



[2017] JMSC Civ 120

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2012 HCV 03222**

<b>BETWEEN</b>	<b>ASSET RECOVERY AGENCY</b>	<b>CLAIMANT / RESPONDENT</b>
<b>AND</b>	<b>OUIDA DESRENE STENNETT</b>	<b>1<sup>ST</sup> DEFENDANT / 1<sup>ST</sup> APPLICANT</b>
<b>AND</b>	<b>IPS INTERNATIONAL LLC</b>	<b>2<sup>ND</sup> DEFENDANT / 2<sup>ND</sup> APPLICANT</b>
<b>AND</b>	<b>MILTON CLARKE</b>	<b>3<sup>rd</sup> DEFENDANT</b>

**IN CHAMBERS**

Mrs. Susan Watson Bonner and Mrs. Charmaine Newsome instructed by the Asset Recovery Agency for the claimant/ respondent.

Mr. Brian Barnes instructed by Brian J. Barnes & Associates for the defendants/ applicants.

Heard: 27<sup>th</sup> March 2015 and 6<sup>th</sup> September 2017.

**Injunction - Interim Injunction - The Proceeds of Crime Act - Restraint Order - Application to Discharge Restraint Order - Application for Extension of Restraint Order - Civil Recovery Order - Standard of Proof - Balance of Probabilities - Good**

**Arguable Case - Criminal Trial - Not Guilty Verdict - Dismissed for Want of Prosecution.**

**CAMPBELL J;**

- [1] The claimant/respondent, the Asset Recovery Agency (“Agency”), is established pursuant to Section 3(1)(a) of the **Proceeds of Crime Act** (“POCA”) as the Financial Investigation Division (“FID”) of the Ministry of Finance and Planning. Section 3(1)(4) of **POCA** provides that the Agency shall have the functions conferred on it by the Act or another Act, and that it *“may do anything (including the carrying out of investigations) that is appropriate to facilitate, or incidental to, the exercise of its functions.”*
- [2] The 1<sup>st</sup> defendant/applicant, Ouida Desrene Stennett, is the sole Director of the 2<sup>nd</sup> defendant/applicant, and a Director of March Communications. The 2<sup>nd</sup> defendant/applicant, IPS International LLC (IPS), was incorporated in Charlestown, Nevis. Its registered address is Hunkins Waterford Plaza, Main Street, Charlestown, Nevis. Credit report issued from Belize Bank International (“Belize Bank”) states that IPS maintains a corporate account with Belize Bank, in which the 1<sup>st</sup> defendant/applicant, Ms. Stennett, is the sole signatory. The 3<sup>rd</sup> defendant, Milton Clarke, is of Belmont District, St. Andrew. Entry of Appearance was entered, for and on behalf of Mr. Milton Clarke on the 2<sup>nd</sup> October 2012.
- [3] Between 2009 and 2010, the 1<sup>st</sup> defendant/applicant was arrested and charged with eighteen (18) counts of Fraudulent Conversion contrary to the **Larceny Act**, two (2) breaches of the **Securities Act** and Money Laundering contrary to **Proceeds of Crime Act**.
- [4] Consequently, a Without Notice Application for a Restraint Order filed on 8<sup>th</sup> June 2012 was made by the claimant/respondent. The application was made pursuant to Sections 32 and 33 of **POCA**. On 10<sup>th</sup> July 2012, the Honourable Ms. Justice Beckford having heard the application, granted the restraint order preventing the defendants, their servants or agents or however otherwise from disposing of,

causing or allowing the disposal of and/or dealing with assets as listed in the application *until the conclusion of legal proceedings including Appeals*. The Agency gave an undertaking to abide by any order the Court may make as to damages, should any of the defendants or a third party suffered damages that the Agency ought to pay. The interim restraint order was extended on several occasions.

- [5] Ms. Stennett was found not guilty on 29<sup>th</sup> April 2014, in relation to all the charges of Fraudulent Conversion contrary to the **Larceny Act**, and those counts were discharged. The Agency filed its Claim Form and Particulars of Claim for civil recovery on 3<sup>rd</sup> March 2015.
- [6] On 13<sup>th</sup> January 2015, the charges of Money Laundering, Dealing in Securities without a Licence and Acting as a Securities Agent without a Licence were dismissed for a want of prosecution on the contested application of the 1<sup>st</sup> defendant/applicant.
- [7] On the 6<sup>th</sup> February 2015, a Notice of Application for Court Orders was filed pursuant to Part 11 of the **Civil Procedure Rules**, on behalf of Ms. Stennett and IPS, for an Order that the Interim Restraint Order made on the 10<sup>th</sup> July 2012 against the applicants be discharged or set aside. The Application was grounded on the Agency's allegations that Ms. Stennett and IPS had engaged in transactions of an unlawful nature and came into properties that were acquired using criminal proceeds for which the applicants were charged. On trial the applicants were found not guilty of eighteen (18) counts. The remaining counts were dismissed for want of prosecution.
- [8] The underlying basis of the claimant's/ respondent's Interim Restraining Order was the charge for the Money Laundering offence in the Criminal Court under the **Proceeds of Crime Act**. The Money Laundering having been dismissed; this holding Order has lost its usefulness.

