[2016] JMSC Civ. 178

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 01129

BETWEEN	**JHEANELL WATKIS**	**1ST CLAIMANT**
AND	**THE ASSET RECOVERY AGENCY**	**2ND CLAIMANT**
AND	**OPAL SMITH**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**2ND DEFENDANT**

IN CHAMBERS

B. St Michael Hylton Q.C. and Sundiata J. Gibbs instructed by Hylton Powell for the claimants.

Althea Jarrett instructed by the Director of State Proceedings for the defendants.

Heard: 5th August, 2016 & 4th November, 2016.

Proceeds of Crime Act – Application for continued Detention of Cash, Procedure in the Parish Court

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] This application for judicial review seeks to determine the proper process to be used in an application for the continued detention of cash under section 76 of the Proceeds of Crime Act (POCA) in the Parish Courts (PC). The decision of the

Court is that this application must be made in accordance with Order XI Rule 7 of the Parish Court Rules.

[2] The claimants are Jheanell Watkis, a Woman Constable of the Jamaica Constabulary Force who is an authorized officer under POCA and The Asset Recovery Agency, a statutory body established under POCA with responsibility, among other things, for carrying out investigations into various financial crimes. The first defendant is a Parish Court Judge (PCJ) of the Corporate Area Parish Court, Civil Division. The 2nd defendant The Attorney General is joined as a representative of the Crown pursuant to the Crown Proceedings Act.

[3] This application was occasional by the refusal of the learned PCJ to consider any further application for the continued detention of cash under section 76 of POCA unless such application was commenced by Plaint Note and Particulars of Claim. The manner of proceeding is dependent on the resolution of the issue whether the application for the continued detention of cash commences the proceedings and is a stage in the process or whether it is an application standing on its own**.**

THE ISSUES

[4] The PCJ's authority is given by section 76 of POCA. Section 76 (2) of POCA provides that:

> *(2)The period from which cash (seized under section 75) or any part thereof may be detained under Subsection (1) (initial detention) may be extended by an order made by a Resident Magistrate Court: (now Parish Court)*
>
> *Provided that no such order shall authorise the detention of any of the cash --*
>
> *(a) beyond the end of the period of their months beginning with the date of the order, in the case of an order first extending the period; or*
>
> *(b) in the case of a further order this section, beyond the end of the period of two years beginning with the date of the first order.*

> *(3) A Justice of the Peace may also exercise the power of a Resident Magistrate's Court to make an order first extending the period mentioned in subsection (1).*
>
> *(5) On an application under subsection (4) the Court or Justice of the Peace, as the case may be, may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met.*

[5] Of note the initial application for an extension can be made to a PCJ or a Justice of the Peace (JP). Subsequent extensions can only be granted by a PCJ. POCA makes no provision for the procedure to be followed in making these applications. It was conceded by the defendants that if this application is to be commenced by plaint, then there would necessarily be separate procedures before a PCJ and a JP for the same type of application.

[6] **In Metalee Thomas v The Asset Recovery Agency** (2010) JMCA Civ 6 Harrison JA indicated that in the absence of rules and regulations under POCA, the commencement of actions in the Parish Court were to be governed by the Judicature (Parish Court) Act (JPC Act) and Parish Court Rules (Rules)

[7] Against this background the claimants contend that the applicable Rule is Order XI Rule 7 which states that:

> *Where by any statute or by these Rules any interlocutory application is expressly or by reasonable intendment directed to be made to the Judge, then subject to the provisions of the particular statute or of the particular Rule applicable thereto, and so far as the same shall not be inconsistent therewith the following provisions shall apply:-*
>
> *(a) The application may be made either in or out of Court, and either ex parte or on notice in writing; when made on notice, the notice shall be served on the opposite party two days at least before the hearing of the application, unless the judge gives leave for shorter notice.*
>
> *(b) No affidavit in support shall be necessary, but the Judge may if he shall think fit adjourn the hearing of the application and order an affidavit or affidavits in support to be filed.*

[8] There was no contest that an application under section 76 would be an interlocutory application in that it would not finally determine or dispose of the

matter. The claimants however contended that section 143 of the JPC Act does not require that all **matters** be commended in the PC by plaint and particulars of claim. Section 143 provides that all actions and suits which, if brought in the Supreme Court, would be commenced by writ of summons should be commenced by plaint and particulars of the claim which it is the contention of the claimant, means that only matters that would be commenced by writ (now claim form) in the Supreme Court, are to be commenced by plaint in the PC. **'Action'** is defined in the Rules as any proceeding commenced by plaint. '**Matter'** is defined in the Rules as any proceeding other than an action and includes interlocutory applications. They make the point that in the Supreme Court, interlocutory applications are commenced by way of Notice of Application and supporting affidavit. In the PC they would be brought by notice and affidavit.

