



[2014] JMSC Civ.10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 06677

**IN THE MATER OF AN APPLICATION
BY THE ASSETS RECOVERY
AGENCY FOR COURT ORDERS
PURSUANT TO SECTIONS 32, 33 &
57 OF THE PROCEEDS OF CRIME
ACT, 2007**

BETWEEN	THE ASSESTS RECOVERY AGENCY	APPLICANT
AND	ADRIAN FOGO	FIRST RESPONDENT
AND	PATRICK FOGO	SECOND RESPONDENT
AND	KAYANN FOGO	THIRD RESPONDENT
AND	PATMARS CLOTHING & RENTAL CO. LTD	FOURTH RESPONDENT
AND	DAWN POYSER	FIFTH RESPONDENT
AND	MARIE MCLEOD	SIXTH RESPONDENT
AND	JULIET SMITH	SEVENTH RESPONDENT

Charmaine Newsome and Susan Watson Bonner for the applicant

No respondents or legal representatives

January 27 and February 6, 2014

**PROCEEDS OF CRIME - APPLICATION FOR RESTRAINT ORDER – SECTIONS 2
(1), 5, 6, 16, 32 OF THE PROCEEDS OF CRIME ACT**

SYKES J

[1] This is a without-notice application for a restraint order under section 32 of the Proceeds of Crime Act ('POCA') preventing any of the named respondents or indeed anyone from disposing of or dealing with several parcels of real estate and personal property including accounts at financial institutions, motor vehicles and heavy duty equipment.

[2] The essential nature of the case brought by the Assets Recovery Agency ('ARA') is this. The ARA claims that it is conducting civil recovery and money laundering investigations under POCA in respect of properties held by the named respondents. It alleged that the total value of the properties is three hundred and ninety nine million, five hundred thousand dollars (JA\$399,500,000.00). It is also alleged that these properties were acquired directly or indirectly from criminal conduct, namely drug trafficking and money laundering.

[3] The investigation commenced on the basis of information received that the Mr Adrian Fogo and Mr Patrick Fogo ('the Fogos') were engaged in drug trafficking and they funneled the proceeds of their activity to the other respondents who have been holding property coming directly or indirectly from the drug trafficking.

[4] In respect of Mr Adrian Fogo, the allegation is that on July 25, 2012, he had delivered to him a suitcase with 2.2 kilogrammes of cocaine. The courier who took the suitcase to Mr Fogo was detected on entry into the United States and thereafter a controlled delivery of a now empty suitcase took place and both Mr Fogo and the courier were arrested and charged with conspiracy to import, importation and attempt to possess with intent to distribute a controlled substance. In March 2013, Mr Adrian Fogo made a plea deal with the United States authorities where he agreed to plead guilty to conspiracy to import and conspiracy to possess cocaine with intent to distribute ('the first indictment').

[5] After his arrest in July 2012, Mr Adrian Fogo was granted bail. It is alleged that while on bail and leading up to the plea agreement, Mr Adrian Fogo and Mr Patrick Fogo made arrangements to import cocaine into the United States of America. Arising from investigations the Fogos were indicted for conspiracy to distribute and possession of cocaine with intent to distribute ('the second indictment').

[6] In July 2013 Mr Adrian Fogo made another plea agreement and pleaded guilty to the two offences with which he was charged in July 2012. He has since been sentenced to eight years (the second indictment). The court will now address each type of property ARA wishes to be restrained.

[7] In respect of Mr Patrick Fogo the evidence was that he was alleged to be involved in drug trafficking. The second affidavit filed on February 5, 2013 alleges that Mr Patrick Fogo pleaded guilty in December 2013 to drug trafficking and entered a plea deal with the United States authorities. Based on the evidence presented so far, this was his first conviction.

Real Estate

[8] There are eleven parcels of real estate in this application. All are located in the parish of St James. All properties, except one, are in the names of the Fogos or the other named respondents. One parcel is in the name of the grandmother of

the Fogos. Unfortunately, the grandmother is now deceased. All the real estate and any subsequent construction done whether by way of making a complete structure or by improving what was already there was done before any of the Fogos were charged with or convicted of any criminal offence.