**[9]** The application was supported by an affidavit by Ms. Stennett dated the 5<sup>th</sup> February 2015, in which she stated;

- At paragraph 3; *“The case against me came on approximately fourteen (14) occasions between August 3, 2010 and June 2, 2014.”*
- At paragraph 4; *“Between August 3, 2010 and April 29, 2014 shy of four years I had attended court about 40 times in between mentions and trial dates.”*
- At paragraph 11; *“I have been living under the severe strictures of the Interim Restraining Order since July 2012. I have been unable to deal with my Bank Accounts and my properties notwithstanding the fact that I have committed no crime.”*
- At paragraph 13; *“The investigations by the police after a lengthy trial and an application to the Court has come to naught. The Affiant’s belief is now unsupported and is of no effect.”*
- At paragraph 18; *“There is now no basis on which to continue this interim restraining order which in essence was a holding action to be derived from a money laundering conviction. I did not commit any crime and was confident that his day would come.”*

**[10]** The Agency filed an Affidavit of Desmond Robinson, a Forensic Examiner and an Authorised Financial Investigator dated 23<sup>rd</sup> February 2015. It was served on Counsel for the applicants the following day. At paragraphs 3 and 6 it was stated;

*“[3] I have conduct of a civil recovery investigation in respect of property believed to be recoverable property obtained by the 1<sup>st</sup> Respondent, Ouida Desrene Stennett, and the 2<sup>nd</sup> Respondent IPS International, LLC who unlawfully operated an unregulated financial organisation, and the 3<sup>rd</sup> Respondent, Milton Clarke, who is believed to be the beneficiary of a tainted gift.*

*"[6] I also wish to refer to and rely on my affidavit filed on the 8<sup>th</sup> June, 2012 at the time of the application for the restraint order against the Defendants."*

- [11] Based on the investigations twenty-two (22) persons made reports to the police in relation to monies invested with the 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants between 2007 and 2008. The contracted rate of return varied from 60 per cent to 144 percent per annum. The investigations further reveal that the parties neither received the interest promised nor were their principal sums returned to them.
- [12] The Affidavit listed the contributors and the respective principal amount invested, which amounted to a total of \$ USD 642,698.00. At paragraph 10, some of the investors reported that they were instructed by the 1<sup>st</sup> defendant/applicant to send funds being invested with her to the Belize Bank International LLC. to a corporate account maintained there by the 1<sup>st</sup> defendant/applicant, in the name of the 2<sup>nd</sup> defendant/applicant.
- [13] It was alleged that a property situated Lot/Apt 8, Shaltell Close, which was acquired with mortgage lien of \$1,710,000.00, the outstanding sum was discharged, with what Mr. Robinson describes as *'funds... were derived from the 1<sup>st</sup> respondent from her involvement in the unregulated financial organisation'*. The property was transferred by way of a gift to Milton Clarke. The Agency asserts that they believe the property is associated property and its transfer to Mr. Clarke constitutes the transfer of a tainted gift.
- [14] On 25<sup>th</sup> February 2015, Gayle J, heard the application by Ms. Stennett to discharge the interim restraint order. The Court ordered that the criminal cases that were dismissed for want of prosecution, in Half Way Tree Resident Magistrate Court be disposed of with a final order. It was also ordered that the restraining order made on the 10<sup>th</sup> July 2012, be extended for seven (7) days.
- [15] On the 2<sup>nd</sup> March 2015, the Agency filed a Notice of Application for Court Orders, with a hearing scheduled for the 27<sup>th</sup> March 2015, applying for several banks including Belize Bank, to provide the applicant with the balances in all the

accounts under restraint pursuant to the Interim Restraint Order granted on the 10<sup>th</sup> July 2012.

[16] On March 3<sup>rd</sup>, 2015, the Agency filed and served a Claim Form with Particulars of Claim, which claimed against all the defendants, Civil Recovery pursuant to Section 58 of **POCA** in relation to the assets set out in the tables, identified as being owned by the defendants and in trust for the 1<sup>st</sup> defendant by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The recoverable real estate particularised, were six (6) properties, four (4) were registered in the name of IPS, one (1) in the name of Milton Clarke, one (1) in trust with Ms. Stennett as the sole beneficiary. Six (6) of the properties were acquired during 2007. Three (3) were acquired, the same day, August 17<sup>th</sup> 2007. The balances in the five (5) recoverable bank accounts are listed as unknown.

### **The Relevant Law**

[17] Section 32(1)(a)(ii) of **POCA** provides;

*“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 benefited from his criminal conduct and –*

*i. A criminal investigation has started in Jamaica with regard to the offence;*

*ii. **Proceedings for the offence have been commenced in Jamaica and have not been conclude; 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.” [Emphasis Supplied].*

[18] Section 34(2)(a) of **POCA** provides;

*“Where an application is made under subsection (1), the Court may vary or discharge the order:*

*Provided that if the condition that was satisfied under section 32(1) was that -*

*“proceedings were started or an application was made, the Court shall discharge the order on the conclusion of the proceedings or the determination of the application, as the case may be...”*

[19] Section 56(3) of **POCA** provides;

*“The court shall decide on a balance of probabilities whether it is proved that –  
Any matter alleged to constitute unlawful conduct have occurred; or  
Any person intended to use any cash in unlawful conduct.”*

### **The Defendant’s/ Applicant’s Submissions**

[20] Counsel for the defendants provided the court with several written submissions, filed on 25<sup>th</sup> February 2015, 11<sup>th</sup> March 2015, 10<sup>th</sup> April 2015 and 20<sup>th</sup> April 2015. The court has read these submissions and now outlines the thrust of these submissions. I mean no disrespect to Counsel’s submission, if I reduce his able submissions to the following heads. Firstly, procedural irregularity, because of non-compliance with court orders and the laying of claim for recovery. Secondly, the failure of all the charges brought against the Applicant has removed the basis for any restraint order. Thirdly, the applicant has suffered a serious delay and is therefore prejudiced. Counsel also argued that the claimant is wholly non-complaint with Order 5 of the court which provides;

*“The claimant undertakes to serve copies of the following document upon the parties not less than seven (7) days before the date fixed for the further consideration of this application...”*

It is argued that to date the claimant has not filed a Fixed Date Claim Form in the matter. There is no reasonable explanation before the court for the non-compliance especially in the nature of the case where the Order granted is coercive. Therefore, the restraint order ought to be discharged.

[21] The Agency knows that there are no provisions for any Restraint Order under Section 57 of **POCA**. It is for this reason that the Agency has failed to file an

application for a new Restraint Order under Section 57 of **POCA**, to try to get the Court to keep in place an expired Restraint Order. (See *paragraph 32 of written submission dated 10<sup>th</sup> April 2015*).