[9] The defendants contend under section 143 of the JPC Act the only originating process in the PC is the plaint, and while conceding that in the Supreme Court the Civil Procedure Rules make provision for pre-action applications, on a true construction, Order XI Rules 1 to 4 refer to applications made during the course of an action. Had it been intended to confer on the PCJ jurisdiction to hear pre-action applications, it was submitted that that would have been expressly done. Hence the PCJ, a creative of statute, had no jurisdiction to hear pre-action applications.

APPLICATION FOR DETENTION OF CASH UNDER POCA

[10] Section 75 of POCA which provides that an authorized officer may seize cash is not an end in itself. Section 76(5) makes it clear that it is an investigative tool or ancillary to criminal proceedings. As an investigative tool its purpose is to give investigators the time to investigate the source of cash. This investigation may give rise to an application for the forfeiture of the cash.

[11] Further, section 76 allows for the **continued** detention of the cash. In **Leroy Smith v Commissioner of Customs** [2014] JMCA Civ 10. Brooks JA seems to make it clear what the stages may be, saying:

> *[19] Part IV of the Act deals with the civil recovery of property which are the proceeds of unlawful conduct. It includes sections 55 through 90 of the Act. Section 55 defines recoverable property and property obtained through unlawful conduct. Section 75 of the Act* ***allows for a customs officer to seize and detain cash*** *if that officer has reasonable grounds to suspect that the cash is recoverable property, or reasonably suspects it to be intended to be used for unlawful conduct.*
>
> *[20]* ***The property having been seized, section 76 allows for its continued detention*** *for a period of up to three months. The person from whom it has been seized may apply, pursuant to the provisions of section 78, for the release of the cash on the ground that either the basis for the detention or the provisions of section 76 are no longer applicable. On the other hand,* ***section 79 allows the detaining officer to apply*** *within the three month period for the cash, or any part, of it to be forfeited. Section 79 authorises a Resident Magistrate, after a summary hearing, to order the forfeiture of the cash.(emphasis mine)*

[12] The application for forfeiture is not inevitable. It is subject to the investigation which may lead to an application for forfeiture of the seized cash. In **Delores Elizabeth Miller v The Asset Recovery Agency** [2016] JMCA Civ. 25 it was held that where cash is detained under section 76, the authorised officer has discretion to make an application for the forfeiture of the whole or any part of the cash under section 79(1). This section did not impose an obligation on the authorised officer to make an such an application (per Dukharan JA at para 19.)

[13] 'Proceedings' in that sense are commenced with the seizure of cash by the relevant authority. The proper interpretation of "the proceedings" in R **(on the application of Chief Constable of Lancashire Constabulary) v Burnley Magistrates Court** (2003) EWHC 3308 (Admin) is therefore that Pitchford J is dealing with proceedings in general under POCA and not the commencement or stages of **court** proceedings. Section 76 does not initiate proceedings. It is a continuation of the actions taken by the authorized officer. It is therefore erroneous to argue, as the defendants do, that making an application for the continued detention of cash commenced proceedings. The application for

forfeiture is a separate proceeding, the order being subject to appeal. As such an application for the continued detention of seized cash could be regarded as a 'pre-action' application.

PRE-ACTION APPLICATIONS

[14] A useful starting point for the discussion is this portion of the judgment of Lord Scarman in **Castanho v Brown and Root** (U.K.) Ltd [1981] A.C. 557

> *"The considerable case law to which your Lordships have been referred does not, in terms, express any limitation upon the sort of cases in which it may be appropriate to exercise the jurisdiction. Counsel for the plaintiff however, submitted that it is to be found to have been exercised only in two classes of case: (1) "lis alibi pendens," where the object is to prevent harassment: he cited as examples The Christiansborg (1885) Page 14 10 P.D. 141, with especial reference to the judgment of Baggallay L.J. at pp. 152-153, The Hagen [1908] P. 189, 202 and The Janera [1928] P. 55: and (2 where there is a right justiciable in England, which the court seeks to protect.*
>
> *In support of his second class, counsel cited a passage from the speech of my noble and learned friend, Lord Diplock, in Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, 256:*
>
> *"A right to obtain an interlocutory injunction is not a cause of action.... It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court."*
>
> *No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."*

The principle was revisited in **Fourie v. Le Roux** (2007 UKHL 1 where it was said by Lord Scott of Foscote that:

> *"If proceedings for substantive relief are not instituted, the freezing order may lapse in accordance with its own terms or, on an application by the respondent, may be discharged. But none of this indicated that the court had no jurisdiction to make the order. No activation of the jurisdiction is needed'*

[15] In that instance there was an application for a freezing order which had been made to be set aside on the basis that there was no jurisdiction to make the order. This argument was made on the basis that there were no subsisting proceedings to which the freezing order could be ancillary and there was no undertaking to commence any such proceedings. The House of Lords considered whether in the absence of any proceedings for substantive relief or any undertaking to commence such proceedings, it was proper for the judge to make the freezing order.