Motor vehicles

[9] All the motor vehicles including the heavy earth-moving equipment were acquired before any of the Fogos were charged with or convicted of any criminal offence.

Accounts at financial institutions

[10] There is no evidence indicating when these accounts were opened.

Bases of the application

[11] ARA has applied for the restraint order on a number of bases. The first basis is that the Fogos have a criminal lifestyle. The argument goes like this. The Fogos have now been convicted of drug trafficking. The offences for which they were convicted are Second-Schedule offences under POCA. According to counsel, the fact that the conviction was before a foreign court is of no moment. Counsel submitted that a conviction of a Second-Schedule offence anywhere in the world is a sufficient trigger event for a benefit hearing into whether the defendant has a criminal lifestyle.

[12] As this court understands the submission, the advantage of classifying a person of having a criminal lifestyle is that it opens up the person to the risk of ARA saying that he has benefited from his criminal lifestyle over the previous ten years ending on the day he was convicted (section 6 (2)). The classification of having a criminal lifestyle carries with it the rebuttable presumption that the all property acquired in that ten years was from crime and that property would represent his benefit from his criminality. In other words, such a classification would enable ARA to go back ten years from the date of conviction and seek to recover the benefit from the presumed history of criminal conduct over that time

period. ARA would not need to prove that the defendant benefited from the particular crime which triggered the benefit hearing.

[13] From that has been said it should be obvious why ARA wants to say that the Fogos have a criminal lifestyle. ARA wishes to say that all properties acquired in the ten years leading up to and ending with the date of their convictions represent their benefit.

[14] After the hearing into this matter was concluded on January 27, ARA decided to submit a second affidavit setting out what it considers to be relevant information. One of the things that stands out in the second affidavit is that a Special Agent David Jensen sent a memorandum, dated January 30, 2014, (three days after the application concluded) to Mr Justin Felice, Chief Technical Director of the Financial Investigations Division in which it is being said that he (Jensen) spoke personally to Mr Adrian Fogo and that Mr Adrian Fogo admitted that he was involved in drug trafficking in the United States for the past ten years. It is important to see what the first affidavit says.

[15] The first affidavit filed on behalf of ARA states at paragraph 25:

I have received information from Homeland Security Investigations' Special Agent David Jensen and do verily believe that based on information he received from cooperating sources, the 1st and 2nd respondents have been involved in drug trafficking activities for over ten (10) years.

[16] The second affidavit from the same deponent states at paragraph 2:

In furtherance of the investigation, I have received a copy of a letter dated January 30, 2014, from Mr David Jensen, Special Agent of the US Immigration and Customs Enforcement indicating that he debriefed a confidential

criminal informant who worked with Adrian Fogo in drug trafficking. This informant told him that the 1st and 2nd respondents have been in drug trafficking activities for over ten (10) years. He stated that some of the information provided by the informant has been verified from public sources. Special Agent Jensen further stated in his said letter that he personally interviewed Adrian Fogo, the 1st respondent on several occasions in 2013 and that he David Jensen was personally told by Adrian Fogo that he was involved in trafficking drugs to the USA for ten (10) years. This is the information to which I referred to in paragraph 25 of my 1st affidavit.

[17] The court makes three observations about this. First, in the first affidavit there is no evidence that Mr Adrian Fogo confessed to being a long-standing drug trafficker. The court's understanding from the first affidavit was that Special Agent Jensen had received his information from a reliable confidential source as distinct from hearing the confession from the mouth of Mr Adrian Fogo. Second, during the hearing the court made the observation that while the law permitted hearsay the court did not think that the permissible hearsay extended to the deponent being told that he was told by Special Agent Jensen who himself was told by a reliable source, who was unnamed, that Mr Adrian Fogo was a drug trafficker. Third, in examining paragraph 25 of the first affidavit it is clear that the noun *information* although used twice in the paragraph does mean the same thing each time it is used. Where it is used the first time in paragraph 25 *information* refers to what the deponent was told by the Special Agent. In the second instance *information* refers to what the Special Agent was told by the cooperating source. It will be recalled that in the paragraph the deponent said that the Special Agent got his communication from a third party. In neither instance does it mean that the Special Agent was told by Mr Adrian Fogo that he (Adrian) was a drug trafficker. If this is correct then it is unlikely that *information* has the meaning now

