[2024] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

APPLICATION NO COA2023APP00301

BETWEEN	**ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**ANDREW PAUL HAMILTON**	**1ST RESPONDENT**
AND	**SAMAR DAVIS**	**2ND RESPONDENT**
AND	**AKAYLA PARIE HAMILTON**	**3RD RESPONDENT**
AND	**LOUISE ANNE MILLER**	**4TH RESPONDENT**
AND	**GEORGE BERNARD LYNCH**	**5TH RESPONDENT**
AND	**MAURICE ANTHONY CHIN SHUE**	**6TH RESPONDENT**
AND	**TAMAR GAYLE BERGER**	**7TH RESPONDENT**
AND	**JONATHAN CLIFTON BROWNING**	**8TH RESPONDENT**
AND	**MAURICE HASKILL**	**9TH RESPONDENT**
AND	**WEBSTER CAMPBELL**	**10TH RESPONDENT**

AND

APPLICATION NO COA2024APP00038

BETWEEN	**ANDREW HAMILTON**	**1ST APPLICANT**
AND	**WEBSTER CAMPBELL**	**2ND APPLICANT**
AND	**ASSETS RECOVERY AGENCY**	**RESPONDENT**

Mrs Caroline P Hay KC, Zurie Johnson and Ms Shannon Young instructed by Caroline P Hay for the applicant/respondent
Lenroy Stewart instructed by Wilkinson Law for the 1st and 10th respondents/1st and 2nd applicants

8, 9, 12 April and 8 November 2024

Civil Procedure - Applications for extension of time within which to apply for leave to appeal - Applications for leave to appeal - Applications for stay of execution of judgment and order - Relevant principles of law - Court of Appeal Rules, 2002 and the Supreme Court of Jamaica Civil Procedure Rules, 2002

DUNBAR GREEN JA

[1] On 8 and 9 April 2024, we heard two applications which arose from the same proceedings. The first was an amended application filed by the Assets Recovery Agency (No COA2023APP00301) ('the ARA application'), on 21 February 2024, for three reliefs: (i) extension of time within which to apply for leave to appeal; (ii) leave to file notice and grounds of appeal against Order 2 of the orders contained in the judgment of Jackson-Haisley J ('the learned judge') delivered, on 11 August 2023; and (iii) reinstatement of the restraint order of Nembhard J, made on 11 November 2020. During oral arguments, "a stay of enforcement of Order 2, pending determination of the appeal" was sought in the alternative to the reinstatement of the restraint order.

[2] Order 2 and the restraint order were made in respect of certain parcels of real estate against which the ARA claimed civil recovery under the Proceeds of Crime Act ('POCA') ('the properties').

[3] The grounds of the ARA application were that (i) section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act stipulates that leave is required to appeal against an interlocutory judgment or order; (ii) the order being appealed is interlocutory in substance; (iii) under rule 1.8(1) of the Court of Appeal Rules ('CAR') an application to apply for permission to appeal must be made within 14 days of the order being appealed; (iv) the ARA was denied leave to appeal by the learned judge, in the mistaken belief that her judgment was final in substance; and (v) the appeal has a real chance of success.

[4] The second application (No COA2024APP00038) ('the 1st and 10th respondents' application') was filed on 22 February 2024 by the 1st and 10th respondents ('Andrew Hamilton'/'the 1st respondent' and 'Webster Campbell'/'the 10th respondent'). They sought an extension of time within which to apply for leave to appeal, leave to appeal "the judgment/decisions" (specifically, Order 1 of the learned judge's orders), and a stay of execution of the "the judgment/decisions" of the learned judge. The grounds of this application were like those relied on by the ARA.

[5] On 12 April 2024, after hearing the applications, we made the following orders, with a promise of written reasons to follow:

Order on the ARA's application

> "(i) Extension of time in which to apply for permission to appeal and permission to appeal are granted.
>
> (ii) The enforcement of Order 2 is stayed pending the determination of the appeal.
>
> (iii) The ARA is permitted seven days within which to file and serve notice and grounds of appeal.
>
> (iv) Costs of the application to be costs in the appeal."

Order on the 1st and 10th respondents' application

> "(i) Extension of time within which to apply for permission to appeal and permission to appeal are refused.
>
> (ii) Application to stay the judgment of Haisley-Jackson J is refused.
>
> (iii) Costs to the ARA to be taxed or agreed."

Background

[6] These are the short facts that gave rise to the applications.

The ARA's claim in the Supreme Court

[7] Section 56 of POCA enables the ARA to recover, in civil proceedings before the Supreme Court of Judicature of Jamaica ('the court'), property which is or represents property obtained through unlawful conduct as defined in POCA. Under section 32, the court may make a restraint order if there is reasonable cause to believe that an alleged offender has benefitted from his criminal conduct.

[8] On 17 October 2019, pursuant to section 57 of POCA, the ARA brought civil proceedings against the 10 respondents, seeking civil recovery orders and a restraint order against several properties (itemised as 1-13 in Table 1 below).