[22] It is submitted that unlawful conduct under Part IV of **POCA** is subsumed under the definition of criminal conduct within the Act. Both definitions require that one must either be guilty of an offence, or charged with an offence or there is some determination under the criminal laws of Jamaica that the conduct is unlawful. This is not the jurisdiction of the civil court. (See *paragraph 37 of written submission dated 10<sup>th</sup> April 2015*).

[23] Again it is submitted that this pronouncement under the criminal laws of Jamaica must be a precondition to any civil action under Section 47 of **POCA**. The civil court under which Section 57 is brought does not have the jurisdiction to make any determinations under the criminal laws of Jamaica. (See *paragraph 39 of written submission dated 10<sup>th</sup> April 2015*). Unlawful conduct must be established under the criminal laws of Jamaica, without this condition met there is no jurisdiction to bring any proceedings against the Applicant under Section 57 of the **POCA**. (See *paragraph 40 of written submission dated 10<sup>th</sup> April 2015*).

[24] It is an abuse to extend this Restraining Order to allow the Agency, to use an order; *“that has no basis to exist and which expired by Order of the Court, for a purpose other than for which it was granted, without the court determining on evidence as whether or not the conditions under POCA and case law justify the making of such Order.”*

[25] The basis for granting a restraint order is found in Section 32 of **POCA**, however the application made was pursuant to Sections 32 and 33 of **POCA**. The application was supported by the Affidavit of Desmond Robinson filed 8<sup>th</sup> June 2012. The content of this Affidavit is devoid of any legal foundation to sustain the extension of the restraint order. The Affidavit was founded on criminal charges



commenced against the 1<sup>st</sup> defendant which have been dismissed and all criminal proceedings concluded.

[26] Counsel submitted in his written submission filed on the 25<sup>th</sup> February 2015 that the application for the interim injunction was predicated on the fact that the affiant believed that the applicants were in possession of criminal property and that the criminal case may yield an order for which forfeiture proceedings would be applicable hence the restraining order.

[27] Paragraphs 34 and 36 of the said Affidavit are critical component for the foundation for the application for an interim injunction. It was stated at paragraph 34 and 36 respectively;

*“34. I have reasonable grounds to believe that Ouida Stennett, IPS International LLC, and Milton Clarke are in possession of assets that need to be restrained to prevent dissipation were an order to be made in relation to the criminal charges and any proceedings for forfeiture.*

*36. I believe that there is a good and arguable case, which is presently before the Half Way Tree Resident Magistrates’ Court the Ouida Stennett/ IPS International LLC have engage in conduct that is criminal under the criminal laws of Jamaica.”*

[28] On the 23<sup>rd</sup> February 2015, on the eve of the hearing of this application the claimant/respondent filed a fresh Notice of Application for Court Orders supported by an Affidavit of Desmond Robinson seeking that the 2012 Restraining Order remains in force. However, the Affidavit in support is the exact replica of the original 2012 Affidavit and raised nothing new. In respect of the hearing on the 27<sup>th</sup> March 2015, the Agency is not the applicant. It is not in the matter of S.57 and S.58 of **POCA**. The application in this matter was filed by the applicants Ouida Stennett and IPS International LLC. The Agency is the respondent in this matter, and here is no proper application under Sections 57 and 58 of POCA. (See paragraph 6 of written submission dated 20<sup>th</sup> April 2015).

[29] The initial application was granted on subsection (ii) of the Act, but the status has since changed. Having heard evidence of all eighteen (18) witnesses the Resident Magistrate found the 1<sup>st</sup> defendant not guilty and the other counts on

the charges dismissed due the prosecution's inability to explain why the matter was not being tried after five (5) years and they would suffer a similar fate based on the same facts and circumstances.

- [30] The application raises no new issues; it is a replica of the 2012 application. However, they are seeking to have the restraint order remain as they intend to file an action for civil recovery pursuant to Section 57 of **POCA**. This application was not entertained as the application was not properly served.
- [31] It was conceded by the claimant/respondent that the basis on which the restraint order was granted no longer exists. There is no new application before the court seeking a restraint order. The court is urged to make a mandatory order to discharge the restraint order under Section 34(2)(a) of **POCA**. The proceedings have concluded and there is no appeal, as the crown does not have any right of appeal.
- [32] The fresh verbal application before the court is frivolous vexatious and an abuse of the process of the court. Under **POCA**, the Agency must be satisfied based on conditions, before the court consider whether or not to grant the order. Thus without a new application supported by affidavit under Section 57, the Agency has failed to invoke the jurisdiction of the court. The court has no jurisdiction to extend an order that has already expired.
- [33] The Agency is seeking to pursue after six (6) years, a completely new matter for which no new application has been brought before the court for consideration. The Agency knows that there is no provision under Section 57 of **POCA** to obtain a restraint order and this is an abuse of the court and the constitutional right of the 1<sup>st</sup> defendant. This transitional position is not supported by **POCA**.
- [34] Section 57 comes under Part IV of **POCA** which deals with Civil Recovery Procedures. This is to allow the Agency to take proceedings against a person believed to hold recoverable property. However, this is based on evidence that

the property was acquired through unlawful conduct under the criminal laws of Jamaica. Recoverable property pursuant to Section 84(1) is property obtained through unlawful conduct. Unlawful conduct according to Section 55(1)(a) of **POCA** means conduct that occurs in, and is unlawful under the criminal law of Jamaica. Criminal conduct pursuant to Section 2(1)(a) of **POCA** constitute an offence in Jamaica.

