[2015] JMSC Civ 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV02793

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

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**VALICIA BARTLEY**	**FIRST RESPONDENT**
AND	**ORACE EDWARDS**	**SECOND RESPONDENT**

IN CHAMBERS

Alethia Whyte for the applicant

Romar Dallas for the first respondent

June 12, August 4 and 13, 2015

PROCEEDS OF CRIME – APPLICATION FOR EXTENSION OF RESTRAINT ORDER TO OTHER PROPERTY – WHETHER RESTRAINT ORDER SHOULD BE EXTENDED TO COVER OTHER PROPERTY – WHETHER COURT CAN PUT MONETARY LIMIT ON RESTRAINT ORDER

SYKES J

[1] This is an application by the Assets Recovery Agency ('the Agency') to extend the ambit of a restraint order to property other than that which has already been restrained. The working theory is that the offence with which Miss Bartley has been charged, if convicted, may permit the criminal lifestyle provisions of the Proceeds of Crimes Act ('POCA') to be invoked. These provisions enable the operation of certain presumptions against the defendant thereby making it possible for the Agency to argue that she has not only benefited from this particular crime but was, in essence, a career criminal and any property acquired ten years prior to the date of the conviction was criminal property.

[2] During the application it became apparent that, based on the Agency's case, the maximum benefit, if any, that it could establish was US$8,000 (approximately). Miss Whyte cited **Jennings v Crown Prosecution Service** [2005] 4 All ER 391 paragraph 28:

> *I think it very important to have in mind that in deciding whether to make a restraint order under section 77 (and if so, in what terms) the court's task is not to reach firm conclusions as to the precise extent of a respondent's benefit, or realisable property, for the purposes of section 71 ; though of course if those matters are plain the facts will be put before the judge. Rather, under section 77 the court's duty is to decide whether to make a protective order so that*

in the particular case the satisfaction or fulfilment of any confiscation order made or to be made will be efficacious.

[3] All this is true but that is not the end of the story. The case of **Joseph Ashford and others v Southampton City Council** [2014] EWCA Crim 1244 is instructive and will be examined at length. That case involved an appeal against a refusal to discharge restraint orders which were granted without-notice. Mr Ashford owned a plumbing business which he operated through 1st Active Drainage Ltd a company of which he was the sole director. At some point his business was operated through another company known as Fast Response Maintenance Ltd. He was also the sole director of that company. In May 2012, the city council received a number of complaints against Mr Ashford's businesses. The complaints were that (i) there was overcharging for work done, (ii) charging customers' credit cards without their permission and (iii) telling persons that their properties needed work done when that was not the case. An investigation ensued. There was a successful without-notice application for a restraint order. The restraint order froze property in excess of £1m. The application for variation sought to reduce the amount to £ ½ m. Not only were the companies that did the plumbing jobs assets frozen but so too were the assets of two other companies which had nothing to do with the plumbing services. Mr Ashford was arrested and bailed. When the variation application came up two years had passed since the allegations were made.

[4] On reading the narrative in the Court of Appeal's judgment it is clear that the primary judge had serious misgivings about the propriety of granting the restraint orders in respect of the other two companies and those misgivings had not disappeared by the time of the application for discharge and variation came before him. The judge went so far as to recognise that the evidence presented by the state was perhaps insufficient to justify the restraint against the two other companies that were not involved in the delivery of plumbing services.

Nonetheless, the judge granted the restraint order against them and later dismissed the variation application.

[5] On appeal, very learned counsel took the judge to task by submitting that there was insufficient basis to grant the restraint order against the other two companies. The ground was that there was no reasonable cause to believe that the two companies benefited from any criminal conduct. The court agreed and the restraint granted against the two companies that had nothing to do with the plumbing business was discharged.