[16] In **British Caribbean Bank Limited v the Attorney General of Belize** (2013) CCJ 4 the Caribbean Court of Justice in a judgment delivered by the Rt. Honourable Mr. Justice Dennis Byron and Honourable Mr. Justice Anderson in discussing **British Airways Board v Laker Airways Ltd and others** (1985) AC 58 and a similar line of cases opined that the power to make the order is dependent upon there being wrongful conduct on the part of the party to be restrained which the applicant has a legitimate interest in seeking to prevent.

[17] This principle that an injunction can be heard at any stage or before the commencement of proceedings (pre-action) has been generally accepted in this jurisdiction. In **Sportsmax Limited v Entertainment Systems Limited and Others** Claim No. HCV 185 OF 2005 Rattray J reviewed the relevant cases and concluded as follows:

> *However even the requirement of a cause of action to ground a claim for an injunction is not an absolute necessity as shown in the case of **Re Oriental Credit Limited** (1988) 2 W.L.R. 172.There, a director of a company who left the jurisdiction before the company went into liquidation was ordered to attend for private examination by the registrar. In anticipation of his return to the jurisdiction, the liquidators obtained an injunction restraining him from leaving until the completion of the examination. On an application to discharge the injunction, the Court held that the order to attend neither created a cause of action nor any legal or equitable right in the liquidators. That notwithstanding that the liquidators had no enforceable right to be protected by an injunction, the Court had a wide power under section 37 of the Supreme Court Act 1981 to ensure that its orders were complied with and therefore the Court had acted within its jurisdiction in issuing the injunction.*

> *The power of the Court to grant an injunction as imposed by statue is indeed very wide. In exercising that power, an obligation is placed on the Court to ensure that it is satisfied that the circumstances before it are such are such that it is just or convenient for the injunction sought to be granted. I too am of the view that the Courts' power to grant an injunction is unfettered by statute and I am hesitant to accept that that power is limited only to certain categories.*

[18] The defendants contend that this power resides only in the higher courts and not the PC and cannot exist where the PCJ has no authority to instruct that the substantive action be commenced.

[19] The jurisdiction of the PC to grant interlocutory injunctions was confirmed in **Ranique Patterson v Sharon Allen** (2016) JMCA 29 where F Williams JA (Ag) (as he then was), considered the jurisdiction of the PC to grant interlocutory injunctions and said:

> *"[42]There are other considerations as well emanating from the particular orders in the Rules referred to by Mr Brown on Miss Allen's behalf. For one, the terms of order xi, rule 7(a) and (c), which deal with the making of interlocutory applications, read as follows:*
>
> > *"(a) The application may be made either in or out of Court, and either ex parte or on notice in writing; when made on notice, the notice shall be served on the opposite party two days at least before the hearing of the application, unless the judge gives leave for shorter notice. ...*
> >
> > *(c) The Judge upon the hearing or adjourned hearing of the application may make an order absolute in the first instance, or to be absolute at any time to be ordered by him, unless cause be shown to the contrary, or may make such other order, or give such directions as may be just." (Emphasis added).*
>
> *[43] In light of what I consider to be the clear terms of these provisions of the rules, I must accept the submissions of Mr Brown that they empowered the court below to have made the interlocutory orders that were made and to have done so ex parte, the prevailing practice notwithstanding.*

The making of interlocutory orders in the PC is therefore not unknown. The PC also has jurisdiction to make orders where there is no substantive action or plaint. This is clear from the interpretation section of the Rules which distinguishes actions and matters. This is also manifest in Order XI which is

replete with references to "the application of any party to any **action or matter**". Order XI Rule 7 does not limit interlocutory applications to either actions or matters.