- [35] It is submitted that before any recovery proceedings in the civil court may be commenced under **POCA** it must be first established that the conduct that occurs was unlawful under the criminal law of Jamaica. In essence there must either be a conviction or a pronouncement by the criminal court that an unlawful conduct occurred. (*See paragraph 20 of written submission dated 25<sup>th</sup> February 2015*).
- [36] Reference was made to the judgment of Justice Sykes in **Asset Recovery Agency v Conroy Rose et al** Claim No 2012 HCV 04018 (delivered on 6<sup>th</sup> February 2014) where he expounded the principles applicable for the extension of an interim restraint order under **POCA**. The court is reminded since the interim order was granted in July 2012, three (3) years after despite the mandatory provisions of the **Civil Procedure Rules** no claim has been filed.
- [37] There is no serious issue to be tried in light of the charges being dismissed against the 1<sup>st</sup> defendant. Thus the 1<sup>st</sup> defendant's application ought to be granted and the restraint order discharged pursuant to Section 34 of **POCA**. The charges filed under Section 92 of **POCA** and Section 24 of the **Larceny Act** are all now dismissed.

### **The Claimant's/Respondent's Submissions**

- [38] The application of the Agency is that the Restraint Order granted by the Honourable Ms. Justice Beckford on 10<sup>th</sup> July 2012 remains in force until the conclusion of the civil recovery proceedings including appeals.

- [39] The FID after investigations believes that recoverable properties have been acquired directly and indirectly with the proceeds of the 1<sup>st</sup> defendant's unlawful conduct.
- [40] This application, is supported by the Affidavit of Desmond Robinson filed 23<sup>rd</sup> February 2015. Mr. Robinson, a Forensic Examiner and an Authorized Financial Investigator outlined that twenty-two (22) persons made reports to the police in relation to a total sum of \$ USD 624,000.00 invested with the 1<sup>st</sup> and 2<sup>nd</sup> defendants between 2007 and 2008. These parties neither received the interest promised nor were their principal sums returned to them. Investigations revealed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not licensed to sell securities and as such would have entered into those contracts illegally.
- [41] The defendants have acquired proprieties shortly after or during the period when the investors' funds were handed over to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Three (3) properties were purchased on the same day the 17<sup>th</sup> August 2007, without a lien registered against any of them. There were two (2) other acquisitions for 2007, in November and December, the latter property was being held in trust with Ouida Stennett the sole beneficiary. A mortgage lien was discharged, in 2007, and transferred by way of gift to Milton Clarke in 2010. (*See Claim Form filed 3<sup>rd</sup> March 2015*). It is believed the sums derived from the illegal venture were used to discharge the mortgage. Based on investigations there are no other business operation or earnings of income to explain the legitimate acquisition of the said assets. There is also a corporate account with a reputable bank in the name of the 2<sup>nd</sup> defendant which was opened in January 2008. An excess of \$USD200,000.00 was transferred from this corporate account to the private account of the 1<sup>st</sup> defendant.
- [42] Reference was made to Sections 55, 57 and 84 of **POCA**, which looks at the definition of "recoverable property" and "unlawful conduct". The 1<sup>st</sup> defendant has engaged in unlawful conduct, in dealing in securities without a licence and acting as a securities agent. In case of a civil recovery proceeding, there need not be a

criminal conviction. Civil recovery is aimed at the identification and recovery of property to which its owner could have no legitimate claim.

- [43] The 1<sup>st</sup> defendant has engaged in conduct that is unlawful in Jamaica and any assets obtained by her either directly or indirectly from this conduct would be recoverable property and therefore liable to civil recovery. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are believed to be holding recoverable property in trust for the 1<sup>st</sup> defendant and have benefited from the 1<sup>st</sup> defendant's unlawful conduct.
- [44] It was submitted that pursuant to Section 57, of POCA, *recoverable property*, is defined in section 84 of **POCA** as "*property obtained through unlawful conduct.*" The 1<sup>st</sup> defendant has engaged in unlawful conduct, to wit, dealing in securities without a licence and acting as a Securities Agent without a licence. It was submitted that Section 56, provided that "*the powers conferred by Part iv are exercisable in relation to any property, whether or not any proceedings have been brought for an offence in connection with the property.*"
- [45] Civil recovery orders can include cases where the defendants have been acquitted of criminal charges. (See; **Director of the Assets Recovery Agency v Taher and others** [2006] EWHC 3402 (Admin)). This has been extended to circumstances where the defendant's conviction had been quashed because his arrest had been unlawful. (See; **Serious Organised Crime Agency v Olden** [2009] EWHC 610).
- [46] The determination of the issue of what constitutes unlawful conduct, is to be resolved on the civil standard, on a balance of probabilities. The English Court in examining Parliament's intention on the question of unlawful conduct made a distinction between the establishment of guilt and the identification of property with a conduct that would make it recoverable. In the case of **The Queen on the Application of the Director of the Assets Recovery Agency and Others v Jeffrey David and Others** [2005] EWHC 3168, Mr. Justice Sullivan said;

*“The court in a civil recovery action, in other words is not concerned to establish criminal guilt. It is concerned with unlawful conduct solely for the purpose of identifying with a sufficient relationship to that conduct to render it recoverable.”*

See also, **Director of the Assets Recovery Agency v He and Chen** [2004] EWHC 3021 (Admin), where Collin J at paragraph 66, underlined the applicable standard and cautioned that the court ‘*should not place a gloss upon, so as to require that the standard approaches that appropriate in a criminal case.*’

- [47] The focus of **POCA** is on property, as distinct from guilt of individuals, and the inability to locate a legitimate source for the property is an important factor. **The Director of the Assets Recovery Agency and in The Matter of Cecil Stephen Walsh and in The Matter of the Proceeds of Crime Act 2002** [2004] NIQB 21 stated that;

*“The functions of the Agency are directed against property rather than individuals and in most cases an important proof on behalf of the Agency will involve establishing the absence of any legitimate source of capital or income on the part of the respondent, which might account for the acquisition or accumulation of the property sought to be recovered. It is important to bear in mind it is not essential for the Agency to establish the precise form of unlawful conduct as a result of which the property in question was acquired and the court may be used to asked to draw appropriate inferences from the unlawful conduct established by the Agency combined with the proved absence of legitimate capital and income.”*

- [48] Investigations have not revealed any legitimate income for the defendants that would enable them to acquire the properties held in their names either solely and/ or jointly. This is supported by the Tax Administration of Jamaica, where checks reveal that the defendants have not engaged in any legitimate activities that would enable them to acquire the said properties from taxable income earned.
- [49] The Without Notice Application for the Restraint Order, at paragraph 1 sought to have the restraint order remain in force until a Civil Recovery or Forfeiture order was made. The proceedings contemplated by Section 34 are either criminal proceedings, reconsideration of benefit after a forfeiture or pecuniary penalty order has been made or civil recovery proceedings. Hence the application for civil recovery having been filed in time, the restraint order ought to stay in force.

