



[2012] JMSC Civ. No. 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV003259

BETWEEN	THE ASSET RECOVERY AGENCY	CLAIMANT
AND	ROHAN ANTHONY FISHER	1ST DEFENDANT
AND	DELORES ELIZABETH MILLER	2ND DEFENDANT
AND	RICARDO FISHER	3RD DEFENDANT
AND	KAREN VASSELL	4TH DEFENDANT

Mrs. Susan Watson Bonner, Mrs. Charmaine Newsome
and Miss Eureka Stewart for Claimant
Mrs. Karlene Barnaby-Channer and Miss Roxanne Brown
two employees of Claimant
Mr. Harold Brady and Mrs. Indira Passard for second Defendant
Miss Delores Miller

Heard in Chambers 30th November 2010 and 17th February, 2012

Application for Civil Recovery of seized property – Parties agree facts not an issue – How law applied

Coram: D.O. McIntosh, J

Introduction

[1] At the start of these hearings, Respondents attorney indicated that the parties were in agreement on the facts that the court only had to decide the issues of law. The attorneys for the Applicants indicated their agreement.

In submissions the Applicants recited the basic acts on which they were relying. There was clear indications that the second Defendant Deloris Miller had little or no credibility and the court would not accept any suggestion by her that she has lost contact with any of the other three Defendants named in this suit. They were served in accordance with a Court Order for substituted service and must be deemed served.

[2] The Claimant, the Assets Recovery Agency (ARA) has filed proceedings pursuant to **Section 57 of the Proceeds of Crime Act 2007**, against the Defendants seeking Civil Recovery of property believed to be the proceeds of unlawful conduct.

Claimant's Submission

[3] **Background**

4. The evidence in support of the application is set out in the Affidavit of Assistant Superintendent of Police (ASP) Dean Roy Bernard and Jorge DaSilva, United States Drug Enforcement Agent.
5. The claim for civil recovery resulted from a search warrant obtained pursuant to the Dangerous Drugs Act and executed on the 2nd Defendant at her residence at Lot 696 21st Avenue, West Cumberland in the parish of Saint Catherine on the 26th day of June, 2007.
6. The ARA alleges that the Defendants hold properties which represent, directly or indirectly, the proceeds of their unlawful conduct.
7. The First and Third Defendants are sons of the Second Defendant and the Fourth Defendant is the girlfriend of the First Defendant.

8. The First Defendant, consequent on his criminal conduct has five previous convictions in the United States of America (USA), four of which are for drug related offences. He is believed to be involved in the cocaine trade.
9. The evidence also indicates that the First Defendant and Third Defendant have been sending the proceeds of their drug trafficking activities to the Second and Fourth Defendants in Jamaica and that these proceeds have been used to acquire the recoverable property described in the Particulars of Claim in the names of the Defendants either jointly and/or individually.
10. Cash totaling US\$1,350,300.00 was found in the freezer compartment of a refrigerator located at the Second Defendant's premises wrapped in newspaper and foil amongst frozen meat. The Second Defendant has not provided a reasonable explanation for the provenance of all of this cash or what it was to be used for; a substantial portion of which the Second Defendant says was sent to her by the First Defendant.
11. The Second Defendant knew, had reasonable grounds to believe or was willfully blind that the monies sent to her by the First Defendant represented the proceeds of unlawful conduct or that the sums of monies sent to her were not legitimately earned.
12. The Second Defendant told the Police that the money was sent to her by her son Dumaine Wright who resides in the USA and that she was keeping the money for him. She further stated that she knows her son to be involved in construction and does not know of him being involved in any other business or employment.

13. Investigations have shown that the name Dumaine Wright is fictitious and was consciously being used instead of the name Rohan Fisher. The birth certificate of the First Defendant was found at the premises of the Second Defendant and genealogy report has shown that Rohan Fisher is the son of Delores Miller and there is no evidence of her having a son by the name Dumaine Wright.
14. Further, investigations have shown that the First Defendant also used the name Richard Anderson, Richard Henderson and Charles Adward. Evidence of photographs and fingerprints from the New York Drug database were compared to information from the database of the Jamaican Immigration and Nationality Department and it has shown that they are all one and the same person.
15. The First, Second and Third Defendants are registered as unemployed with the Taxpayer Audit and Assessment Department in Jamaica and have filed no tax returns.