[9] Reproduced here, for convenience, is Table 1, which sets out the properties and purported ownership:

Table 1- Real Property

No. #	Description of Property	Registered Proprietor (s)	Volume/Folio	Date of Acquisition	Consideration	Market or estimated Market Value
1.	Lot 2 Buena Vista, Mandeville Manchester	Andrew Paul Hamilton & Andrene Peta-Gaye Hamilton (deceased)	1415/617	07/12/2007	J$8,000,000.00	J$11,000,000.00
2.	Strata Lots 9, 19 and 21 Ballater Avenue, Kingston, St. Andrew	Samar Davis Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Paul Hamilton Jnr	1394/792	11/01/2007	USD$160,000.00	USD$600,000.00 Together with Items #3 and 4
3.	Strata Lot 4 of 19 and 21 Ballater Avenue, Kingston, St. Andrew	Samar Davis Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Paul Hamilton Jnr	1394/787	11/01/2007	USD$160,000.00	USD$600,000.00 Together with Items #2 and 4
No. #	Description of Property	Registered Proprietor (s)	Volume/Folio	Date of Acquisition	Consideration	Market or Estimated Market Value

4.	Strata Lot 5 of 19 and 21 Ballater Avenue, Kingston, St. Andrew	Samar Davis Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Paul Hamilton Jnr	1394/788	11/01/2007	USD$160,000.00	USD$600,000.00 Together with Items #2 and 3
5.	Strata Lot 8 of Ironshore and Hartfield Estates, St James	Louis Anne Miller of 2002 Steffi Avenue, Lawrenceville, GA, 30049, United States of America (Address believed fictional)	1421/677	04/04/2012	USD$320,000.00	USD$350,000.00
6.	Lot 43, Barbara Avenue, Bridgeport, Edgewater, Portmore, St. Catherine	George Bernard Lynch of 30035 Honeyway Street, Canoga Place, California 91306, United States of America (address believed fictional)	1100/257	04/01/2011	J$9,000,000.00	J$14,000,000.00
7.	Lot 1, 32 Caledonia Road, Mandeville, Manchester	Maurice Anthony Chin Shue of 122 Topscott Road, Scarborough, Ontario, MIB 3G7, Canada (address believed fictional)	1118/61	14/02/2011	J$29,050,000.00	J$35,000,000.00
8.	Lot 11 Fullerswood St Elizabeth	Louis Anne Miller of 2002 Steffi Avenue, Lawrenceville, GA, 30049, United States of America (Address believed fictional)	1152/445	14/01/2011	USD$250,000.00	USD$300,000.00
9.	Strata Lot 10 of Providence, Ironshore and Hartfield and parts of Lots 1087 and 1088B, St. James	Tamara Gayle Berger of 210-50 24th Avenue, Unit 20, Queens New York 11260, United States of America (address believed fictional)	1398/302	14/01/2011	J$30,000,000.00 Together with Item #11	J$35,000,000.00 Together with Item #11
10.	28 Caledonia Road, Caledonia, Manchester	Johnathan Clifton Browning of 2425 Strag Avenue, Bronx, New York, 10466, United States of America (address believed fictional)	1150/646	23/04/2012	USD$200,000.00	USD$250,000.00
No. #	Description of Property	Registered Proprietor (s)	Volume/Folio	Date of Acquisition	Consideration	Market or estimated Market Value

11.	Strata Lot 3 of Providence, Ironshore and Hartfield and part of Lots 1087 and 1088B, St James	Tamara Gayle Berger of 210-50 24th Avenue, Unit 20, Queens New York 11260, United States of America (address believed fictional)	1398/295	14/01/2011	J$30,000,000.00 Together with Item #9	J$35,000,000.00 Together with Item #9
12.	Lots 8 and 8A, Forest Hills, St. Andrew	Maurice Haskill of 8527 Walters Edge Drive, Stonemont, GA 30087, United States of America (address believed fictional)	976/666	14/01/2011	J$15,000,000.00	J$20,000,000.00
13.	Lot 49, Woodlawn, Mandeville, Manchester	Webster Campbell of 4430 Arizona Avenue, Los Angeles CA 90046, United States of America (address believed to be fictional)	1447/736	12/01/2011	USD$980,000.00	USD$1,200,000.00

[10] The proceedings against the 2nd respondent were brought in her name and in her capacity as trustee for minor children of Andrew Hamilton.

[11] The particulars of claim stated, among other things, that Andrew Hamilton: (a) engaged in unlawful conduct between 1998 and 2012, and was twice convicted for drug-related offences in the United States of America ('the USA'); (b) had pleaded guilty to the offence of conspiring to distribute marijuana and to launder money, and was sentenced, on 3 February 2014, to serve 54 months in a federal prison in the USA; (c) had purchased or facilitated the purchase of parcels of real estate in Jamaica, between 2007 and 2012, from the proceeds of his unlawful conduct in the USA, with the assistance of family members and associates, including the other named respondents; and (d) had no licit income or resources in Jamaica or the USA sufficient to acquire the said properties for cash or otherwise.

[12] Annexed to the particulars of claim were multiple documents including: (i) copy indictment containing charges brought against Andrew Hamilton, in the USA, for drug-related crimes, and conspiracy to launder money between a "date unknown" and 9 November 2011; (ii) copy titles in the names of the respondents; and (iii) documents showing purported transfer of properties between Andrew Hamilton and the 4th, 5th, 6th, and 9th respondents.

[13] The claim form and particulars of claim were purportedly served personally on Andrew Hamilton at his address in Jamaica on 2 April 2020.

[14] As regards the 2nd to 10th respondents, the ARA obtained orders in the court, on or around 19 February 2020, dispensing with personal service of the claim form, particulars of claim, notice of application seeking the restraint order and affidavit of Robin Sykes filed in support of the application for the restraint order.

[15] The bases of the application for service by specified method, on the 4th to 10th respondents were that they were not real persons, were represented by fictitious names, and were associated with fictitious addresses in the USA or Canada.

[16] The court orders stipulated that the 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents were to be served by registered post at the respective addresses set out in the order, while the 4th and 9th respondents were to be served by publication of notice of proceedings, for a period of five days, in a national newspaper in Georgia, USA. The latter service order was amended on 2 September 2020 to four days in a newspaper circulated in Winnett County, Georgia. The court also extended the validity of the claim form for six months, from 17 April 2020 to 16 October 2020, to facilitate service on all respondents.