being sought to be attributed to it in the deponent's second affidavit. There is a world of difference between being told by a third party that Mr Adrian Fogo is a drug trafficker and Mr Adrian Fogo confessing to a law enforcement officer that he is in fact a drug trafficker.

[18] If the deponent is saying in his second affidavit that Mr Adrian Fogo's confession was what he had in mind in his first affidavit then the critical question that arises is why did he not say so? Why say that the Special Agent was given information by a third party when what you really meant or also meant was that Mr Adrian Fogo had actually admitted to being a drug trafficker for the past ten years? In light of what has been said it is with deep regret that the court takes the decision not to rely on this most recent revelation. Coming as it has on a without notice application when it was available before and without any explanation for not disclosing it earlier the court will not take such information into account on this application.

The analysis

[19] In resolving this application it is important to understand the confiscation regimes in POCA. POCA has established two systems for removing property from either convicted criminals or persons who hold property derived from unlawful conduct. POCA also allows forfeiture of the instrumentalities of crime and cash that may be used for the commission of crime. The two systems are (a) conviction-based and (b) civil recovery. Taking the conviction-based system first. This requires a conviction of a defendant in any of the courts named in section 5 of POCA. These courts are the Supreme Court, all divisions of the Gun Court except the Resident Magistrate's Court Division and the Resident Magistrate's Court. Under section 5 (3) the court must conduct a benefit hearing to find out whether he benefited from his criminal conduct.

[20] The Act demands a particular sequence if the defendant is convicted of Second-Schedule offences or in the circumstances stated in section 6. If he is convicted of Second-Schedule offences or the circumstances stated in section 6

then he is regarded as having a criminal lifestyle. He is then said to have engaged in general criminal conduct and is therefore regarded as a career criminal. As stated before, this categorisation creates the opportunity for a ten-year reach back from the date of conviction and raises the presumption that any property acquired in that period was his benefit from his criminal lifestyle.

[21] If the court concludes that the defendant does not have a criminal lifestyle then the court must decide whether the defendant has benefited from particular criminal conduct, that is to say, benefited from the offence for which he has been convicted by a court in Jamaica (section 5 (2) (b)). Criminal conduct is defined in section 2 (1) to mean conduct occurring on or after the appointed day, being conduct which (a) constitutes an offence in Jamaica; or (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica.

[22] Under POCA great care must be taken in any effort to say that a defendant has criminal lifestyle. The reason for this caution is that general criminal conduct (that is the label attached to the criminal conduct if the defendant is convicted of a Second-Schedule offence or in circumstances stated in section 6) is defined in POCA to mean all of the defendant's criminal conduct occurring **after** the appointed day (section 2 (1)) (emphasis added). This prohibition on going back before the appointed day is supported by section 2 (10) which provides that nothing in section 5 permits the court to rely on conduct occurring or offences committed or property transferred or obtained, before the appointed day in order to make any conviction-based order. The appointed day was May 30, 2007. In this case Mr Adrian Fogo was convicted in 2012 and Mr Patrick Fogo who was convicted in December 2013. Both convictions were after the appointed day. Since some of the transactions involving some of the properties were done before May 30, 2007 those properties and transaction would be off limits under POCA.