[6] His Lordship went on to consider whether the value of the property restrained should be reduced in light of the criminal lifestyle submission. This was how the argument was put at paragraphs 23 and 24:

> *23 Without making any admission, Mr Ashford and 1st Active Drainage Ltd concede that there was sufficient evidence, at least by February 2014, to allow the judge to conclude that there was reasonable cause to believe they had benefited from criminal conduct and there was no objection to the imposition of the restraint order. On their behalf, however, Mr Talbot does challenge its current unlimited scope and submits that the judge was wrong to refuse to vary the restraint order against them and impose a cap of £500,000.*
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> *24 In refusing to vary the restraint orders against Mr Ashford and 1st Active Drainage Ltd, Judge Jarvis relied on indications that the investigation had the potential to generate a finding of criminal lifestyle pursuant to the provisions of s. 6(4)(a) POCA, whereupon the court must apply the relevant statutory assumptions in s. 10 of the Act when calculating the benefit figure for a confiscation order.*

[7] Sir Brian Leveson indicated that the judge was correct to be alive to the possibility of the criminal lifestyle being established. Inspite of this concession, Sir Brian Leveson disposed of the possibility of a criminal lifestyle finding in paragraphs 26 and 27:

> *26 … Assuming that every complaint of the 240 is valid (or following a finding of a criminal lifestyle, the contrary cannot be proved) and given that Mr Ashford is likely to have a ready explanation for his income, for example by providing invoices for the work legitimately undertaken and in respect of which there are no complaints, the maximum value of a confiscation order in this case was five times the current value, approximately £720,000.*
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> *27 There has been no suggestion by the investigating authority that the offences for which Mr Ashford and 1st Active Drainage Ltd are being investigated represent a systemic policy of overcharging that could generate an adverse finding even in the absence of complaint. Thus, on the present evidence, at its most generous, and assuming that this investigation does indeed progress to a prosecution and conviction, it does not appear to us that there is a realistic possibility that a confiscation order will follow in excess of £720,000. In the circumstances, we would grant Mr Ashford and 1st Active Drainage Ltd leave to appeal and allow the appeal by imposing that cap (albeit in excess of the cap conceded by Mr Talbot).*

[8] In other words the court may have regard to the case theory of the Agency and how it has constructed its case and take that into account when determining whether there should be a cap on the value of the property restrained.

[9] The case theory of the Agency began on the premise that US$46,000.00 appeared in her account under suspicious circumstances. That amount has been restrained. To say that money was received under suspicious circumstances, without more, says nothing except to point to the need for further investigation. The further investigation has placed the Agency in a position to say that Miss Bartley received only US$8,000.00. This means that there is an excess of US$38,000.00 that has been restrained and there is nothing to suggest that her benefit, if any, exceeds the US$46,000.00. Put another way, there is nothing to suggest that the sum already restrained will not be able to meet the maximum benefit that can be proved.

[10] It appears that the criminal investigation is complete because the information is that the criminal case is set for mention and on that date counsel for Miss Bartley is to indicate his readiness for trial. This can only mean that the Crown has completed its investigations, made the necessary disclosures and is ready to present its case, if required, against Miss Bartley.

[11] The case has not been presented on the basis that Miss Bartley is a career fraudster to the extent that that has really been her lifestyle. As Sir Brian Leveson indicated, the court can take account of the likelihood of a benefit being made in excess of US$8,000.00 in the event of a criminal conviction. There is no evidence that she was paid or received any other criminal property or benefit other than what it is said she received.

[12] Since the account is in her name, it means that she has control over the funds and to that extent, subject to third party rights, the account represents realizable

property (**Regina v Ahmed** [2015] AC 299 Lord Neuberger, Lord Hughes, Lord Toulson at para 41 – 47).

[13] In light of the law as it has been explained by the judges cited above it is not clear why the Agency wishes to have the restraint order extended to other property. Sir Brian Leveson was very clear that the restraint judge can look at the case and, while it is true to say that he is not trying the criminal case nonetheless he can, take account of what is likely to be the sum recoverable if the person is convicted where the information is available. This is a factor that may be taken into account when the court is called upon to exercise the discretion to extend the ambit of a restraint order. The application to extend the restraint order to cover other property is refused. There is no basis in fact or law, at this stage, based on the case theory advanced by the Agency, to believe that the property already restrained will prove insufficient to cover any benefit assessed.

DISPOSITION

[14] Application to extend restraint order to other property is dismissed. Costs to the first respondent to be agreed or taxed.