[2017] JMSC Civ 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV02582

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

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**CLAIMANT**
AND	**ROBERT SYLVESTER DUNBAR**	**1ST DEFENDANT**
AND	**CHRISTINA ROSETTI DUNBAR**	**2ND DEFENDANT**

Forfeiture of Assets – Application for Interim Order – Claim filed twice with same number- Whether service of second filed Claim valid- Affidavit pre-dates claim and application which were served- Whether valid- Delay in making application- Application inter partes- Whether honest belief reasonably held that Defendants likely to dissipate assets- Whether evidence in support of application sufficient- whether Act has retroactive effect.

Susan Watson Bonner for Claimant

Denise Senior-Smith instructed by Oswest Senior Smith & Co. for 1st and 2nd Defendants

Heard: 9th March 2017 and 31st March, 2017

IN CHAMBERS

BATTS J

[1] In this interlocutory application the Claimant, a state agency, seeks to restrain the disposal of assets due to the pendency of criminal proceedings. The jurisdiction relied upon is that provided by the Proceeds of Crime Act and in particular sections 32 and 33 of that Act. Those sections state:

> *"Section 32 . –*
> *(1) The Court may make a restraint order if any of the following conditions are satisfied-*
>
> *(a) there is reasonable cause to believe that an alleged offender has benefitted from his criminal conduct and-*
>
> *(i) a criminal investigation has been started in Jamaica with regard to the offence;*
>
> *(ii) proceedings for the offence have been commenced in Jamaica and have not been, concluded; or*
>
> *(iii) the enforcing authority has made an application under section 5, 20, 21, 26 or 27, which has not been determined, or the Court believes that such an application is to be made;*
>
> *(b) where—*
>
> *(i) the enforcing authority has made an application under section 22 (reconsideration of benefit after order is made), which has not been determined or the Court believes that such an application is to be made; and*
>
> *(ii) there is reasonable cause to believe that the Court will decide under that section that-*
>
> *(A) in the case of a forfeiture order, the property identified under the fresh identification of the defendant's benefit exceeds the property found by the Court that made the order; or*

(B) in the case of a pecuniary penalty order, the amount found under the new calculation of the defendant's benefit exceeds the relevant amount as defined in that section;

(c) where-

(i) the enforcing authority has made an application under section 24 (reconsideration of available amount after order is made), which has not been determined, or the Court believes that such an application is to be made; and

(ii) there is reasonable cause to believe that the Court will decide under that section that the amount found under the new calculation of the available amount exceeds the relevant amount as defined in that section; or

(d) where the enforcing authority has made an application under section 58 (recovery orders), which has not been determined or the Court believes that such an application is to be made.

(2) Subsection (I)(a)(ii) is not satisfied if the Court finds that-

(a) there has been undue delay in continuing the proceedings; or
(b) the Director of Public Prosecutions does not intend to proceed.

(3) If an application mentioned in subsection (1) (a) (iii), (b), (c) or (d) has been made, the requirements of those provisions are not satisfied if the Court finds that-

(a) there has been undue delay in continuing the application; or
(b) the enforcing authority does not intend to proceed.

(4) If subsection (1) (a) (i) is satisfied-

(a) references in this Part to the defendant are to the alleged offender;
(b) references in this Part to the enforcing authority are to the Director of Public Prosecutions; and

(c) *section 2(2)(a) (relevant dates for identifying tainted gift) has effect as if proceedings for the offence had been commenced against the defendant when the investigation was started.*

33.-(1)
A Judge of the Supreme Court (hereinafter referred to as the Judge) may make a restraint order upon an application made without notice in Chambers by-

(a) the Director of Public Prosecutions; or
(b) the Agency.

(2) If any of the conditions set out in section 32(l) is satisfied, the Judge may make an order prohibiting any person dealing with any realizable property held by a specified person.