[50] The Agency is proceeding with civil recovery and has filed its civil recovery claim satisfying section 32(1)(d) of **POCA**. The civil claim is against property which is an action in rem and by no means concerned with the guilt to the 1<sup>st</sup> defendant. (See; **In Director of Assets Recovery Agency v Ashton** [2006] EWHC 1064, Newman J at paragraph 50).

[51] It is submitted that the properties are recoverable properties and if the restraint order is discharged it would allow the defendants to dissipate the assets and render any future judgment for civil recovery futile. According to Sykes J in **Assets Recovery Agency v Fogo and Others** [2014] JMSC Civ 10 and in **Assets Recovery v Andrew Hamilton and Others** [2013] JMSC Civ 136, the test for granting a restraint order in civil recovery proceedings is lower than a balance of probabilities and is a good arguable case.

[52] The evidence before the court surpasses that test in that;

- i. The 1<sup>st</sup> defendant operated without a licence an unregulated financial scheme contrary to the Securities Act of Jamaica;*
- ii. The defendants acquired several properties in and around the time the 1<sup>st</sup> defendant operated the unregulated financial scheme;*
- iii. There is no record on the part of the 1<sup>st</sup> and 3<sup>d</sup> defendants of any legitimate income that would have enabled them to acquire the properties;*
- iv. No evidence that the 1<sup>st</sup> defendant has repaid the victims.*

[53] The risk associated with the discharge of the restraint order is pellucid. In the interest of justice, the court ought to apply the overriding objective to deal with cases justly. (See; **Holmes v SGB Services plc** [2001] EWCA Civ 354, per Justice Arden). The benefits to be obtained from the reduction of criminal activities outweigh the disadvantage to the defendants.

## **Analysis and Conclusion**

[54] It is common ground that on the 8<sup>th</sup> June 2012, the Agency filed a Without Notice Application for a Restraint Order, pursuant to Sections 32 and 33 of **POCA**, to

prevent the defendants and their servants from disposing, causing or allowing the disposal of certain listed properties, allegedly obtained from the 1<sup>st</sup> defendant's unlawful conduct.

[55] The application came about as a result of reports in 2009, that Ms. Stennett and IPS have collected monies from several persons for investment in an unregulated financial scheme, based on contracts that were signed with some of these investors offering returns substantially above the rates then available in the money market. It is not unfair to say, that greed was a motivating factor among these investors. The investors to date have not received any returns by way of interest, or the principal sums invested. The Agency has listed some twenty-two (22) such investors who claimed to have invested through Ms. Stennett a total sum of \$ USD 624, 000.00.

[56] The 1<sup>st</sup> defendant was arrested and charged with twenty-one (21) counts; eighteen (18) counts of Fraudulent Conversion under the **Larceny Act**, two (2) counts of breaches of the **Securities Act**, and one (1) count of Money Laundering under Section 92 of **POCA**.

[57] The substance of these charges, formed the allegations in the Affidavit of Desmond Robinson, a Forensic Examiner that supported the application. On the 10<sup>th</sup> July 2012, Beckford J, on the ex parte application granted restraint order which has been extended on notice on several occasions by the court. The Order was made pursuant to Sections 32 and 33 of **POCA**, and (i) restrained the three (3) defendants whether by themselves, their servants or agents or however otherwise from disposing of, causing or allowing the disposal of and/or dealing with the following assets listed in the Claim Form, in respect of Ouida Stennett and IPS LLC., whether or not identified in this Order, **until the conclusion of legal proceedings including Appeal**, in respect of the said assets. (ii) The Agency was allowed to enter the listed properties to photograph those properties and record the contents. (iii) The balances in four (4) of Ms. Stennett's accounts were restrained, including her account in IPS. As was an account in the name of



one Sharon Loshusan. The Agency was allowed to detain and maintain custody of two (2) motor vehicles. Liberty to third parties affected by the Order to apply to set aside or vary the order. (iv). The Order would be further considered on the 8<sup>th</sup> October, 2012. (v). The Agency undertakes to serve upon the parties not less than 7 days before the date fixed for further consideration: the interim restraint orders, the Without Notice of Application for Restraint Order, the Affidavit in support of the Application for Court Order and the Fixed Date Claim Form. The restraint order was further extended on the 8<sup>th</sup> October 2012 and various dates after in contested applications.

- [58] In January 2015, Ms. Stennett was acquitted of all the charges. On the 6<sup>th</sup> February 2015, Ms. Stennett along with IPS filed an Application for Court Orders pursuant to Part 11 and 17 of the **Civil Procedure Rules**, for a discharge of the restraint order made on the 10<sup>th</sup> July 2012. The application, was scheduled for hearing on the 25<sup>th</sup> February 2015, and was substantially grounded, on the failure of the criminal prosecutions that were mounted against Ms. Stennett. That the underline basis for the grant of the restraint order by Beckford J, was that proceedings for the offence had commenced in Jamaica and was continuing. That was no longer the case and the restraint order ought to be discharged.
- [59] Ms. Stennett's Affidavit dated the 6<sup>th</sup> February 2015, supported the application to set aside the restraint order. Ms. Stennett stated, that between 2009 and July 2010, she was arrested and charged with several offences against the **Larceny Act**, the **Securities Act** and Money Laundering contrary to **POCA**. She attended court approximately forty (40) times between August 3, 2010 and April 29, 2014. On Eighteen (18) of the charges she was acquitted at trial, the remainder were initially dismissed for want of prosecution. She spoke of the hardship that the restraint order had placed on her.
- [60] On the 23<sup>rd</sup> February 2015, the Agency filed an Affidavit of Desmond Robinson (2<sup>nd</sup> Robinson Affidavit) in support of Notice of Application for Court Orders. It stated it was in the matter for a restraint order pursuant to S.32 & S.33 of the