[17] On 11 March 2021, Andrew Hamilton, through his attorney-at-law, filed a form of acknowledgement of service, admitting knowledge of the civil recovery proceedings, and indicating an intent to defend the claim. He, however, denied having been personally served. On that same date, through the same attorney-at-law, the 2nd respondent also filed an acknowledgement of service in which she indicated that she was not served with

the claim form or particulars of claim. She, too, expressed an intent to defend the claim. On 9 November 2021, the 10th respondent, through the said attorney-at-law, filed an acknowledgement of service denying receipt of the claim form and particulars of claim. Subsequently, on 11 November 2021, the 10th respondent filed an application for a declaration that the court had no jurisdiction to try the claim against him due to non-service, and that the claim form had expired without it being served.

[18] None of the respondents filed a defence to the ARA's claim.

The restraint order

[19] On 11 November 2020, Nembhard J granted a restraint order against the properties sought to be recovered by the ARA.

Judgment in default of defence

[20] Between 28 July 2022 and 11 August 2023, the learned judge heard an application by the ARA to enter judgment in default of defence. Consequent on her primary finding that all the properties listed in the ARA's claim were recoverable on the basis that they were acquired through unlawful means, the learned judge made six orders (Orders 1-6). However, by Order 2, the learned judge refused to grant civil recovery in respect of the properties associated with the 2nd, 3rd, 6th and 8th respondents (properties listed at numbers 2, 3, 4, 7, and 10 in Table 1). She did so on the basis that service had not been effected on those respondents, given that the registered mail containing the claim form and particulars of claim ('the documents') was returned to sender, unclaimed.

[21] By Order 1, she granted civil recovery in respect of properties in the names of certain respondents, including Andrew Hamilton and the 10th respondent. These properties are listed at numbers 1, 5, 6, 12 and 13 in Table 1.

[22] No orders were made in respect of the listed properties at items 8, 9, and 11 of Table 1 as those properties had already been sold.

The ARA's application

Proposed grounds of appeal

[23] The ARA sought leave to appeal the learned judge's decision not to grant civil recovery of the properties itemised in Order 2. This was done, firstly, in the court below and then before us, on the following proposed grounds:

> "Ground 1: the learned judge fell into error when she found that the properties listed at numbers 2, 3, 4, 7 and 10 in respect of the names of the 3rd, 6th and 8th Respondents in Table 1 are not recoverable based only on the fact that the postal documents (the parcels) were returned to sender despite the evidence demonstrating strict compliance with Orders dispensing with personal service of the claim form and particulars of claim and orders for service by specified method.
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> Ground 2: the learned judge failed to appreciate based on the evidence before the Court, compliance with service by specific method would still likely result in the parcels returning to sender. Because of that failure, the learned Judge fell into error when she held that non-service of the parcels was a basis to refuse to enter judgment on the claim, especially considering the effect of Supreme Court Civil Procedure Rules, 2002 (CPR) Rule 6.8(1) which gives the Court power to dispense with service where appropriate to do so.
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> Ground 3: The learned judge erred in her finding that the return of the parcels to sender defeated the application to enter judgment on the claim in circumstances where she accepted that all the properties described in Table 1 were placed in the names of the 2nd to 10th Respondents by way of a trust to hold same on the 1st Respondent's behalf. Had the learned judge properly appreciated the connection between the 1st Respondent who was served and all the properties in Table 1, she would have found that the return of any parcels to sender was inconsequential.
>
> Ground 4: The learned judge erred in law when she found that despite the documents being sent in accordance with the Formal Orders of the court for Substituted Service the return

of the documents without more was determinative of the issue of service.

Ground 5: The learned judge failed to consider that, on the Applicant's evidence, the registered mail was correctly addressed and sent in the ordinary course of service by registered post and that notwithstanding the return of the article, unclaimed, the onus would have been on the Respondents disputing service to provide the evidence that the registered mail was sent to the wrong address and could not have come to his attention and this was the reason for the return of the registered mail. By this failure the learned Judge fell into error.

Ground 6: the learned judge erred when she found that the rebuttal of the presumption of deemed service meant that the order for specified service was invalid without any evidence being put forward to show that the Respondents were not able to ascertain the contents of the documents.

Ground 7: the learned judge erred in law when she failed to consider the effects of Supreme Court Civil Procedure Rules, 2002 ('CPR') Rule 5.14 which seems to outline the threshold for deemed service which by the Rule is that the method is likely to enable the Respondents to ascertain the contents of the documents and not the receipt of the documents.

Ground 8: the learned Judge erred in law when she failed to consider the effect of CPR Rule 5.19(1) which appears to put a time limit on the rebuttal of deemed service when it says, '*unless the contrary is shown, on the day shown in the table in rule 6.6'* which is 21 days after the date indicated on the Post Office receipt."

Submissions on behalf of the ARA

[24] King's Counsel, Mrs Caroline Hay, submitted that the application for permission to appeal outside the requisite 14-day period arose because the ARA was erroneously led to believe, by the learned judge, that no permission was required. She referred to para. 33 of the affidavit of Courtney Smith, filed on 3 January 2024, where he averred as follows:

> "I am advised by the Applicant's Attorneys-at-law and verily believe that on August 23, 2023 the 1st, 2nd, and 10th

> Respondents' Attorneys-at-law attempted to apply for leave to appeal the Orders of the learned judge. The learned judge refused to hear the application as she was of the view that leave was not required since it was a final judgment. This would mean that the period for filing Notice and Grounds of Appeal would be within 42 days of the date on which the learned judge made her judgment…"

[25] Beyond that explanation, it was submitted that the ARA should succeed in its application because the appeal has a real chance of success. King's Counsel posited that the learned judge was wrong, in law, for refusing to grant recovery of the properties at Order 2 when it is considered that (a) the ARA strictly complied with the orders for substituted service by specified methods, (b) it was accepted by the learned judge that Andrew Hamilton was personally served with the relevant documents, the properties were acquired by him for his own benefit, and there was no statement of case to the contrary, (c) the orders for substituted service were granted on the basis that some of the named respondents are fictitious and have fictional addresses, including the 6th, 8th and 10th respondents, and (d) the 2nd respondent did not state in her response why the registered mail should not have been sent to her address which is on the relevant title documents, or why its contents would not have likely come to her attention.