(3) A restraint order may provide that it applies to-

(a) *all realizable property held by the specified person, whether or not the property is described in the order;*
(b) *realizable property transferred to the specified person after the order is made.*

(4) A restraint order may be made subject to exceptions, which may-

(a) *provide for reasonable living expenses and reasonable legal expenses, other than any legal expenses that-*

(i) *relate to an offence which falls within subsection (5); and*

(ii) *are incurred by the defendant or by a recipient of a tainted gift;*

(b) *make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;*

(c) *be made subject to conditions.*

(5) The offences that fall within this subsection are-

(a) the offence mentioned in section 32(l)(a)(i), if the condition mentioned in that subsection is satisfied;

(b) the offence mentioned in section 32(a)(ii), if the condition mentioned in that subsection is satisfied;

(c) the offence concerned, if any of the conditions mentioned in section 32(1) (a)(iii), (b) or (c) is satisfied.

(6) Where-

(a) the Judge makes a restraint order; and

(b) the applicant for the order applies to the Judge to proceed under this subsection, whether as part of the application for the restraint order or at any time afterwards,

the Judge may make such order as the Judge believes is appropriate for the purpose of ensuring that the restraint order is effective, including in particular, any provisions which the Judge considers appropriate for the preservation of the property with respect to which the order is made.

(7) For the purposes of subsection (2), dealing with property includes removing property from Jamaica.

(8) A copy of a restraint order shall be served on a person affected by the order in such manner as may be prescribed by rules of court."

The Act and these provisions have in their relatively short existence received considerable judicial gloss from our courts see for example: **The Asset (sic) Recovery Agency v Rohan Anthony Fisher et al [2012] JMSC No 16 ,**on appeal **Delores Elizabeth Miller v Assets Recovery Agency [2016] JMCA Civ 25 ; The Assets Recovery Agency v Michael Brown aka Erdley Barnes [2015] JMSC Civ 163 ; Assets Recovery Agency (Ex-parte) Jamaica [2015] UKPC 1, Privy Council Appeal No 0036 of 2014.**

[2] The Claimant has filed four (4) affidavits sworn to by the same affiant. These affidavits support the application and respond to affidavits filed by the Defendants. They assert that the 1st Defendant was under investigation, has been charged and is now before the court for money laundering. Much reliance

is placed on statements made by Dean and Delmar Drummond which implicate the 1st Defendant. Dean was successfully prosecuted in the United States of America for drug related offences. Reliance is also placed on seized ledgers, which it is said refer to the 1st Defendant. The affidavits also purport to demonstrate that the Defendants' income was insufficient to acquire property the Defendants now own. Paragraph 28 of the affidavit dated the 30th April 2015 stated:

> "28. *Based on the information obtained surrounding the purchase of the property and the subsequent palatial property construct [sic] on the land there is sufficient for the court to infer that the acquisition of the property and buildings thereon were funded with the 1st respondent's benefit derived directly or indirectly from his involvement in drug trafficking. Based on the investigations conducted, I have reasonable ground to believe that it is more likely than not that the asset identified was not acquired from the Respondent's known legitimate income. The known sources of income identified at Table 5 above are insufficient to enable the Respondents to acquire the asset identified and listed in Table 1 above. This asset I believe represents the Respondents' benefit from criminal conduct namely the 1st Respondent's drug trafficking activities with Dean Drummond.*
>
> *29. There are reasonable grounds to believe that the Respondents have engaged in conduct that is criminal under the laws of Jamaica, to wit, money laundering and might take steps to transfer, sell, dissipate or otherwise deal with the asset and thereby frustrate any subsequent civil recovery order made by the* court."

[3] The sole asset in respect of which the restraint order is sought is property located at Lot 24 Whittingham Avenue Ironshore, Hartfield Meadows, Little River, St. James, registered at Volume 1324 Folio 52 of the Registrar Book of Titles. It was

purchased by the Defendants for $1.5 million .A house was constructed on the property by the Defendants. The property was valued at $50 million in the year 2013.