[23] The problem for ARA, in this case, is that the text and context of section 5 (1), having due regard to the definitions in section 2 (1), clearly show that conviction means conviction in a Jamaican court and not convictions before a foreign court. The courts named in section 5 makes it clear that only convictions before Jamaican courts will trigger the benefit hearing. Section 5 is a definition by description and not essence. The refers only to courts in Jamaica and by description excludes foreign courts. It is therefore impossible to see how ARA could arrive at the conclusion that a conviction in a foreign court is a conviction for the purpose of triggering a benefit hearing under section 5 (2). It follows that if there is no conviction of an offence by any Jamaican court then no conviction-based benefit hearing can take place under section 5 (2). The Fogos have not been convicted in an Jamaica court and therefore the Supreme Court has no jurisdiction to embark upon any benefit hearing to decide whether the Fogos benefited from criminal activity.

[24] ARA sought to rely on the wording of section 32 (1) (a) to secure the restraint order. Unfortunately, the ability to secure a restraint order under section 32 (1) (a) really rests on the underlying and heavily implied proposition that there is or will be before the Jamaican courts a prosecution which may lead to a conviction. Section 32 (1) (a) reads as follows:

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 (sic) from his criminal conduct –*
- (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.*

[25] As can be seen all subparagraphs rest on the proposition that a criminal investigation has commenced or proceedings have commenced or there has in fact been a conviction. The applications mentioned in subparagraph (iii) are all post-conviction application. When section 32 (1) (a) is read along with sections 5 and 6 it is too plain that a restraint order based on the section can only be obtained in respect of criminal investigations, criminal proceedings or criminal convictions in Jamaica.

[26] The second basis for the restraint order was said to be that money laundering investigations have commenced and so a restraint order should be granted. The fact that a money laundering investigation has commenced is not in and of itself sufficient for the grant of restraint order. It is not the commencement of the investigation that is required but an investigation in a context where there is **reasonable cause to believe that an alleged offender has benefited from his criminal conduct** (emphasis added to words of statute). A restraint order under section 32 (1) (a) (i) requires firstly, a criminal investigation in Jamaica and secondly, reasonable cause to believe that an alleged offender has benefited from his criminal conduct. As far as section 32 (1) (a) (i) is concerned there is no indication that ARA intends to prosecute the Fogos or any person in Jamaica for any offences committed under Jamaican law. An application under this provision requires ARA to say who the alleged offender is.

[27] Section 32 (1) (a) (i) and (ii) makes the distinction between investigations and proceedings. When section 32 (1) (a) (ii) is read with regulation 2 of the Proceeds of Crime Regulations 2007 made under section 138 of the Act, it is equally plain that overseas convictions are out of the question. Regulation 2 states proceedings for an offence commences when

- a. a justice of the peace issues a summons under section 2 of the Justices of the Peace Jurisdiction Act in respect of the offence;
- b. a person is charged with an offence after being taken into custody without a warrant;
- c. an indictment is preferred under –
 - i. section 274 of the Judicature (Resident Magistrates) Act; or
 - ii. section 2 of the Criminal Justice (Administration) Act (preferment at Circuit Court)

[28] Just to make an observation here. It is quite surprising that the description of when proceedings commence excludes a person arrested on a warrant. What if the person was arrested on a warrant and an it is an information that is preferred against him and not an indictment? Most persons would say that proceedings have commenced but according to this description no proceedings have commenced.

[29] ARA cannot rely on section 32 (1) (a) (iii) because the applications there are made only after a verdict of guilty in a Jamaican court.

[30] The point is that an application for a restraint order is not a reflex action but rather the outcome of mature consideration and clear decisions taken on who the alleged offender is, what offences he is alleged to have committed, that he has benefited and it is intended to prosecute him or proceedings have commenced or he has been found guilty. If there is no such intention or prosecution then there is no basis for the grant of a restraint order under section 32 (1) (a) (i) or (ii). Section 32 (1) (b) and (c) do not arise for consideration.

[31] This leaves the possibility of granting the restraint order on the basis that civil recovery proceedings have commenced or about to commence (see section 32

(1) (d)). During the oral judgment the court stated that no application for civil recovery had been filed. The court was corrected by counsel who pointed out that a civil recovery claim had been filed. In light of this the reasons for judgment were corrected and recast to reflect the fact that a civil recovery claim as filed.