[26] It was also contended that the learned judge did not have regard or sufficient regard for the evidence which established that personal service was not possible on all the respondents. Also, she failed to consider that the ARA was averring a trust for Andrew Hamilton, as it was his unlawful conduct that generated the wealth placed in the hands of other respondents, including those with fictional names and addresses. Had these matters been properly considered, King's Counsel argued, it might have been evident that some of the documents would have been returned to the ARA, unclaimed. Further, the refusal to grant civil recovery on the basis that some of the documents were returned to the ARA, rendered nugatory the orders for substituted service by specified methods. Additionally, the court's focus ought to be on the properties in civil recovery matters; the names holding the properties are secondary since there is no need for the latter persons to have participated in the unlawful conduct that generated the particular asset.

[27] King's Counsel pointed to rule 6.8 of the Civil Procedure Rules, 2002 ('CPR') and contended that it was open to the learned judge to dispense with service pursuant to that rule. Also, consideration could have been given to rule 5.19(2) of the CPR, which permits the date of the service of an acknowledgement to be treated as the date of service, she argued. Reliance was placed on several cases including **Norris Nembhard v Assets Recovery Agency** [2020] JMCA App 22, **Rachel Graham and Erica Graham v Winnifred Xavier** [2021] JMCA Civ 51, **Wakako Yoneyama McGee and MIWA Enterprise USA v Norris Webb** [2013] JMSC Civ 2013 para. 21, and **Alicia Hughes v PAJ Imports Limited** [2019] JMSC Civ 93.

Submissions on behalf of Andrew Hamilton and the 10th respondent

[28] There was no challenge to the ARA's application for permission to appeal. There was, however, opposition to the reinstatement of the restraint order, by these respondents, on the basis that this court has no jurisdiction to grant such an order. Counsel also objected to a stay of execution of Order 2 on the basis that the ARA's amended notice of application for permission to appeal did not request a stay of that order.

[29] It is convenient to note here that the other respondents who are directly affected by Order 2 did not appear and had no representation or submissions at the hearing of this application.

Discussion

Whether extension of time for leave to appeal should be granted

[30] Under rule 1.7 of the CAR, this court has the authority to extend time beyond the prescribed 14–day period within which to seek the court's permission to appeal matters where the threshold requirements are met (see **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, and **The Commissioners of Customs and Excise v Eastwood Care Homes** (2001) EWHC Ch 456). Ordinarily, a delay of four

months would be inordinate, but we accepted the ARA's explanation for it. We considered, as well, that there would be no prejudice to the respondents above that which would be likely suffered by the ARA.

[31] For these reasons, we granted the order to extend time within which to appeal.

Whether leave to appeal should be granted

[32] Broadly, the ARA's proposed grounds of appeal turn on the learned judge's treatment of the factual circumstances of service, and whether she misapplied the provisions of the CPR pertinent to service by specified methods. This, against the background of the learned judge's findings that the properties, listed in Table 1, directly or indirectly represent the proceeds of the unlawful conduct of Andrew Hamilton in drug trafficking and money laundering, and that they are held by the other respondents on trust for the benefit of Andrew Hamilton.

[33] Permission for leave to appeal is predicated on the satisfaction of the 'real chance of success' requirement under rule 1.8 of the CAR (see **Garbage Disposal & Sanitations Systems Ltd v Noel Green & Ors** [2017] JMCA App 2 for an explanation of the rule).

[34] The learned judge's reasons for her decision reveal an acceptance of the evidence, adduced by the ARA, that Andrew Hamilton was served personally with the claim form and particulars of claim, at his home address in Jamaica, further to which his attorneys-at-law indicated, by letter, that they had received instructions in the matter (see paras. [39] and [40] of judgment). She also found that proper service had been effected on the 4th and 9th respondents, who were purportedly served, by publication, in accordance with the court orders, as well as on the 10th respondent, who was purportedly served by registered post at the address indicated in the court order and associated with the transfer instruments for the certificate of title in his name. However, she found that there was no proper service regarding the 2nd, 3rd, 6th and 8th respondents, who were also purportedly

served by registered post at the addresses indicated in the court order and associated with the transfer instruments for the certificates of title in their names.

[35] It should be recalled that all documents purportedly served by registered post returned to sender, unclaimed.

[36] The learned judge also accepted evidence, produced by the ARA, that the 4th, 5th, 9th and 10th respondents were fictitious based on evidence of investigative searches conducted abroad, on behalf of the ARA, which did not verify the names and addresses.

[37] We observed further that, in relation to the "fictional" 10th respondent, there remained an unresolved inconsistency in the learned judge's reasons. Having found at para. [46] that service by registered post was proper, she then said, at para [47], "[w]ith respect to the 7th and 10th Respondents, the evidence from the ARA is that these packages were also returned to them. They have not done anything to effect any other service **so they too have not been properly served**" (emphasis added). Yet, at para. [49], the learned judge went on to conclude that the ARA had satisfactorily proved service, and eventually granted civil recovery of the property connected to the 10th respondent.