The question is whether an application under section 76 POCA is one contemplated by Order XI Rule 7

JURISDICTION OF PCJ

[20] The RM now PCJ is a creature of statute. To that extent all the powers of the PCJ must be derived from some statute or rules made thereunder. As was said by Harrison JA in **Metalee Thomas:**

> *"Resident Magistrate's Courts, it should be remembered, are essentially creatures of statute, "They are inferior courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by Statute": **Lindo v Hay** Clarke's Reports 118. It is therefore reasonable to think that Resident Magistrate's Courts may exercise only such powers as are given to them by statute, and that in doing this they must act in accordance with the procedures laid down in the statute and not otherwise."*

[21] The extent of the PCJ jurisdiction is set out in section 65 of the JPC Act. This jurisdiction has in many instances been extended by particular statutes e.g. section 9 of the Criminal Justice (Administration) Act extended the geographical jurisdiction set out in section 267 Judicature (Resident Magistrate) Act. (See **Eric Alexander v R** (2010) JMCA 46). In some instances the PCJ is given jurisdiction where none had existed e.g. Property Rights of Spouses Act. (See **Hyacinth Gordon v Sidney Gordon** (2015) JMCA 39). To like effect is the POCA which grants, to an extent, concurrent jurisdiction to the PCJ and JP. A JP has no jurisdiction to hear an action.

[22] Parliament could not have intended the absurdity of having the same application done one way before the PCJ and another before the JP, and must therefore be taken to have given the PCJ the jurisdiction to hear such an application without a plaint being filed. This application would by definition be a matter subject to Order

XI Rule 7 which sets out the practice and procedure for interlocutory applications authorised "...by any statute...expressly or by reasonable intendment directed to be made to the Judge". Order XI therefore even if taken as written to be dealing only with applications made during the course of an action, has been extended by POCA. Laws are meant to deal with both present and future circumstances, even those not within the contemplation of the draughtsman. The legislation thus **does** determine that the Learned PCJ could hear this application brought by Notice of Application.

[23] I do not believe I am on singular ground in this view. Rattray J opined in **Sportsmax** that:

> *"In a rapidly changing environment spurred on by the speed of technological advancement, the advent of new legislation and the emergence of new rights, a Court ought to be slow to apply self imposed restraints on its power to act, when the circumstances of a case may warrant or cry out for such action."*

PROCEDURE

[24] In **Metalee Thomas** recourse was had to the JPC Act and Rules **because** the enabling legislation was devoid of such. Of note, **Metalee Thomas** was an appeal against an order made on an application for forfeiture in which Harrison JA spoke to provisions relating to the **"commencement of actions"**. The principle is nonetheless applicable in the instant case. In instances where the Act or Rules is silent on procedure, regard may be had to Order XXXVI Rule 18 which provides that where no forms are provided, procedures may be framed using the forms in the Appendix A as a guide.

[25] The application itself before the Learned PCJ has not been exhibited. The affidavit of Courtney Smith indicated that the documents would be a Notice and Affidavit in support of Application for Continued Detention of Seized Cash. No objection was taken to this form as incongruent with the forms currently in use in the Parish Courts.

[26] This procedure would appear to be sanctioned by Order XI Rule 7 which provides that an interlocutory application may be made either ex parte or on notice in writing and may be supported by Affidavit.

[27] The defendants challenge the application being heard ex parte on a matter of principle arguing that the persons from whom the cash is seized should have the opportunity to challenge the application. As such the appropriate procedure would be by plaint. With respect, this argument is rebutted by section 78 which deals with the release of detained cash. Of course the person from whom the cash is seized has notice of its detention. This person has the right, immediately, and continued throughout the two years, to apply for the release of the detained cash as no limitation as to the time for application is indicated. Section 78 (1) states:

> *"This section applies while any cash is detained under section 76."*

There is therefore no unfairness to the person from whom the cash is seized as he has an immediate remedy. It would be for the authorized officer to prove that the further detention of cash was justified. In any event as confirmed in **Ranique Patterson**, the PCJ has the jurisdiction to make an interlocutory order ex parte.

[28] It is worth noting that an application under section 78 if successful would finally dispose of the matter between the parties. In this sense these 'pre-action' applications can be final as opposed to interim. This is contemplated by Order XI Rule 7(c) which provides that:

> *"The Judge upon the hearing or adjourned hearing of the application may make an order absolute in the first instance, or to be absolute at any time to be ordered by him..."*

CONCLUSION

[29] The Application for further detention of cash is a continuing application of the authorized officer for the detention of seized cash. This may or may not be followed by an application for forfeiture. The order seizing cash may lapse if not

"activated" by an application for forfeiture. This application, interlocutory in nature, is within the jurisdiction of the PC as given by statute and is provided for in the JPC Act. The practice and procedure governing this application is provided for in Order XI of the Rules.

[30] The application for forfeiture is a separate action, civil in nature and begun by Plaint. While the detention of cash is the foundation and a necessary antecedent to the application of forfeiture, the reverse is not true.

ORDER

[31] It is declared that an application made in the Parish Court under section 76 of POCA for the continued detention of cash should be made by notice and affidavit in accordance with Order XI Rule 7 of the Parish Court Rules.