[32] In light of this correction the court reassessed its decision to deny the restraint order. In support of its contention that it could support a restraint order on the basis of the civil recovery claim even though some the properties were acquired before POCA was passed into law ARA relied on section 71 of POCA. This section must also be read along with section 55 (3).

[33] Section 71 (1) provides that the Limitation of Actions Act does not apply to any proceedings under Part IV which deals with civil recovery claims. Section 71 (2) states that civil recovery proceedings may be brought upto twenty years after ARA's cause of action accrued. Section 71 (3) describes when ARA's cause of action accrues. The cause of action accrues at the time when the original property obtained from unlawful conduct was first acquired. If the original property has been converted to other forms of property then the cause of action accrues when the original property was first acquired. Property obtained through unlawful conduct is called recoverable property (section 84)1))

[34] Section 55 (3) states that in 'deciding whether or not property was recoverable at any time, including any time before the appointed day [May 30, 2007], it shall be deemed that this Part was in force at that and any other relevant time.' This means that in deciding whether property was obtained through unlawful conduct the court is to assume that that POCA was in fact in force at the time the property was acquired. This assumption is to be made even if the property was acquired before the Act was in force.

[35] The practical result of this is that property acquired before POCA was passed can be seized through civil recovery proceedings if it can be shown that it was obtained through unlawful conduct. The limitation period is twenty years from the

time of acquisition. This stands in sharp contrast to section 2 (10) which provides in that nothing in the sections that assist in conviction-based recovery of property applies to 'conduct occurring, offences committed or property transferred or obtained, before the appointed day.'

[36] On the face of it there is express statutory authorisation for the retrospective imposition of a civil penalty to facts and circumstances that occurred before POCA was enacted or came into force.

[37] There is one point that must be addressed. The deponent on behalf of ARA keeps making the point that the respondents did not have the means to acquire the properties registered in their names. Then he says that in the absence of legitimate income then there must be illegitimate income and therefore they are involved in criminal activity and thus the property in their names is recoverable property. The jurisprudence in this area, based on the wording of POCA, which has been accepted is that this kind of reasoning is flawed. This type of reasoning was fully addressed by Sullivan J in his now famous judgment in **The Director of Assets Recovery Agency v Green** [2005] EHC 3168 (Admin).

[38] His Lordship had to determine whether a claim for civil recovery can be decided on the basis that the respondent has no identifiable income to warrant the lifestyle and purchase of that respondent without identification of any particular criminal conduct. The Director submitted she did not have to identify or prove any specific acts of unlawful conduct and may rely on the fact that respondent did not provide any satisfactory explanation as to how the property was obtained and this would lead to the inevitable conclusion that the property was obtained by some unidentified unlawful conduct.

[39] Sullivan J rejected the Director's submissions and insisted that based on the wording of the provisions in the English POCA of 2002, the Director had to indicate what matters were said to be the unlawful conduct. His Lordship further held at paragraph [25] that civil recovery was not concerned with the recovery of

property however obtained but rather with property obtained through conduct which was unlawful under the criminal law.

[40] So too the Jamaican POCA is not concerned with property however obtained but only with property obtained through unlawful conduct. Therefore to keep asserting that the respondents did not have the income to support the acquisition of the property in question is really beside the point. ARA must assert that the property came from unlawful conduct and provide evidence to back up the claim. The crucial question is how much detail is required where ARA is relying on civil recovery to ground the restraint? To answer the question the court goes back to the judgment of Sullivan J.

[41] The court shall set out the relevant English provisions followed by Sullivan J's reasoning and response to submissions of counsel. Thereafter the Jamaican provisions will be set out and contrasted with the English provisions. The effect of the difference will be stated and finally, the consequence of the difference. The outcome of this analysis will be applied to the facts of this case.

[42] The English POCA provisions are sections 240 to 242. Section 240 states:

(1) This Part has effect for the purposes of –

(a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct.

(b) enabling cash which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff.

(2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property.