[4] The Defendants (who are the Respondents to the application) relied on affidavits of Olivia Derrett filed 3rd March 2017, the 2nd Defendant (Christina Dunbar) filed 27 January 2017 and an affidavit from each Defendant filed on the 15th November, 2016. These affidavits deny involvement in illegal activity, explained their "relationship" with the Drummonds and set out in some detail their sources of income in the period. Both sides filed written submissions and supplied authorities and also addressed me orally. For reasons which will shortly become apparent I do not think it necessary or particularly helpful to set out or reference in detail the respective arguments or factual assertions. The Defendants' counsel opened with an uncontroverted perspective which, to my mind, compels only one result.

[5] Mrs. Senior-Smith commenced her submission by indicating a fact that only came to her attention whilst the Claimant's counsel was presenting the case for the Crown. She stated that the conditional appearance filed by the Defendants was in response to an irregular document that is on the face of it null void and of no effect. Enquiry of Claimant's counsel, and a review of the court's file confirm the following:

(a) This Claim was filed on the 14th May 2015. Also filed on that date were a Particulars of Claim, a Notice of Application for Restraint Order and an Affidavit in support. Save for the Affidavit these documents have never been served on the Defendants.

(b) On the 8th March 2016 another Claim Form and Particulars of Claim, with the same suit number and in terms identical to the one filed on 14 May 2015, was filed. This document, an Application for Restraining Order and the Affidavit filed on the 14th May 2015, were served on the Defendants on the 16th March, 2016.

(c) The Defendants entered a conditional appearance on the 31st March, 2016 because they had not been served with the usual forms that the rules say are to accompany a claim.

(d) Claimant's Counsel filed the 'claim' on 8th March, 2016 (with same suit number as that filed on 14th May 2015) because in her view the Claim that was filed on the 14th May 2015 expired after 6 months. Since it had not been served in March 2016, she filed the other 'claim'. Counsel pointed to the Form 1 attached to the Civil Procedure Rules 2002 in support of a submission that the Claim Form has no validity if not served within 6 months.

(e) The Claim Form, Particulars of Claim and the Application filed on the 14th May 2015 have never been served.

[6] This conundrum only became possible it seems because the originating process was not sealed by the court. This is contrary to the rules (Order 3.9). Claimant's counsel being of the view that her claim had expired without being served sought to correct the position by an entirely irregular act. That is by simply retyping another Claim with the same suit number and obtaining a later filing date. In effect, passing off the document as being a Claim filed in 2016 when in fact the Claim was filed in 2015.

[7] The law is that a Claim remains alive for 12 months not for 6 months. Had Claimants counsel read the rules (Order 8.14 (1)), instead of only looking at the forms, she would have realised this. The forms do not make law or create a binding practice, see Order 3.10 (2) and (3).Clearly a stated rule cannot be varied by the content of a form. .

[8] This court has the power to correct irregularities see Order 26.9. However, I do not believe that the conduct displayed in this case should be so rewarded. The rules are clear as to what should be done if a Claim needs renewal. An application is to be made see Order 8.15 (1) . Alternatively, and if there is no

applicable limitation period, a new suit may be filed. This Claimant did neither. A Claimant, and in particular the state as Claimant, ought not to be permitted to adopt irregular measures bordering on the deceptive, and then be allowed to proceed. I hold that the document served on the Defendants was not an originating process. It was null and void and of no legal effect. If it were allowed to stand it would mean that the Claimant would have a claim valid for the period 8th March 2016 to 7th March 2017 (although bearing the same suit number as the one filed in May 2015). A party whose suit was about to expire, instead of applying to extend its life, need then only retype a Claim form, insert the old suit number, file it and proceed. It is a dangerous precedent to contemplate. The document filed on the 8th March 2016 and served was therefore null and void and of no effect.

[9] It cannot be said that by entering an Acknowledgement the Defendants waived the irregularity. In the first place, they had not the full knowledge necessary for waiver, they did not know the document was not an originally filed claim. Secondly they filed a conditional acknowledgment.

