itself but a means to an end. Whenever a restraint order is applied for there must be some clear ultimate conclusion in mind. That ultimate conclusion must either be a conviction-based order or a civil recovery order. While it is true that section 32 (1) (a) (i) permits some latitude in the grant of restraint orders, that is to say a restraint order may be granted at the investigative stage and before anyone has been charged a proper appreciation of that provision makes it clear that the applicant for the restraint order must be saying that he has reasonable cause to believe that an alleged offender has benefited from his criminal conduct and either (a) a criminal investigation has been started in Jamaica with regard to the offence; or (b) proceedings have commenced and have not ended or (c) an application for any of the conviction-based orders has been made and it is still outstanding or the court believes that an application for such an order is to be made. ARA's case is not premised on this approach. It is not seeking a conviction-based order. This court has stated elsewhere that for the conviction-based orders to be available to ARA those convictions must be by a Jamaican court (**ARA v Fogo** [2014] JMSC Civ.10). If that is not the case then the only other type of order that can be made is a civil recovery order.

[14] POCA is not intended to be a type of mutual legal assistance through the back door. The purpose of POCA is to take (a) away the benefit derived by a convicted person from criminal activity and (b) the property that is connected to criminal activity in circumstances where the person may not have been convicted or cannot be prosecuted for a variety of reasons. POCA is not directed at the profits of criminal enterprises or career criminals but a benefit. Indeed the offender may have made a loss on his criminal activity. ARA must use POCA for its intended purpose. There is more than a hint here that the restraint order was granted to hold the property pending conclusion of the proceedings in Canada. This is not POCA's objective. If there is a need to restrain property on behalf of a foreign state then the Mutual Legal Assistance (Criminal Matters) Act is the route to go. There is more than ample provision for the registration of foreign restraint orders which on registration have effect as if they were issued by a Jamaican court.

Disposition

[15] The extension of the restraint order is refused because there has been delay in taking the matter forward since 2012. ARA was awaiting outcome of proceedings in Canada before moving forward. POCA is not designed to facilitate mutual legal assistance but rather to assist Jamaican law enforcement agencies in taking the benefit from criminal activity as well as property derived from criminal activity.

Order

[16] Application to extend order is refused. Costs to the third respondent to be agreed or taxed. Application for leave to appeal refused.