[38] We considered, also, the 2nd respondent's affidavit in opposition to the notice of application to enter judgment, in which it is averred that she was not at the address to which the documents were allegedly sent by registered post. Nonetheless, she gave no information as to why serving her at the address on the title documents would not have sufficed as likely enabling her to become aware of the contents of the claim form and particulars of claim. The substance of her response, as embodied in para. 5 of the affidavit, is as follows:

> "At all material times since the filing of this Claim I have resided in Jamaica and do not reside at 9312 Capobella Aliso Vidjo, California 92656 USA as stated in the Claimant's claim form. Therefore, even if documents were sent to the address for me they would not have come to my attention."

[39] At para. [45] of the judgment, the learned judge interpreted the 2nd respondent's response thus:

> "…They have asserted that she was served by registered post pursuant to the order of the Court. However, the Claimant has presented affidavit evidence that the packages sent to her address and that of Akayla Hamilton were returned, so they are possessed of information that the documents did not come to her attention."

[40] Also, at para. [62], the learned judge said:

> "With respect to the properties listed at numbers two to four, there is a familial connection in that [the 2nd respondent] is alleged to be the mother of the two children who are also owners of these properties. Andrew Hamilton is their father, and the children were minors at the time of acquisition. However, I had already found that service was not proper and for that reason these properties are not recoverable at this time."

[41] Having determined that Andrew Hamilton had a beneficial interest in the properties held by all the respondents, the learned judge said, at para. [60]:

> "…[T]here [was] no indication of any licit source of income of Andrew Hamilton to justify the acquisition of these properties. It is of note that none of the properties were acquired by way of a mortgage as there are no mortgages of the property endorsed on the Certificate of Titles. It [was] the uncontested view of the ARA that several of these properties were put in the names of persons who do not exist. These properties were originally in the name of Andrew Hamilton and were transferred to other Respondents. I am of the view that when one examines the time period within which the transfers occurred coupled with the evidence which I accept on a balance of probabilities that these persons are fictitious persons, the inference can be drawn that it was done to divert any attention [from] Andrew Hamilton who at the time had already been convicted".

[42] We believe that in the light of the learned judge's findings that (a) Andrew Hamilton, who beneficially owned the properties, was properly served, and that all the properties were connected to him and, therefore, recoverable, (b) that properties in the

joint names of the 2nd and 3rd respondents were held by the 2nd respondent, with whom she found a familial relationship with Andrew Hamilton, as trustee for the children of the said Andrew Hamilton, during their infancy, and (c) in the absence of an explanation by the 2nd respondent as to the reason she could not have been properly served at the address to which the documents were sent, the ARA is on sound footing to successfully argue on appeal that the learned judge came to the wrong conclusion as regards service of the 2nd and 3rd respondents.

[43] Further, as regards the 6th and 8th respondents, although the investigative searches bore no fruit, there was evidence before the learned judge that the transfers to them were not genuine as there were purported irregularities with the associated addresses. There was also no official record in proof of the assertion that at the time of purportedly signing the instruments of transfer, they were in Jamaica. These aspects of the evidence, coupled with the learned judge's primary finding that they would have held the properties, in their names, on trust for Andrew Hamilton, seem to support the ARA's contention that the learned judge erred in not granting civil recovery of those properties.

[44] In our view, and as observed by learned King's Counsel, in civil recovery matters, the court's focus is ordinarily on the properties obtained through the unlawful conduct, and not on the persons in whose names the properties are held.

[45] Having considered learned King's Counsel's submissions and the relevant principles of law, we hold the view that there is a real chance of success, on appeal. We see some merit in the proposed grounds, given the learned judge's findings that the properties listed in Order 2 were also recoverable, on the basis that all the properties were being held by the respondents for the benefit of the 1st respondent, Andrew Hamilton, and that they were derived from proceeds connected to his unlawful conduct. Further, we believe that there is merit in at least some of the proposed grounds, based on evidence which demonstrates (a) strict compliance with the court orders as to service, (b) that service was attempted at the last known address of the 2nd, 3rd, 6th and 8th respondents, as disclosed by title documents, and (c) that the 2nd respondent, by her acknowledgement

of service, was aware of the claim and provided no good reason why the registered mail could not have been properly served at the address noted on the title documents bearing her name, or why the registered mail, having been sent to her last known address, would not have enabled her to ascertain the contents of the claim form and particulars of claim. There was also evidence from which the learned judge could conclude that the 6th and 8th respondents did not exist. But for the curious finding that they were not served, she would have deemed the properties connected to them recoverable.

[46] The ARA is in a solid position to argue on appeal that the evidence and law, specifically rules 5.5, 5.11, 5.13, 5.14, 5.15, 5.19(2) and 6.8 of the CPR, as well as the provisions of sections 56 and 57 of POCA, do not support the learned judge's position that the fact of the return of the registered mail was conclusive evidence of non-service on the 2nd, 3rd, 6th, 7th and 8th respondents. That likely error on the part of the learned judge, coupled with the findings as to the acquisition and true ownership of the properties, in our opinion, establishes a real chance of success of the appeal.

[47] For these reasons we granted permission to appeal.

Whether there should be a stay of enforcement of Order 2

[48] The applicable principles for a stay of execution are well established (see **Calvin Green v WynLee Trading Limited and Naylor & Turnquest** [2010] JMCA App 3, **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44 at para. [60], **Combi (Singapore) PTE Limited v Sriram and another** [1997] Lexis Citation 3331 and **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12). These authorities make it plain that the determination of whether a stay of execution is granted turns on the justice of the case, that is, whether there is a real risk of injustice if the stay is granted or refused. The court should make the order that best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal (see **Combi (Singapore) PTE Limited v Sriram and Another)**.