[10] If the document served was null and void there has been no service of the Claim. The Claim filed in May 2015 has long expired. There is therefore no valid claim before the court. The application before me is therefore dismissed with costs to the Defendants to be taxed or agreed.

[11] There are other points made by Defendants' Counsel. I will briefly address them in the event another court takes a view contrary to the one I have taken on the nullity of claim point.

[12] The second point made by Mrs. Senior Smith is that the affidavit in support of the application predates both the Claim and the application by several months. In other words, assuming that the claim filed and served in March 2016 is valid , the affidavit in support was dated 14th May, 2015. The application for a restraining order which was served on her was filed on the 8th March, 2016. Counsel relied on ***Challenge International Airlines Inc v Challenge International Airlines Ja.***

***Ltd*. et al SCCA 63/86 unreported judgment 5 June 1987** as authority for a submission that in that situation the application should be dismissed. I agree that, save in exceptional circumstances, the affidavit in support ought not to predate the application and its originating process. If it does, it cannot be relied upon. In the **Challenge Enterprise** case however the Lord President Rowe applied an exception to that principle which also applies in the case before me. The principle is not applied where the Defendant has filed an affidavit responding to the irregular affidavit, as per the Lord President, Rowe:

> "***It became crystal clear to us that the court could not understand the affidavit of Mr. Gordon White of December 9, 1986, without looking at the affidavit of Mrs. Jones to which it made such full references. We therefore hold that Mrs. Jones affidavit was incorporated into that of Mr. Gordon White, and that it could be looked at by the learned trial judge and become the basis of his order granting to the respondents, an interlocutory injunction."***

[13] On the substantive issues Defendant's counsel made the following points, all of which taken cumulatively, result in a refusal of this interim application.

a) The application was not made ex parte. Notice was given to the Defendants of the intention to apply for a restraint Order. This it was submitted demonstrates that the Claimant had no genuine belief that the Defendant's were likely to dissipate the asset. The Claim was filed in 2015. This was 3 years after criminal charges related to money laundering were laid against the Defendants (in 2012). These charges are still pending as the Defendants have not yet been tried. Furthermore this application first came before the court on the 5th April 2016, and was adjourned to the 17th November 2016 and thereafter adjourned to the 17th January 2017 and

again to the 9th March 2017. No Interim Order has ever been made. The Defendants have not in all the time since the year 2012 taken any step to dissipate the asset. I agree with counsel that the interim relief claimed should be refused as I am not satisfied on a balance of probabilities or at all that the Defendants are likely to dissipate. No reasonable ground has been demonstrated on the evidence that they are likely to do so. The Claimant's conduct suggests there is no real belief reasonably held that the Defendants intend to do so. In this regard I find some comfort in the words of Lord Justice Longmore:

> ***"Fear of dissipation of assets is the reason for seeking a restraint order. Such fear must, in fact, exist before an order should be applied for. But in a case where dishonesty is charged, there will usually be reason to fear that assets will be dissipated. I do not therefore consider it necessary for the prosecutor to state in terms that he fears assets will be dissipated merely because he or she thinks there is a good arguable case of dishonesty. As my Lord has said, the risk of dissipation will generally speak for itself. Nevertheless prosecutors must be alive to the possibility that there may be no risk in fact. If no asset dissipation has occurred over a long period, particularly after a Defendant has been charged, the prosecutor should explain why asset dissipation is now feared at the date of application for the order when it was not feared before."***
>
> (Emphasis added)
>
> ***Jennings v Crown Prosecution Service [2005] 4 All ER 391 @ 411.***

b) The investigation reported on by the Claimant's affiant was not his own. His affidavits are almost entirely based upon things told to him about what others have said or done. He appears not to have personally conducted any of the interviews or investigations. This factor, along with those at (c) (d) and (e) and (f) below, invite a conclusion that the probability of ultimate success is rather modest.