[4] **THE LAW**

THE PROCEEDS OF CRIME ACT 2007 (POCA)

16. Section 57 of the Proceeds of Crime Act 2007 states that;

‘The enforcing authority may take proceedings in the Court against any person who the enforcing authority believes holds recoverable property’

17. **‘Recoverable property’** is defined in section 84 of the POCA as

property obtained through unlawful conduct’.

18. **‘Unlawful Conduct’** as defined in section 84 of the POCA means –
 - a. Conduct that occurs in and is unlawful under the criminal law of Jamaica or
 - b. Conduct that -**
 - (i) occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and**
 - (ii) if it occurred in Jamaica would be unlawful under the criminal law of Jamaica.**
19. The First Defendant has previous convictions for drug related activity and is presently involved in the cocaine trade. The Second Defendant has been charged with Money Laundering albeit the matter has been adjourned sine die and once the witnesses are made available the matter will be reinstated.
20. The Defendants have engaged in conduct that is unlawful both in Jamaica and overseas and any assets obtained directly or indirectly from this conduct would be recoverable property and therefore liable to civil forfeiture.
21. Section 55 of the POCA states that **‘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 purposes of deciding whether any person obtains property through unlawful conduct’ –**

(a) 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;

(b) It is not necessary to show the particulars of the conduct;

22. Section 56 of the POCA states that:-

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

(3) The Court 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.

23. It is submitted that the property restrained is recoverable property.

24. In the case of *The Queen on the Application of the Director of the Assets Recovery Agency and Others v. Jeffrey David Green and Others* [2005] EWHC 3168. Mr. Justice Sullivan looked at Parliaments intention in determining unlawful conduct and stated that “Civil rules of evidence will apply and it is not to matter for example that the person who carried out the conduct might be untraceable, or has died, or has been acquitted on a criminal trial relating to the ‘unlawful conduct’ **The court in a civil recovery action, in other words is not concerned to establish criminal guilt. It is concerned with ‘unlawful conduct’ solely for the purpose of identifying**

property with a sufficient relationship to that conduct to render it recoverable.”

25. The Second Defendant has admitted that the money she has in her possession was from her son and whether or not the charges against the Second Defendant have been adjourned is irrelevant.
26. Further, Coglein, J in the matter of *The Director of the Assets Recovery Agency and In The Matter of Cecil Stephen Walsh and In The Matter of the Proceeds of Crime Act 2002 [2004] NIQB 21* stated that “the functions of the Agency are directed against property rather than individuals and in most cases an important proof on behalf of the Agency will involve establishing the absence of any legitimate source of capital or income on the part of the respondent, which might account for the acquisition or accumulation of the property sought to be recovered. It is important to bear in mind that it is not essential for the Agency to establish the precise form of unlawful conduct as a result of which the property in question was acquired and the court may be asked to draw appropriate inferences from the unlawful conduct established by the Agency combined with the proved absence of legitimate capital and income.”
27. The First and Second Defendants who are recorded as unemployed but are alleged to be a ‘construction worker’ and a ‘higgler’ respectively could not have amassed this amount of wealth given their income and expenses. It is submitted that in the absence of legitimate income or capital to support the asset base it is reasonable for the Court to find on a balance of

probabilities and in light of the affidavit evidence of ASP Bernard and Jorge DaSilva that the assets restrained are recoverable property and should be forfeited to the Crown.

28. That the assets listed in the Particulars of Claim are recoverable property because they represent directly or indirectly the proceeds of unlawful conduct or they represent items which have been purchased with the proceeds of unlawful conduct over a period when the lawful income of the Defendants was insufficient to fund the purchase of the properties listed.