[49] Taking account of the likelihood of success of the appeal, as we have determined, the interests of justice weigh in favour of the grant of an order for a stay of Order 2, pending determination of an appeal. Having so found, there is no need to consider whether this court has jurisdiction to reinstate the restraint order which was discharged by the learned judge (Order 4) on the basis that section 88(5) of POCA makes properties under a restraint order unrecoverable.

The 1st and the 10th respondents' application

[50] As indicated earlier, Andrew Hamilton and the 10th respondent also sought an extension of time within which to apply for leave to appeal, permission to appeal the grant of a civil recovery order against the properties in their names and a stay of execution of the "judgment/decision" of the learned judge. The application was supported by the affidavit of Andrew Hamilton, filed on 22 February 2024, outlining a similar reason as the ARA for being dilatory.

[51] Andrew Hamilton's and the 10th respondent's proposed grounds of appeal are as follows:

> "a. The Appellants did not receive a fair hearing as the learned judge, in granting the Civil Recovery Orders, was influenced/unfairly by knowledge gained in the **Assets Recovery Agency v Andrew Hamilton et al** [2022] JMSC Civ 108, which she heard shortly before she commenced hearing the **Assets Recovery Agency v Andrew Hamilton et al** [2023] JMSC Civ 117.
>
> b. The learned judge erred in finding that the Appellants were properly served with the Claim Form and Particulars of Claim.
>
> c. In coming to her decision to grant the civil recovery Orders the learned Judge erred in using an unauthorized procedure in considering the affidavit evidence of Elizabeth Ryan Dorsey, Ronald Rose and Darwin Diaz which were affidavits filed in a different claim instead of limiting herself to the Particulars of Claim filed in accordance with rule 12.10 (4) of the Civil Procedure Rules and the authority of **Glen Cobourne v Marlene Cobourne** [2021] JMCA Civ 24.

> d. The learned judge erred in granting the civil recovery Orders as the Respondent's Particulars of Claim do not support that the properties listed therein were obtained from any unlawful conduct on the part of the first Applicant.
>
> e. The learned judge erred in granting civil recovery Orders in circumstances where a mandatory requirement of section 55 of Jamaica's Proceeds of Crime Act (POCA) was not met namely that "double unlawfulness" be demonstrated where the unlawful conduct is said to have occurred outside of Jamaica as is alleged by the Respondent in the instant case."

Submissions on behalf of Andrew Hamilton and the 10th respondent

[52] Mr Stewart, relying on **Lascelles Augustus Chin v Audrey Ramona Chin** [2001] UKPC 7 ('**Lascelles Augustus Chin**'), submitted that the learned judge could not have properly resolved the factual dispute of service "on paper" when there was competing affidavit evidence from the ARA and the respondents. Further, the learned judge erred in her finding that the documents were served on the 10th respondent, having accepted that the address to which the documents were sent could not be found. Also, the learned judge inexplicably found that the 10th respondent was not a real person although there was affidavit evidence sworn and notarized by him. Further, it was argued that, if the 10th respondent was correct that he was not served within time, the claim form would have expired, and there would be no need for any application to set aside service, applying rule 8.14 of the CPR.

[53] Counsel also submitted that the learned judge used the wrong procedure in determining the application to enter judgment. He argued that she should not have considered the affidavit evidence of the ARA's witnesses but, rather, limit her consideration to the claim form and particulars of claim (the statement of case), in accordance with rule 12.10(4) of the CPR. He relied on **Glen Cobourne v Marlene Cobourne** [2021] JMCA Civ 24 ('**Glen Cobourne**'). Lastly, the statement of case was attacked for failure to accord with section 55 of POCA. Counsel submitted that the ARA

was required to plead, and had failed to plead that the unlawful conduct, which occurred in the USA, was also unlawful under the criminal law of Jamaica.

Submissions on behalf of the ARA

[54] As a preliminary point, Mrs Hay highlighted the failure of the 10th respondent to file an affidavit in support of his purported application before this court, and that Andrew Hamilton's filing of an affidavit purportedly on his and the 10th respondent's behalf was a clear demonstration that Andrew Hamilton was protecting the interest in "his properties". Following along this line, King's Counsel argued that paras. 6, 7, 10, 11 and 12 in the affidavit of Andrew Hamilton were objectionable as was the request for orders, in his proposed grounds of appeal, relevant to properties which are not in his name, namely those at items 5 and 6 of Table 1, in the respective names of Louise Anne Miller and George Bernard Lynch. The indication was that these were "his properties", a point also borne out by the evidence that Andrew Hamilton lives in the home said to be registered in the name of the 10th respondent.

[55] King's Counsel posited that this connectedness of their names (Andrew Hamilton and Webster Campbell) supported the learned judge's finding that the property recorded in the 10th respondent's name is, in fact, beneficially owned by Andrew Hamilton and that the 10th respondent's name, as it appears on the certificate of title, is, in fact, fictional. The fiction is also evident from the handwriting expert's finding that the signatures on the affidavits filed in the name of the 10th respondent are different from the signature of 'Webster Campbell' on the instrument of transfer.

[56] King's Counsel submitted that there were no particulars to ground the complaint of unfairness by the learned judge, pointing to this court's refusal of Andrew Hamilton's earlier application for leave to appeal the learned judge's refusal to recuse herself from hearing the application to enter judgment. It was also contended that the learned judge's erroneous inclusion of information from a previous judgment involving Andrew Hamilton, into the draft judgment in the instant case, was not evidence of unfairness.

[57] It was submitted further that the learned judge was not plainly wrong when she resolved the question of service based on affidavit evidence. King's Counsel sought to distinguish **Lascelles Augustus Chin** by pointing out that, unlike that case, there was material before the learned judge on which she could have made findings in favour of the ARA's account of service. She indicated that the ARA had not only established personal service through the process server but demonstrated that the content of the documents had come to Andrew Hamilton's attention, as evidenced by the documents filed in response, and the posture of his attorney-at-law. Further, bare denials would not rise to the standard to cause a court to order cross-examination of witnesses.

