

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

APPLICATION NO COA2022APP00159

BETWEEN	ANDREW HAMILTON	1ST APPLICANT
AND	JANET RAMSAY	2ND APPLICANT
AND	PAULETTE HIGGINS	3RD APPLICANT
AND	THE ASSETS RECOVERY AGENCY	RESPONDENT

Ian Wilkinson KC and Lenroy Stewart instructed by Wilkinson Law for the applicants

Mrs Caroline Hay KC and Zurie Johnson instructed by Caroline P Hay for the respondent

8, 10 and 11 November 2022

BROOKS P

[1] In considering this application for leave to appeal and stay of execution, we assessed, firstly, the issue of whether, by the Court of Appeal Rules, the applicants were required to apply for leave to appeal or were bound to file an appeal within 42 days of the date of the judgment of Jackson-Haisley J ('the learned judge') made on 8 July 2022.

[2] The resolution of that issue depends on an administering of the application test as explained in **Jamaica Public Service v Rosemarie Samuels** [2010] JMCA App 23 in paragraphs [13] to [23]. That application makes it necessary to ask what the status of the claim would be if the learned judge had refused the Assets Recovery Agency's ('ARA')

application. The answer is that the claim would not have come to an end but would have continued before the Supreme Court.

[3] That answer requires this court to find that the learned judge's decision was an interlocutory one. As a result, it must be found that the applicants used the correct procedure in approaching this court in this matter.

[4] The court must now consider whether the proposed appeal has a real prospect of success. That issue raises two broad points. The first is whether the learned judge's refusal to stay the application for the civil recovery order, which she eventually made, is open to assessment as the applicants contend. Mrs Hay KC submitted that it is not, as there was no appeal from that order, which was made on 20 April 2022. Mr Wilkinson KC countered by submitting that both decisions must be considered together.

[5] Mr Wilkinson's submissions fail on this point. At the hearing of the application that was decided in April 2022, the applicants sought a stay of the substantive proceedings and an adjournment of the ARA's application for judgment. In treating with the application, the learned judge heard submissions concerning the issue of the outstanding litigation relating to the status of the ARA as a legal entity. She considered the issues of prejudice to the applicants, the age of the case, and the delay in concluding the outstanding litigation, and ruled that the overriding objective required her to exercise her discretion in favour of refusing the application for a stay of the proceedings. The issue, having been assessed and decided upon, cannot now be properly considered along with the proposed appeal against the decision granting the civil recovery order against the applicants.

[6] In the present application, Mr Wilkinson again sought to advance that the learned judge erred in refusing to grant the stay in April 2022. He advanced that she did not properly consider the issue of the outstanding litigation in this and other courts. It must, however, be held that that matter cannot be considered by the proposed appeal as it was not the subject of the order, which the applicants now propose to challenge.

[7] The second broad point is whether the learned judge erred in her decision and orders made on 8 July 2022. On this point, Mr Wilkinson submitted that the learned judge failed to properly consider the fact that some of the properties were not recoverable, as they were acquired before 30 May 2007 and could not be affected by the Proceeds of Crime Act ('POCA'). That argument fails as section 55(3) of POCA specifically speaks to that issue. It states:

“(3) For the purpose of deciding whether or not property was recoverable at any time, including any time before the appointed day, it shall be deemed that this Part [Part IV dealing with the civil recovery of property] was in force at that and any other relevant time.”

[8] Mr Wilkinson also argued that other persons who are not parties to the claim are affected, but they have not been afforded an opportunity to be heard. That argument must also fail as no such party is before this court taking that point.

[9] Finally, Mr Wilkinson submitted that the learned judge erred in finding that the applicants had not advanced a defence to the ARA's claim. He accepts that they have not filed a document intitled "Defence" but argued that the applicants' challenge to the ARA's status as a legal entity constitutes a defence to its claim.

[10] Mr Wilkinson's submission misses the point that the learned judge made in her reference to the absence of a defence. The learned judge found, that although the absence of a source of income does not by itself render property recoverable, the combination of the fact of Mr Hamilton obtaining large amounts of income from unlawful activities with the fact of ownership of expensive property by his relatives and connections, who do not have any obvious income to justify such ownership, was sufficient to satisfy her that the property was recoverable. We agree with Mrs Hay that in the absence of these applicants filing a defence or any other material showing that they acquired the property otherwise than by unlawful conduct, there is support for the learned judge's decision that the property is recoverable and that there is no reason to disturb that decision.

[11] None of the other proposed grounds raises any real prospect of success. Accordingly, the application for leave to appeal must be refused.

[12] The application for permission to appeal being refused, the application for a stay of execution must also be refused. The court therefore orders as follows:

1. The application for leave to appeal is refused.
2. The application for a stay of execution is refused.
3. Costs to the respondent to be agreed or taxed.