**Proceeds of Crime Act.** It is the same Affidavit that the Agency relied on before this court. Mr. Barnes at paragraph 10, of his written submission dated 25<sup>th</sup> February 2015, states inter alia; “*The Affidavit in support is the exact replica of the original 2012 Affidavit and raised nothing new*”. However, again I cannot agree. It is clear that the 2<sup>nd</sup> Robinson Affidavit is concerned with the civil recovery procedures whilst the earlier Affidavit is awaiting the outcome of the criminal trials.

- [61] The 2<sup>nd</sup> Robinson Affidavit at paragraph 34 stated; “*The Agency is in the process of completing its civil recovery investigation and will be in a position to file its civil recovery claim.*” In the event, the Agency filed a Claim Form with Particulars of Claim on the 3<sup>rd</sup> March 2015. Mr. Barnes in his submission of the 25<sup>th</sup> February, 2015 submitted, that paragraphs 34 and 36, are the critical components of the foundation for the application for the interim injunction.

Paragraph 34 states; “*I have reasonable grounds to believe that Ouida Stennett, IPS international LLC, and Milton Clarke are in possession of assets that need to be restrained to prevent dissipation **were an Order to be made in relation to the criminal charges and any proceedings for forfeiture***”. [My Emphasis]

Paragraph 36 states; “*I believe that there is a good and arguable case, which is presently before the Half Way Tree Resident Magistrate Court that Ouida Stennett IPS International LLC have engaged in conduct that is criminal under the criminal laws of Jamaica.*”

- [62] On the 25<sup>th</sup> February 2015, the contested application to set aside Beckford J's Order was heard by Gayle J, who ordered that, the matters pending in the Resident Magistrate Court, that were dismissed for want of prosecution, be disposed of by a final order. The restraining Order was extended for a further period of seven (7) days.

- [63] Before Gayle J, Ms. Stennett's Affidavit in support of Application to Set Aside the Interim Restraint Order, had exhibited letters from the Resident Magistrate certifying the dismissal for want of prosecution. Gaye J, ordered that the matters be disposed of with a final order. This was a necessary pre-condition for a setting aside based on the grounds that learned Counsel, Mr. Barnes was urging on the court. Mr. Barnes submitted that the prosecutions that underpinned the restraint order, were no longer in existence, so there was no need for the interim restraint order. Mr. Barnes in his written submissions on the 25<sup>th</sup> February 2015, in paragraph 20 stated that; "*before any recovery proceedings in the civil court may be commenced under POCA it must first be established that the conduct that occurs was unlawful under the criminal law of Jamaica. In essence there must either be a conviction or a pronouncement by the criminal court that an unlawful conduct occurred.*" That submission was repeated before me. However, it is a submission I cannot accept. **[Emphasis Supplied]**
- [64] It seems to me that the Order obliged, the applicant to satisfy the Court, that the criminal proceedings before the Resident Magistrate Court had been concluded, including appeals. The prosecution not having a right of appeal, proof of the final disposition of the proceedings before the Resident Magistrate Court would be sufficient. The applicant cannot achieve the discharge of the restraint order without providing the evidence ordered by the court for the reasons adumbrated herein.
- [65] The Agency had filed the 2<sup>nd</sup> Robinson Affidavit, prior to the hearing before Gayle J, for a restraint order based on civil recovery process rather than on the ongoing criminal proceedings. On 3<sup>rd</sup> March 2015, the claimant filed a Claim Form and Particulars of Claim claiming a civil recovery order seeking to obtain recoverable properties which the Agency believes that the 1<sup>st</sup> defendant obtained by unlawful conduct. An oral application was made for the restraint order to remain in force until the conclusion of the civil recovery proceedings, because they have

commenced a civil recovery claim pursuant to Section 32(1)(d) of **POCA** against the defendants. This section provides that the court may grant a restraint order;

*“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.”*

[66] The application under Section 58 of the **POCA** has commenced and has not been determined. The claim was filed within the period limited by Gayle J for the extension of the restraint order. Once a civil recovery claim has been filed, the court may grant a restraint order. Section 32(2) of **POCA** provides that if any of the conditions set out in Section 32(1) is satisfied, the Judge may make an order prohibiting any person from dealing with any realizable property held by a specified person.

[67] Mr. Barnes submitted; “that notwithstanding the conditional nature of the No Order and the Dismissal for want of prosecution, these are orders of the court concluding the proceedings and removing them from the court list as distinct from an adjournment sine die.” (See paragraph 12 of written submission dated March 11<sup>th</sup> 2015). The law is well settled. See **Attorney General v Keith Lewis**, SCCA No: 73/05 per Harrison J.A. and **Attorney General v Keith Lewis**, SCCA No: 73/05 per Forte J.A. Mr Barnes further submitted that there were no proceedings before the court for the interim restraint order to continue.

*“(1) A claimant who wishes to start proceedings must file in the registry of the court at The Supreme Court, King Street, Kingston (or at such other place as the Rules Committee may determine) the original and not less than one copy for each defendant –*

*(a) the claim form; and*

*(b) unless either rule 8.2(1)(b) or 8.2(2) applies-*

*(i) the particulars of claim; or*

*(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part.*

**(2) Proceedings are started when the claim form is filed”. [My Emphasis]**

[68] It is a general rule pursuant to Part 11.6(1) of the **Civil Procedure Rules** that an application before the court ought to be in writing. However, subsection 2(b) permits the court to hear the oral application of a party. I reject the arguments of counsel for the defendants that there is no proper application before the court for an extension of the restraint order

[69] An application has been made for civil recovery and as such the court cannot make an order to discharge the restraint order until the determination of the application. Also the order of the court appears broad to cover all legal proceedings including appeals and not just criminal proceedings against the 1<sup>st</sup> defendant.