APPLICANT'S CONCLUSION

29. The Defendants have demonstrated their familiarity with the banking sector as evidenced by the spread of the recoverable property into various financial institutions. The sworn evidence indicates that the Defendants **concealed US\$1,350,300.00 in cash in a freezer**. To have kept money in this manner is highly suspicious and that the court can infer from the Defendants actions that on a balance of probabilities, the money is recoverable property.
30. The Second Defendant has not evidenced any earnings as a higgler and has not demonstrated to the Court that the monies and assets in her possession were legitimately obtained.
31. The Second Defendant has shown by her actions that she is involved in concealing the financial gains from the unlawful conduct of persons.

32. The majority of the assets listed are in the names of the First and Second Defendants. Further, the Second Defendant has stated that most of the cash seized belongs to her son. None of the Defendants have made any submissions to the Court as to the source of legitimacy of the funds and the Second Defendant's share is comingled with that of the First Defendant's.
33. The Second Defendant, not being able to show the source of these funds and how she has acquired these assets, has failed to satisfy this Honourable Court that the assets were obtained from legitimate income. The inference to be drawn by the Court is that the assets are recoverable property and should be forfeited to the Crown.
34. Further, upon the claim being brought for civil recovery the Second Defendant attempted to withdraw over US\$40,000.00 from the bank and sought to transfer the sale agreement for the purchase of two properties into the name of third parties or to cancel the sale and have their deposit returned so as to avoid the freezing order and ultimately the civil recovery orders. These actions are indicative of someone attempting to frustrate the Court proceedings. If these assets were legitimately earned there would be no need to attempt to deceive the Court.
35. This is a matter in the interest of the public. The benefits to be obtained by the reduction in the incidents of criminal activities outweigh any disadvantage to the Defendants. The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from

circulation property which can be shown to have been obtained by unlawful conduct or which is likely to be used in perpetuating unlawful conduct.

36. On a balance of probabilities the assets restrained are recoverable property and an order for Civil Recovery of the said property should be granted on the basis that the assets represent whether directly or indirectly the **Proceeds of Crime** of the Defendants.

Respondents Submissions

[5] The Legislative Scheme

37. The **Proceeds of Crime Act** (POCA) was passed into law in March 2007. **POCA** creates a legislative scheme for the recovery by the Asset Recovery Agency (“the agency”) assets, the source of which is criminal activity or is intended to be used in unlawful conduct.
38. The legislative scheme is divided in seven parts. Part I establishes the Asset Recovery Agency, the Claimant in this matter.
39. Parts II and III make provisions in respect of Forfeiture Orders, Pecuniary Penalty Orders and Restraint Orders. In particular, Section 50 deals specifically with money seized.
40. Part IV of the legislative scheme sets out the procedure for the agency to recover in civil proceedings, property which is or represents, property obtained through unlawful conduct (Section 56(1)a)).

41. The legislative scheme makes specific provisions for dealing with cash. Sections 72 to 90 establish a procedure for recovery of cash in summary proceedings.
42. Part V deals with Money Laundering, Part VI investigations and Part VII makes general provisions in respect of the legislative scheme.

The Part IV Claims against Deloris Miller – The Second Defendant

43. Set out below the claims brought against Deloris Miller, the Second Defendant solely and claims with others who are not before the Court are set out below under Part IV of the scheme.

- (i) “As Against the Second Defendant (Deloris Miller)

A civil recovery order pursuant to section 57 of the Proceeds of Crime Act, 2007 in relation to:

1990 Toyota Hiace Motor Van registration number PC 4555.

- (ii) The balances contained in Victoria Mutual Building Society account Numbered 2340532 and 2115312.

- (iii) As Against the First and Second Defendants:

A civil recovery order pursuant to section 57 of the **Proceeds of Crime Act.**

In relation to:

- (iv) The sum of US\$1,350,000.00 One Million, Three Hundred and Fifty Thousand Dollars (US Dollars) in cash seized from the Lot 696 21st Avenue, West

Cumberland, St. Catherine.