[58] On the question of service on the 10th respondent, by registered post, King's Counsel submitted that it had always been the ARA's position that it would not be able to personally serve him as his last known address, derived from the relevant certificate of title, was a fiction. Neither was it verified that "he" was a real person. Further, had "he" been a real person and caused the acknowledgement of service to be filed, there was no reason provided as to why the last known address should not have been used. **Rachel Graham** and **Wakako Yoneyama McGee** were relied on.

[59] As regards the allegation that the learned judge inappropriately relied on affidavit evidence, King's Counsel indicated that the ARA had filed a notice of intention to rely on the relevant affidavit evidence, to which there was no objection. Further, she contended that, the wording of rule 12.10(4) of the CPR did not preclude a court from receiving and considering affidavit evidence in an application to enter judgment, and that rule should be read together with rule 12.10(5) which requires the placement of sufficient evidence before the court to enable a court to ascertain a claimant's entitlement to judgment on an application to enter judgment. Reliance was placed on **Delores Elizabeth Miller v The Assets Recovery Agency** [2016] JMCA Civ 25.

[60] King's Counsel also sought to distinguish the facts, in the instant matter, from those in **Glen Cobourne**. It was then submitted that there was nothing in the latter case which suggests that the court cannot consider affidavit evidence if it is relevant to the

application for a default judgment, and where such evidence is required to prove an assertion in the statement of case, as in the instant case where the burden is on the ARA to prove that the properties were recoverable.

[61] Finally, it was contended that the respondents had not demonstrated how the omission to state, in the particulars of claim, that drug trafficking is contrary to the Dangerous Drugs Act and that money laundering in Jamaica offends POCA, rendered that application defective. King's Counsel posited that the phrase "unlawful conduct" as used in paras. 9, 10 and 12 of the particulars of claim imported the definition set out in POCA. Paras. [3], [10] and [11] of the particulars of claim, on the other hand, pertain to the unlawful conduct, the convictions of Andrew Hamilton, and the nature of the convictions outside Jamaica.

Discussion

[62] Rule 30.3 of the CPR permits a litigant to file an affidavit containing statements of information and belief. However, we do not believe that a litigant is at large to advance the case of some other person without any legal basis disclosed for doing so. In the circumstances of this case, where the learned judge found the 10th respondent to be a fictitious person, it seems unwise and most curious that the application was supported solely by evidence from Andrew Hamilton, purportedly to advance a case for the 10th respondent as well. In paras. 7, and 9-12 of his affidavit, Andrew Hamilton averred that (a) he was relying on information given to him by his lawyer that the claim was sent by registered post to an address that was not that of the 10th respondent, (b) that the 10th respondent had filed an affidavit, in the court below, giving his correct address, and (c) the learned judge erred in finding that the 10th respondent was properly served and is not a real person.

Whether leave to appeal should be granted

[63] Having examined the proposed grounds of appeal, filed on behalf of Andrew Hamilton and the 10th respondent, we are of the view that there is no real chance of success in respect of any of them. Ground (a) lacks any indication as to how the learned judge was supposedly influenced unfairly by knowledge gained in another case involving Andrew Hamilton. It is not sufficiently a cogent basis on which to ascribe unfairness to the learned judge simply and solely because she made adverse findings against the party in a previous case or had mistakenly included information from a previous decision in the draft judgment which was shared with counsel before delivery. We also note that the appeal against the learned judge's refusal to recuse herself from the instant case was dismissed.

[64] In respect to ground (b), it was a question of fact for the learned judge whether Andrew Hamilton was personally served. She was entitled to weigh up the evidence produced, including the bare denial by Andrew Hamilton that he was served, in the face of evidence to the contrary by the process server. There was also evidence that Andrew Hamilton had instructed his lawyer to represent him in the matter, with no disclosure as to how the matter came to his attention, if not by personal service or why he could not have been personally served in the circumstances the witness for the ARA alleged. This factual situation is different from that in **Lascelles Augustus Chin**, where there was a central issue disclosed in the material before the trial judge, which needed to be resolved through cross-examination. In the circumstances, we cannot say that it has been demonstrated that there is a real chance of success on this issue.

[65] As regards the purported service of the documents on the 10th respondent, there was evidence before the learned judge that they were sent by registered post to his last known address listed in the title documents bearing that name. The 10th respondent purportedly raised a jurisdictional challenge, but his objection on the matter of service was entirely devoid of any reason or explanation as to why the address should not have been used, or that he would not have likely become aware of the contents of the claim

form and particulars of claim by the method of registered post. In these circumstances, we cannot say that the 10th respondent has demonstrated that the learned judge erred in finding that he was properly served, in accordance with the method prescribed in the order dealing with service.

[66] Having said that, we believe that there is a logical inconsistency and misnomer to ascribe 'service' on an individual whom the court determined was a fiction. At para. [65] of her judgment, the learned judge said, "[d]espite the affidavit purported to have been signed by him [the 10th respondent], I am not convinced that he is a real person and find that there is sufficient evidence to draw an inference that he too is a fictitious person…". Based on the learned judge's reasoning throughout, this finding was, clearly, not determinative of the core question of whether property purportedly owned by 'Webster Campbell' was, in fact, the property of Andrew Hamilton for purposes of a POCA proceeding.

[67] The 10th respondent's challenge to the validity of the claim form was tenuous. There was evidence (see order of Tie-Powell J dated 2 September 2020) of an extension of the validity of claim form, for six months, covering the period in which the contested service purportedly occurred. The court's jurisdiction, therefore, could not be successfully challenged based on the contention that the claim form had expired prior to the alleged service on the respondents.