[70] Before me, Mr. Barnes, in the application to set aside the interim restraint order, continued his line of attack, of the Agency's case. Firstly, he maintained as he did before Gayle J, that the substratum that supported the grant of Beckford J's Order, had been demolished. He argued that, without the finding of an engagement in a transaction that involved criminal property, the 1<sup>st</sup> Robinson Affidavit had become baseless and of no effect. He said the Beckford J's order was granted under S.32(1)(a)(ii) of **POCA**, which required ongoing proceedings, and the criminal trials have concluded.

[71] Mr. Barnes submitted that the interim restraint should be discharged in accordance with the statutory proviso to S.34(1), which mandates that the Court shall discharge the Order. Section 34 (2) of **POCA** states; where an application is made under subsection (1), the Court may vary or discharge the order: Provided that if the condition that was satisfied under section 32(1) was that-

*(a) proceedings were started or an application was made, the Court shall discharge the order on the conclusion of the proceedings or the determination of the application, as the case may be."*

[72] The second line of attack, by learned counsel, Mr Barnes, was his contention that to constitute unlawful conduct there must be a breach of the criminal law of Jamaica. He arrived at that conclusion by an examination of the statutory

definition of “recoverable property”, which S.55 (1) of **POCA**, states shall be construed in accordance with SS.84 to 89. S.84(1) provides, that property obtained through **unlawful conduct** is recoverable property. In order to satisfy the criterion in Section 32(1)(d) there had to be some unlawful conduct on the part of the 1<sup>st</sup> defendant. The meaning of unlawful conduct, pursuant to Section 55(1)(a) is, “*conduct that occurs in, and is unlawful under the criminal law of Jamaica*”. Criminal conduct pursuant to Section 2(1)(a) of **POCA** constitute an offence in Jamaica. It was submitted that both definitions required that a person must be guilty of an offence, charged with an offence or there is some determination under the criminal law.

**[73]** Mr. Barnes learned submission ignores the distinction between civil recovery and forfeiture. Part 1V, of **POCA** deals with Civil Recovery of the Proceeds of unlawful conduct. Section 55(2)(g), falls under PART 1V. It provides that for the purposes of this Part, (g) *references to proving any matter or satisfying any Judge or court of any matter shall be construed as references to proof or satisfaction, as the case may require, on the balance of probabilities*. This standard is therefore applicable to the definition of “unlawful conduct”, which falls within the reach of Part 1V. Therefore, for a claimant, to prove or establish conduct that is unlawful under the criminal law of Jamaica, it is required to adduce evidence to satisfy the Judge on a balance of probabilities of the breach of the criminal law that he asserts. In short, S.55 (2)(g) provides the requisite standard of proof required of a claimant.

**[74]** The enactment of POCA in 2007, introduced a seismic shift in the entitlement of persons who were in possession of the proceeds of crime. Prior to the **POCA**, a person in possession of proceeds of crime, if not convicted, and those proceeds not proved to be connected with his crime, held a good title to those proceeds of crime as against the world. With the passage of POCA, Parliament was seeking to take the benefit of crime away from those whose unlawful conduct placed the proceeds of crime in their possession. Such persons who were quite likely to

invest those proceeds in the furtherance of more crime. It is clear that the recovery of proceeds of unlawful conduct is not a deprivation of property from anyone. The property was not the entitlement of anyone, so no one could be deprived, victims might be able to recover something of what they lost from the proceeds. In those circumstances there was no danger of these provisions of **POCA** colliding and being inconsistent with the constitutional guarantees of not being deprived of property.

[75] POCA was enacted, to provide for the investigation, identification and recovery of the proceeds of crime and for connected matters. The general purpose of Part 1V of **POCA**, as stated in the side note of Section 56(1)(a) of **POCA**, “**is - (a) enabling the enforcing authority to recover, in civil proceedings before the Court, property which is, or represents, property obtained through unlawful conduct.**” The Agency is placed in the position of an ordinary claimant in civil proceedings. The Agency has no prosecutorial function, its role is limited to “investigate, identify and recovery proceeds of crime” and matters ancillary to those objectives. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. The law is not directed at a lifestyle; neither is it aimed at individuals. **[Emphasis Supplied]**.

[76] The civil recovery order is directed against property rather than against the defendant. The guilt of the defendant is not in issue. In **The Assets Recovery v Adrian Fogo et al** [2014] JMSC Civ 10, Justice Sykes looked extensively on a critical issue before this court. I adopt his analysis. At paragraphs 40 and 45 he stated;

*“[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...”*

[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.** [My Emphasis].

[77] There was an order of this court made by the Honourable Mr. Justice Martin Gayle on 25<sup>th</sup> February 2015 stating;

*"The matters pending in the Corporate Area Magistrate's Court – Criminal Division being information # 10487/10, 14609/10, 14610/09 and 3456/10 that dismissed for want of prosecution on 13<sup>th</sup> January 2015 be disposed of with a final order."*

This order has not been complied with and as stated by the defendants in their written submission filed 11<sup>th</sup> March 2015 this order was directory and it is not a condition precedent for the discharge of an Interim Restraint Order under Sections 32 and 33 of **POCA**.

[78] However, counsel for the claimant explained to the court that this order was made by the court as it was thought that the matter was not brought to finality. I am of the same view. It is a well settled principle that a dismissal for a want of prosecution is not an acquittal.