- (vi) The sum of \$1,151,625.00 paid by the First and Second Defendants for the purchase of property known as Lot 17, Helshire Glades, St. Catherine, being the land comprised in certificate of title registered at Volume 1398 Folio 834 of the Register Book of Titles.
- (v) The sum of \$649,000 paid by the First and Second Defendant for the purchase of the property known as Lots 541 and 542 Plantation Village, St. Ann.
- (vii) 2005 Blue/White Suzuki GSXR6001 motor cycle.
- (viii) A 2005 Red/Black Honda CBR 600 RR-1 motor cycle valued at approximately \$182,000.00.
- (ix) The balance contained in Victoria Mutual Building Society account numbered 22768980.
- (x) The balances contained in National Commercial Bank Account numbered 357150523.
- (xi) The balances contained in NCB Capital Market accounts numbered 766157 and 761028-1.

44. As Against the Second, Third and Fourth Defendants

A civil recovery order pursuant to section 57 of the Proceeds of Crime Act.

In relation to:

The sum of \$1,165,125.00 paid by the Second, Third and Fourth Defendants for the purchase of the property known as Lot 3, Helshire

Glades, St. Catherine, being the land comprised in certificate of title registered at Volume 1398 Folio 820 of the Register Book of Titles.

45. As Against the Second and Third Defendants

A civil recovery order pursuant to section 57 of the Proceeds of Crime Act 2007 in relation to:

The balance contained in National commercial Bank account numbered 244274889.

46. As Against all the Defendants:

A Freezing Order to restrain the Defendants from disposing of or dealing with the said assets.

Such further and other relief as the Court may deem just.”

Section 76 Applications – Detention and Forfeiture of Cash

47. Under Section 76-(1) of the statute detention of cash seized may be extended by a Resident Magistrate’s Court provided that no such order shall authorize the detention of cash beyond the period of three months from the date of the order or in the case of a further order under the statute beyond the period of two years beginning from the date of the first order.

48. In the instant case, the funds were seized by officers in a joint operation On 26th June, 2007. Since that time, the funds have been in the possession of the Claimant. There has been no order obtained from the Resident Magistrate’s Court as required under Section 76 extending the

- period for such detention in keeping with sub-paragraph (a) of Section 76-(1).
49. The Applicant submits that the funds having been first seized under Section 76 of the statute then the Claimant ought to have sought and obtained extension in or about August 2007 for the continued detention of the cash seized, given the fact that the initial seizure was done pursuant to Section 76-(1).
50. The Claimant instead chose to abandon the summary proceedings against Deloris Miller (from whom the cash was seized) and instituted civil proceedings by applying for and obtaining a detention and custody order and a freezing order from the Supreme Court as a means of shoring up the defect in the procedure for detention of the funds.
51. The Second Defendant submits that the Cash having been detained in June pursuant to Section 76 for a period of three (3) months and no further extension having been obtained the Second Defendant is entitled to the cash. In any event a period of 2 years has elapsed and the Claimants has failed to apply for a forfeiture order.

The Legal Issue

52. The single issue to be determined before this Court is whether the property is the subject of the claim is “recoverable property”.

Section 57:

The enforcing authority may take proceedings in the Court against any person who the enforcing authority believes holds recoverable property.”

53. The term “recoverable property” means “Property obtained through unlawful conduct” – Section 84.
54. The Agency is therefore called upon to satisfy this Court that the property owned by the Second Defendant are property obtained through “unlawful conduct.”
55. The correct approach to be taken in determining whether property was obtained through unlawful conduct was set out by *Mr. Justice Sullivan in the Director of Asset Recovery Agency and others v. Jeffrey David Green and others (2005) EWHC 3168*.

“(i). In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.

(ii) A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle.”