c) The evidence establishes that the Defendants were registered owners of a bare parcel of land on the 3rd May 2004. The Defendants have said that the agreement of sale was entered into in the 1990's, although the transfer was registered much later. This allegation was not contradicted by the Claimant's affiant who appears not to have consulted with the vendor in that regard. Claimant's counsel was content to point out that the attorney having carriage of sale was now deceased. The other point made by the Defendants' counsel is that the alleged date of acquisition predates the earliest time their involvement in crime is alleged to have occurred, that is in 2007. The land acquisition, if not the construction of the house could not have been from proceeds of the crime alleged.

d) The house which was constructed by the Defendants was built over a period of several years. In 2005, the Claimant says, it was partly constructed. In this regard, it is relevant to note that there is an inconsistencey between the "evidence" of the two Drummonds. Dean says that the 1st Defendant needed money to buy the property and build the house hence the drug deal;

Delmar says that the 1st Defendant used the drug money to assist completion of construction of the house. He does not directly relate it to the purchase of the land, See **Exhibits LJ 5 and 6 to Affidavit filed 14th May 2015.** .

e) Much of the Defendants' very detailed evidence of their sources of income has not been directly contradicted. The sources alleged include commission earned at Sunholding Travel and Tours and commission earned at Firestar Water Sports and Freestyle Charters as well as earnings from selling jewellery, clothes, Cuban cigars among other things. In addition, they were associated with various companies, which are identified by name. The Claimant did not adequately investigate these detailed assertions. Most notably no information, as to whether commissions(as against salary) were paid in the period, was obtained from the stated companies.

f) No documents were seized at the Defendant's premises or anywhere else which clearly connect them to the drug dealers or those convicted of drug dealing. The ledgers to which reference is made, were obtained from the Drummonds and do not speak for themselves. It is the witness statements of the Drummonds which interprets the document and explains its connection to the 1st Defendant. The other evidence on which reliance is placed to link the 1st Defendant to proceeds of crime is the report by the Drummonds of a meeting and reported transactions with the 1st Defendant.

[13] I agree with counsel that the evidence at this stage is rather tenuous and, given the delay in making this application, somewhat inadequate for the purpose of obtaining this interim relief. This is not to say that at trial further evidence may not be forthcoming or that the evidence such as it is may not be sufficient to satisfy a court to the requisite standard. All I am saying is that at this stage, given the comparative weight of the respective cases , and the fact that the Defendants have taken no step to dissipate since being charged, the Claimant's case that there is a real risk of dissipation is found wanting. Let me repeat I make no findings of fact.

[14] The Defendant's counsel points also to the fact that the property was acquired prior to 2007 when the Act came into force and that the alleged illegal conduct also occurred prior to 2007.Her clients assert that construction of the house was completed in 2005. She urges me to say that, as the Act does not have retroactive effect, the application to forfeit must fail. Reliance is placed on the authority of ***Asset Recovery Agency v Michael Brown*** **[2015] JM SC Civ 163 (unreported judgment 28 July 2015) See per Sykes J at para 8.**Statutory instruments which adversely affect the subject's liberty or property are to be strictly construed or, as some say construed *contra proferendem.* I am not obliged to make a final determination at this stage and I decline to do so. I will however refuse this interlocutory application on the basis, in addition to the matters stated in paragraphs (10) and (13) above, that on the evidence before me the Crown's application to forfeit is unlikely to be ultimately successful.

[15] It does appear to me that the conduct of this matter has been beset by inexperience if not incompetence. It behoves those charged with the responsibility of implementing this Act, in its Civil and Criminal jurisdictions, to familiarise themselves with the relevant rules of practice and procedure and/or to retain counsel of experience. It is in the public interest that the law is enforced, but such enforcement must itself be done in accordance with the law.

[14] In the result, the application is dismissed with costs to the Defendants to be taxed if not agreed.

David Batts
Puisne Judge