[79] In **Attorney General v Keith Lewis**, SCCA No: 73/05 (delivered 5<sup>th</sup> October 2007) dealing with the issue as to whether a dismissal for a want of prosecution amounts to an acquittal, Harrison J.A noted that;

*"The authorities have made it abundantly clear however, that when a charge is dismissed for want of prosecution no trial has taken place and charges may be re-listed once witnesses are available to attend the trial...." He further stated; "In my judgment, there would have had to be the pronouncement of a verdict of "not guilty" for there to be an acquittal of the charges. It is for this reason that section 280(3) of the **Judicature (Resident Magistrates) Act** mandates that at the conclusion of a trial;*

*"the Magistrate shall declare the accused person guilty or not guilty, and shall thereupon demand, give such accused person a certificate of conviction or acquittal, as the case may be".*



See also **Attorney General v Keith Lewis**, SCCA No: 73/05) Forte, J.A. (as he then was) said that the appellant had "failed to prove that he has ever pleaded to these charges and consequently not having joined issues with the Crown, the plea of autrefois acquit could not avail him."

[80] Additionally, it is the order of the court that the restraint order was to last until the conclusion of proceedings, including appeals. As it relates to obtaining a restraint order, the claimant has a right of appeal. Section 35(1) of **POCA** does provide for the Agency to appeal. The section states; "*if the Judge decides not to grant an application for a restraint order, the applicant may appeal to the Court of Appeal against the decision*".

[81] Proceedings are still ongoing and as such I agree that the restraint order remains in force in compliance with the order of the Honourable Ms. Justice Beckford.

[82] I agree with the written submissions of the claimant filed 10<sup>th</sup> April 2015, in relation to the standard for granting a restraining order to facilitate a civil recovery application. In **The Asset Recovery Agency v Andrew Hamilton et al** (No. 2) [2013] JMSC Civ 136, Sykes J at paragraph 72 noted;

*"Section 32 (1) (d) authorises the court to make a restraint order in support of a civil recovery application. It does not state the standard that must be met before a restraint order is granted. However, the standard must be less than that required for the making of the civil recovery order which is on a balance of probability. At this stage ARA does not have to prove the connection as if this were the final hearing. It simply has to adduce sufficient evidence to make the inference reasonable; reasonable because these kinds of cases, the world over, are proved largely by inferences drawn established fact."*  
[My Emphasis].

[83] The test at the interlocutory stage for an application for the grant or discharge of an interim restraint order is a good arguable case. This Court in **The Assets Recovery v Adrian Fogo et al** took guidance from the Court of Appeal of England and Wales. 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. Sykes J said;

*“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? 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? 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 looked extensively on a critical issue before this court.”*

I respectfully adopt his analysis of the issue at hand.

**[84]** The properties listed were acquired over a six (6) month period. The depositors have documentary support for deposits placed with Ms. Stennett and IPS, at the material time. The Agency submitted that investigations, revealed no legitimate income source for the defendants that would enable them to acquire the properties held in their names either solely and/or jointly without a lien over a six (6) month period.

**[85]** Additionally, there has been no restitution for the twenty-two (22) victims as the 1<sup>st</sup> defendant has not returned any money to them. In the Affidavit of Desmond Robinson filed 23<sup>rd</sup> February 2015, he said at paragraph 7;

*“That investigations revealed that parties have neither received the interest promised nor were their principal sums returned. Our investigations have not unearthed any evidence to show that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were licensed to sell securities and as such would have entered into those contracts illegally.”*

**[86]** The claimant/respondent has provided sufficient details of the ownership of the properties and the time of acquisition of these properties. (See paragraph 12 of the affidavit of Desmond Robinson filed 23<sup>rd</sup> February 2012). There are two (2) properties without lien, one (1) with a consideration of \$25,000,000.00 and the other \$17,000,000.00. Another property was transferred on trust with the sole beneficiary being the 1<sup>st</sup> defendant. Additionally, another property previously

owned by the 1<sup>st</sup> defendant was transferred by way of gift to a third party. There is also sufficient details of the sums deposited by investors based on statements given to the police (*See paragraph 8 of the affidavit of Desmond Robinson filed 23<sup>rd</sup> February 2012*). It has been alleged that there is no filed tax return for the 1<sup>st</sup> and 2<sup>nd</sup> defendants since 2007. Also there has been a transfer of over \$US 200,000.00 from a reputable bank to a private account of the 1<sup>st</sup> defendant.

[87] The claimant's/respondent's assertions stand unchallenged and there was no affidavit evidence filed rebutting such assertions. The court having weighed all the competing factors in this case is minded to grant the extension of the restraint order until there has been a determination in the civil recovery matter.

[88] A constitutional point was raised by counsel for the defendants. Section 16(5) of the **Charter of Fundamental Rights and Freedom** (Constitutional Amendment) Act, 2011 provides; *'Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.'* This issue has been addressed in the case of **Re The Director of Assets Recovery** [2004] NIQB 21 where Coghlin J looking at a similar provision, Article 6(2), held at paragraph 18;

*"It seems to me that, in substance, proceedings by way of a civil recovery action under the provisions of Part 5 of the POCA differ significantly from the situation of a person 'charged with a criminal offence' within the meaning of art 6 ... I have reached the view that the essential focus of the statutory scheme is recovery of property and not the conviction and punishment of individuals for breaches of the criminal law. **The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the 'untouchable' image of those who have resorted to it for the purpose of accumulating wealth and status...**"*

Further at paragraph 21;

*"In the circumstances, I have come to the conclusion that civil recovery proceedings within the meaning of Part 5 of the POCA should be **classified as civil rather than criminal**. It will be appreciated that such a classification will not in any respect detract from the ability of a respondent in such proceedings to rely upon the full range of rights and privileges available at common law and by virtue of art 6(1) of the Convention." [My Emphasis]*

**[89]** Having carefully analyzed this matter, to my mind justice would be served to maintain the restraint order until the conclusion of the civil recovery matter. The court therefore makes the following orders:

1. The application for the discharge of the Restraint Order is refused.
2. The application for the Restraint Order granted by Honourable Ms. Justice Beckford on 10<sup>th</sup> July 2012 to remain in force until the conclusion of the civil recovery proceedings is granted.
3. The claimant/respondent is to give the usual undertaking as to damages.
4. Costs to the claimant/respondent to be agreed or taxed.