56. The approach taken by Mr. Justice Sullivan was approved by the court of Appeal in *R v W (N) and others 2009 1 WLR 965* where it was held:
- “That in the criminal provisions in Part 7 of the 2002 Act, as in the civil enforcement provisions in Part 5, Parliament’s legislative purpose had been to strike a careful balance between the civil rights of the individual and the need to ensure that the state could protect society by tackling crime effectively and to that end it had to steer a careful course between

requiring proof of the commission of a specific criminal offence or offences by a particular individual or individuals and allowing the making of a wholly unparticularised allegations of unlawful conduct, such as would require a defendant to justify his lifestyle; that Parliament could not therefore have intended that no particulars whatever needed to be given or proved. The cardinal elements in the case, namely the criminal conduct relied on, must be proved, since it was a requirement of elementary fairness; and that, accordingly, in order to prove that the funds involved constituted “criminal property” within the meaning of Section 340 of the 2002 Act the Crown was required to identify at least the class of crime in question.

Summary

57. This Honourable Court has no jurisdiction over the money seized from the Second Defendant’s residence and for which a forfeiture order was obtained pursuant to S.76 of POCA.

The Claimant has failed to establish that the cash seized flowed from any or any class of unlawful or criminal conduct or that it constituted a benefit from the Second Defendant’s criminal conduct or it represented such a benefit.

The Second Defendant ought not to be called to justify her lifestyle.

Court

- [6] The issue for the court to decide is whether the properties seized are recoverable property that is “property obtained through unlawful conduct”.
- [7] To decide this question, one has to look at the evidence which the parties agreed were not an issue.
- [8] Upon an evaluation of the evidence there are fundamental facts which seem unassailable.
- [9] The second defendant is central to the proceedings. She is mother of the First and Third Defendants while the Fourth Defendant could be styled, as daughter-in-law or the common law wife of her son, the First Defendant.
- [10] On the 26th June 2007 her house at Lot 696 – 21st A venue, West Cumberland in the parish of St. Catherine was searched.
- [11] It is during this search that the properties seized were discovered. The police had gone to search the premises armed with a search warrant under the Dangerous Drugs Act.
- [12] During this search they found a large sum of foreign currency (U.S. dollars) hidden under some meat in the freezer compartment of a refrigerator.
- [13] The money having been found, members of the F.I.U. were called in and further search led to the seizure of other properties and the unearthing of the true identity of the First and Third Defendants.

[14] When asked about the money, Ms. Miller at first said most of it was sent to her by her son Dumaine Wright who resides in the U.S.A., who was a construction worker and she was keeping it for him.

[15] Later she also claimed that some of the monies were hers and came from her earnings as a higgler.

[16] Investigations later proved that she had no son named Dumain Wright. The First and Third Defendants were her sons. They lived in the United States of America. They were both involved in the illegal drugs trade.

When one put the facts together including –

- (a) her lying about the identity of her sons and their occupation;
- (b) her own life style;
- (c) the absence of any evidence that she worked to earn money, whether as a higgler or otherwise;
- (d) the fact that all the properties seized were in her (defendant's possession) must lend to one inevitable conclusion;
- (e) her admission that the monies were sent to her from abroad.

The non appearance of Defendants in whose names appears on bank accounts are held by Miller, demonstrating abandonment of their assets.

[17] Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more.

There is no indication of any work place or higglering or any enterprise on her part.

[18] The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.

[19] The second Defendant seems to be claiming all the monies seized by virtue of section 76 of the **POCA**. At best she could only be claiming a part of it which is not identifiable. She was never able to say how much of that money was hers and how much belonged to other person/persons. Section 58 of the **POCA** sets out the conditions which must be met for this court not to make a Recovery Order. There is no evidence that any of those provisions are relevant to this application.

[20] Some authorities cited before this court seem to suggest that one should not look at the life style of a person to conclude that money in their possession was proceeds of an unlawful act. In today's world one of first indication of corruption is one's life style. Without more however, this would not suffice and any presumption based purely on life style would be a rebuttable presumption.

[21] In this case life style is merely one of the many factors which this court takes into consideration.

[22] This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August, 2007.

ADDENDUM

In the interest of clarity -

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The monies was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets.

Donald O. McIntosh
Puisne Judge