[43] Section 241 defines unlawful conduct in the following manner:

(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.

(2) Conduct which –

(a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and

(b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part

is also unlawful conduct.

(3) The court or sheriff must decide on a balance of probabilities whether it is proved –

(a) that any matters alleged to constitute unlawful conduct have occurred, or

(b) that any person intended to use any cash in unlawful conduct.

[44] Section 242 defines property obtained through unlawful conduct:

(1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct –

(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct.

(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

[45] Sullivan J reasoned that in light of these provisions and others (not set out) the Director was placed in the position of an ordinary civil claimant. She did not have to prove that any criminal charges have been laid and neither did she have to prove that there was a conviction for any offence in connection with the property. His Lordship went on to say that if one were to ask which property the Director could seize by way of civil recovery proceedings, the answer would be property obtained through unlawful conduct which (a) if it occurred in the United Kingdom would be criminal under United Kingdom law and (b) if the conduct occurred overseas would be unlawful under the law of the foreign state and unlawful under United Kingdom law. This answer provided by Sullivan J comes from the definition of unlawful conduct and the definition of property obtained through unlawful conduct. The further question to be posed according to his Lordship is

how does one know whether the conduct in question falls under (a) or (b)? To resolve this question some information must be given (see para [16]).

[46] Sullivan J held at [17] that while the statute is not limited 'to any particular kind or kinds of criminal offences ... it does not follow that the Director is not under any obligation to describe the conduct which is alleged to have occurred in such terms as will enable the court to reach a conclusion as to whether that conduct so described is properly described as unlawful conduct.' Importantly, his Lordship stated that in relation to conduct occurring in the United Kingdom, for the purpose of section 240 and 241 (1) and (2), 'a description of the conduct in relatively general terms should suffice, "importing and supplying controlled drugs", "trafficking women for the purpose of prostitution", "brothel keeping", "money laundering" are all examples of conduct which, if it occurs in the United Kingdom is unlawful under the criminal law.' However more detail may be required if the conduct occurred outside the United Kingdom. This court observes that this may not necessarily be the case if the conduct is alleged to have occurred in a country with similar laws to Jamaica and has a similar legal tradition.

[47] Now comes a crucial part of the reasoning of Sullivan J in paragraphs [18] and [19]. In relation to section 241 (3) the Director had submitted that since that subsection required proof on the civil standard it followed that the Director did not have to identify the matters alleged to constitute the unlawful conduct. Section 241 (3) was said to be unnecessary because section 240 (1) required the civil standard of proof and so that statement by definition meant a balance of probabilities and thus section 240 (3) was inserted out of an abundance of caution to make it clear that it was the civil standard that applied. Sullivan J's response is important. His Lordship said that since section 241 (3) required the court 'must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred' then the words 'any matters alleged to constitute,' when read in context of section 240 and the rest of section 241, are not otiose but meant that the Director would need to

identify the matters alleged to constitute unlawful conduct in sufficient detail to enable the court to decide whether the conduct so described was unlawful under United Kingdom criminal or, where applicable, the criminal law of the foreign country and the United Kingdom. Sullivan J stressed that the detail required is not to decide whether any particular individual had committed any particular crime but whether the conduct fitted within the description required by the statute.

[48] Sullivan J reinforces his conclusion by reference to section 242 in paragraphs [20] and [21]. His Lordship referred to the words 'if he obtains property by or in return for the conduct' in section 242 (1) and stated that if the question, what conduct? is asked and the answer was simply unspecified unlawful conduct then the draftsman would have simply said 'through unlawful conduct.' The draftsman did not provide this simple answer because section 242 (2) (b) requires the Director to give more than simply assert some unspecified unlawful conduct.