[68] The resolution of ground (c) turns on whether it was permissible for the ARA to go outside the "four corners" of its claim form and/or particulars of claim (statement of case) in proof of its case for civil recovery (see the provisions of rule 8.9 and 12.4 of the CPR, as well as paras. [27]-[28] of **Glen Cobourne** which were relied on by Andrew Hamilton and the 10th respondent). The clear objective of the requirement, in rule 8.9(1) of the CPR, is to guard against entering a judgment on a case which has not been pleaded. In **Glen Cobourne**, the judge at first instance relied on a previously filed affidavit, not one filed in support of the application, and entered a default judgment "for the defendant" who did not file an acknowledgement or defence. Apart from the ruling

that, obviously, a default judgment cannot be entered in favour of a defendant, under Part 12 of the CPR, this court pointed out that there was no need to prove what was pleaded when a defendant, having been properly served, failed to file a defence.

[69] In its decision, this court did not appear to be saying there should never be evidence called in an application to enter judgment, but rather that the statement of case must state all the facts relied on to prove the case against an absent defendant. That said, the decision being specific to the provisions under part 12 of the CPR, is not relevant to the instant case. There was no requirement for the learned judge to adhere strictly to rule 12(4) of the CPR when entering judgment in default of defence in the instant matter, as counsel for Andrew Hamilton and the 10th respondent submitted. Panton P made the observation, with which we agree, in **Bobette Smalling v Dawn Satterswaite** [2014] JMCA Civ 55, a case challenging the validity of a warrant for search and seizure under POCA, at para. [24], that "the Civil Procedure Rules cannot, in our view, be imported into the proceedings under the Proceeds of Crime Act".

[70] It follows that, in adapting the provisions of the CPR to the circumstances of the instant case, the learned judge was not at fault for considering evidence, notice of which was given to the respondents, in support of the ARA's statement of case which was pleaded. See POCA's authorised procedure for entering default judgments in civil recovery matters in The Judicature (Supreme Court) (Proceeds of Crime) Rules, 2021, which came into force after the instant application before the learned judge, on 7 April 2021.

[71] In any event Andrew Hamilton and the 10th respondent have not demonstrated that the approach followed in the instant case was not compliant with rule 8.9(1). The evidence, about which notice was given, did not, in our view, add any new dimension to the statement of case. In addition to Table 1, which sets out particulars about the properties there were statements in the claim form and particulars of claim as to (a) Andrew Hamilton having been a twice convicted drug dealer (with copy indictment from the USA annexed), and sentenced in February 2014 to serve time in a Federal prison having pleaded guilty to conspiracy to distribute marijuana and conspiracy to launder

money, (b) the relationship between Andrew Hamilton and alleged beneficiaries of his illicit gains, (c) the purchasing or facilitation of purchase of the properties between 2007 and 2012 from proceeds of the unlawful conduct (with copies of certificates of titles annexed), (d) the assistance of family members and associates with the purchase of the properties without any evidence of mortgage financing, (e) investigations which disclosed no lawful income of the registered proprietors, and (g) investigations which revealed that some of the registered proprietors are fictitious.

[72] At para. [56] of the judgment, on the matter of unlawful conduct, the learned judge referred to the affidavit of Elizabeth Ryan Dorsey, which supported some statements in the claim form and particulars of claim. The referenced affidavit went further than the claim form and particulars of the claim in that it included an opinion on the quantity of Andrew Hamilton's ill-gotten gains. The learned judge also relied on evidence from Ronald Rose about the estimated amount of money seized from Andrew Hamilton over a three-year period and his belief that these funds facilitated the purchases in Jamaica. These alleged estimates of total proceeds were not in the claim form, particulars of claim or the documents annexed, as far as we were able to ascertain. Their non-inclusion, however, is not a basis for vitiating the learned judge's decision, since the copy indictment attached to the particulars of claim included allegations of cash amounts derived from the alleged unlawful conduct of Andrew Hamilton and his associates in the USA. There was also evidence from Dharwin Diaz, referenced by the learned judge, in support of the verification of persons and addresses of persons who purchased properties from Andrew Hamilton, which bore some similarity to the information contained in Table 1.

[73] In the circumstances, we cannot say that we are satisfied that ground (c) has merit.

[74] Ground (d), as to whether the particulars of claim supported a conclusion that the properties were obtained from unlawful conduct, was a matter of inference for the learned judge. We should say, however, that there was material at paras. 3, 10 and 11

of the particulars of claim, which, in our view, sufficiently addressed the issue of unlawful conduct.

[75] With respect to ground (e), it is our view that the phrase "unlawful conduct" as used in the particulars of claim imports the definition set out in section 55 of POCA, as Mrs Hay submitted. We are also of the view that the omission, from the particulars of claim of a statement that the offences are criminal offences in Jamaica, is not fatal to the learned judge's decision since it is either that drug trafficking and conspiracy to launder money are criminal offences in Jamaica, or they are not; and there has been no assertion that they are not. The omission is, therefore, inconsequential.

[76] In the circumstances, Andrew Hamilton and the 10th respondent did not satisfy us that the proposed grounds had any real chance of success.

[77] Having seen nothing in the respondents' proposed grounds of appeal with any real chance of success, the applications for an extension of time in which to appeal, and for a stay of the execution of the judgment must necessarily be refused (see **Construction Developers Associates Limited v Urban Development Corporation** [2016] JMCA App 14).

On the question of costs

[78] There being no justification shown for a deviation from the usual rule that costs follow the event, the ARA is entitled to its costs in the 1st and 10th respondents' application.

[79] It was for these reasons that we made the orders at para. [4].