[49] The Director had submitted that section 242 (2) (b) referred to matters that the Director need not prove but it did not say that the Director had to show that the conduct was of any particular kind. Sullivan J rejected this on these grounds. His Lordship observed that when one looks at section 242 (2) (b) (repeated here for ease of reading)

*(b) it is not necessary to show that the conduct was of a particular kind **if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.***
(emphasis added)

if the draftsman wanted to achieve what the Director submitted he could have done this by omitting the words after *kind*, that is the words in bold. This would mean that section 242 (2) (b) would read:

...in deciding whether any property was obtained through unlawful conduct – (b) it is not necessary to show that the conduct was of a particular kind.

[50] Sullivan J reasoned that the words after *kind* must mean something. His Lordship concluded that under section 242 the Director must be alleging either (a) that the property was obtained by or in return for one of a number of kinds of unlawful conduct or (b) that the conduct was a particular kind of unlawful conduct. It was emphasised by his Lordship that section 242 (2) (b) be read in context of sections 240 and 241 and in particular section 241 (3).

[51] Turning now to the Jamaican provisions. Section 55 (1) defines property obtained through unlawful conduct as:

*property obtained **directly or indirectly** by or in return for or **in connection with** unlawful conduct, and for the purpose 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** (my emphasis)*

[52] The words in bold do not appear in the section 242 of the English POCA. Thus the Jamaican definition is wider than the English provision. Recall that Sullivan J held that if it were the case that the Director did not have to give particulars the English section 242 (2) (b) would have read 'it is not necessary to show that the conduct was of a particular kind' and the words that came after *kind* in the section 242 (2) (b) of the English POCA would not have been included. The

Jamaican POCA does not have the words after *kind* and indeed stops quite abruptly. So the questions are what does paragraph (b) mean and what does ARA need to allege? How much information is it required to give?

[53] In answering this question reference must be made to the definition of unlawful conduct in the Jamaican POCA. It is defined in this way:

Unlawful conduct 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

[54] When paragraph (b) of the definition of ‘property obtained through unlawful conduct’ is read with the definition of ‘unlawful conduct’ and taking into account Sullivan J’s reasoning about the effect of the additional words in the English statute, it seems to this court that paragraph (b) means that in Jamaica ARA need not give details of the unlawful conduct. ARA need not allege that the conduct was of a particular kind. Particulars as used in paragraph (b) seem to refer to those details that are normally put forward in a criminal trial. These would be the name of the defendant, the date, time and location where the crime was committed. If one considers an indictment or an information stripped of the particulars just mentioned then what one would be left with would be an assertion

that a crime took place but there would be no statement indicating who, when and where the crime was committed. It seems to this court that this is exactly what paragraph (b) is saying. In effect the Jamaican POCA has avoided to a significant extent Sullivan J's reasoning in relation to the English section 240 (2) (b) and took his 'advice' by not only omitting the words his Lordship identified but also by saying that it is not necessary to show the particulars of the conduct. Thus it seems that an assertion without particulars is sufficient but the assertion must still have sufficient information, however slight, to enable the court to decide whether the conduct relied on amounts to a crime whether in Jamaica or under both the law of the foreign state and Jamaica.

[55] This court holds that the wording of the Jamaican POCA on this score was deliberate and intentional. The purpose was to negate this aspect of Sullivan J's reasoning. This court accepts Sullivan J's proposition that because the statute is not concerned with any property however obtained but only with property obtained through unlawful criminal conduct whether in Jamaica or overseas there must be some material that would enable the court to come to its own independent conclusion that the property was obtained through unlawful conduct. Thus it is not permissible for ARA to state their belief that the property was obtained through unlawful conduct. The reason is that it is the court that must be so satisfied and this can only be done, as a practical matter, by stating some information that is sufficient to enable the court to draw that conclusion. Sullivan J noted that the English POCA 'deliberately steered a careful middle course between, at the one extreme, requiring the Director to prove (on the balance of probabilities) the commission of a specific criminal offence or offences by a particular individual or individuals and, at the other, being able to make a wholly unparticularised allegation of "unlawful conduct" and in effect require a respondent to justify his lifestyle' (see paragraph **[25]**). This court agrees with this analysis and would add that the Jamaican POCA has deliberately steered a path around section 242 (2) (b) of the English POCA. The consequence is that the

Jamaican authorities do not have to give as many details as their English counterparts but some information is still required.

Application to case

[56] In this case, the application for the restraint order is being made at the interlocutory stage. The test cannot be the same as that for the final hearing when the civil recovery order is being considered. The test has to be somewhat lower. The point being made is this: if ARA need not prove the particulars of the conduct at the final hearing then it cannot be incumbent on them to prove those particulars at the interlocutory stage. What is the test for granting a restraint order? The Court of Appeal of England and Wales has provided guidance on this. That court has adopted the test of a 'good arguable case.' That was stated in the case of **Crown Prosecuting Service v Compton** [2002] EWCA Civ 1720 [38]. This court adopts this expression to describe the because it is convenient to describe the threshold requirement which is below the civil standard of proof. This is the description of the test for freezing orders. This court speaks of description of the test because the content varies according to the cause of action in view and what needs to be proved. Thus a good arguable case is one where on the face of it the allegations speak for themselves and when assessed objectively indicate that there is a good chance of success at the final hearing.

[57] A note of caution here: the meaning of the expression in the context of the Jamaican POCA may well differ from that of the United Kingdom having regard to the amount of detail that the authorities are required to prove in the final hearing in both countries. It is entire possible that in light of Sullivan J's reasoning a case in the United Kingdom may fall below a good arguable case because the enforcement agency may not be able to meet the rigours of Sullivan J's analysis but may amount to a good arguable case in Jamaica because the amount of detail required in Jamaica is less.

[58] In this particular case the allegation against the Fogos is that they are drug traffickers who have sought to put their money and property beyond the reach of law enforcement by putting it the names of person who they can control. The Fogos have now been convicted in the United States but not Jamaica. This point is not being made to say that a conviction is required for civil forfeiture but as part of the examination of the affidavit evidence to see the statutory standard for the grant of a restraint order has been met. In the second affidavit, the deponent exhibited a letter from Special Agent Jensen but not even that letter claimed that Mr Patrick Fogo had confessed to any drug trafficking over the past ten years. Mr Patrick Fogo's conviction was in December 2013. The closest one gets to any assertion that Mr Patrick Fogo got property from unlawful conduct is the sentence which says that '[s]ubsequent investigation has linked Adrian and Patrick Fogo to multiple drug seizures in various cities in the U.S. since at least 2008 or before.' This sentence is not sufficient to say that the property he acquired before this conviction was from unlawful conduct. Despite the lower threshold in Jamaica it is not this low. More information would be needed about what exactly is meant by linked to multiple drug seizures. In short, on the facts presented there is not a good arguable case that Mr Patrick Fogo has property from unlawful conduct and so there is no basis for issuing a restraint order against any property owned by him. Needless to say there is no basis for saying that the persons holding property on his behalf should be subjected to a restraint order.

[59] Mr Adrian Fogo's conviction is too recent in the time line to say that there is a good arguable case that the property he acquired before his conviction came from unlawful conduct. This court has already dealt with the alleged confession and need not repeat it here. The court is not saying that hearsay is inadmissible. Section 37 of POCA makes hearsay admissible. It may be that at the final hearing the Special Agent will attend court for cross examination assuming he provides an affidavit and it may well be found that his evidence is strong. But for the circumstances of the disclosure this court would have found that the confession would be sufficient to support a restraint order. It would have been

sufficient because it is the type of case envisioned by paragraph (b) of the definition of property obtained through unlawful conduct. When this is taken with the other evidence such as the absence of legitimate employment and the absence of the economic wherewithal of the current property holders to have generated the revenue to purchase the property a restraint order could have been granted.

[60] Sullivan J reminds us that 'conduct consisting of the mere fact of being in possession of other types of property, expensive jewellery, houses, cars and so forth, or the mere fact of having a lavish lifestyle or of living beyond one's apparent means, do not, without anything more, provide reasonable grounds for suspicion demanding an explanation' (see paragraph **[33]**).

Disposition

[61] The application for a restraint order is refused.