

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 198/2018

MOTION NO COA2019MT00016

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE SIMMONS JA (AG)**

BETWEEN	NORRIS NEMBHARD	APPLICANT
AND	THE ASSETS RECOVERY AGENCY	RESPONDENT

Hugh Wildman instructed by Hugh Wildman & Company for the applicant

Miss Alethia Whyte for the respondent

3, 4 December 2019 and 4 May 2020

PHILLIPS JA

[1] Norris Nembhard (the applicant) has filed a motion for conditional leave to appeal to Her Majesty in Council from the decision of this court delivered on 30 September 2019. The court had dismissed the applicant's application for permission to appeal the decision of Laing J with costs to the Assets Recovery Agency (the respondent), on the basis that the applicant's appeal had no real chance of success.

Background

[2] On 5 October 2011, the respondent brought civil proceedings against the applicant in the Supreme Court of Judicature of Jamaica, seeking a civil recovery order and restraint order pursuant to the Proceeds of Crime Act (POCA) against certain properties owned by the applicant, namely, several items of real estate and motor vehicles. The applicant was incarcerated in the United States of America when the claim was filed. However, there is agreement that the applicant was served personally, through his then attorney-at-law, with the claim form, the particulars of claim and other supporting documents. The applicant filed no defence to the claim and so, on the respondent's application, judgment in default was issued against the applicant and a civil recovery order made in relation to five properties and 11 motor vehicles, pursuant to section 58(2) and (3) of POCA. The applicant's application to set aside that default judgment and extend time to file his defence was refused. Leave to appeal was also subsequently refused.

[3] He filed an application for permission to appeal those orders in this court which was also ultimately refused with costs to the respondent. At paragraph [14] of the court's written reasons, the issues identified on the application for permission to appeal were as follows:

- "i) whether the respondent, in commencing the claim by way of a claim form as opposed to a fixed date claim form, proceeded in an incorrect manner;
- ii) whether the learned judge failed to take into account that the unlawful conduct alleged against the applicant was criminal conduct which had occurred

prior to 30 May 2007, and, in so doing, misapplied section 2(1) of the POCA;

- iii) whether the applicant gave a good reason for the delay in filing his defence; and
- iv) whether the learned judge should have stayed the application to set aside the judgment until the determination of an earlier claim.”

[4] Pursuant to those issues, this court reviewed the documentation and submissions before it to assess whether, in accordance with the requirement of rule 1.8(7) of the Court of Appeal Rules (CAR), the applicant had a real chance of success. Based on the proposed grounds of appeal, the court found that the applicant had not established that he had any chance of success on appeal, and the application was therefore refused with costs to the respondent.

[5] It is from this court’s refusal to grant permission to appeal, that the applicant sought conditional leave to appeal to Her Majesty in Council.

The motion to appeal to Her Majesty in Council

[6] The applicant sought conditional leave to appeal to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution of Jamaica (the Constitution), on the basis that the questions posed in the motion, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council. Those questions allegedly arose from issue (ii) stated in paragraph [3] above. As a consequence, nothing will be said in relation to the other issues stated therein.

[7] The questions posed in the motion read as follows:

- "a. [Whether] the Proceeds of Crime Act, 2007, has retrospective effect to allow for unlawful conduct that occurred prior to May 2007 to be used as the basis for making a Civil Recovery Order under section 57 of the Proceeds of Crime Act.
- b. Whether section 55(3) of the Proceeds of Crime Act overrides the provision of section 2 of the Proceeds of Crime Act in so far as it relates to the appointed date for the purposes [of] a Civil Recovery Order in respect of an unlawful conduct that occurred prior to May 2007."

[8] In his affidavit filed 18 October 2019, in support of the motion, the applicant deponed that this court had misinterpreted section 55(3) of POCA in light of the provisions of sections 2 and 55(1). He stated that on a true and proper construction of those provisions, the respondent would not have been able to rely on those provisions to establish that a civil recovery order could properly be made against him; and so, the questions set out above ought to be referred to Her Majesty in Council for consideration and clarity.

Relevant sections of POCA

[9] It may be useful to indicate at this juncture what the relevant provisions of POCA state and mean.

[10] Section 2 defines "criminal conduct" as conduct occurring after 30 May 2007, 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.

[11] Section 55 is found under Part IV of POCA which deals with, *inter alia*, civil recovery of the proceeds obtained through unlawful conduct. "Unlawful conduct" is defined as conduct that occurs in, and is unlawful under the criminal law of Jamaica; or is conduct that occurs outside of Jamaica, and is unlawful under the criminal law of that country; and if it had occurred in Jamaica, would be unlawful under the criminal law of Jamaica. "Recoverable property" is stated in section 55 to be construed in accordance with sections 84-89. Section 84 states that property obtained through unlawful conduct is "recoverable property". Where such property is mixed with other property or other property is obtained in place of it, that property is also recoverable. Where the recoverable property is disposed of, it may be traced from the person who obtained it through unlawful conduct, into the hands of the person where it may be found, but there are some exceptions (see sections 85-89).

[12] In respect of section 55(3), in order to ascertain whether property is recoverable at any time, including at any time before 30 May 2007, POCA is deemed to have been in force at that time, or at any other relevant time.

[13] Under section 57 of POCA, the enforcing authority can commence proceedings in the Supreme Court against any person who the enforcing authority believes holds recoverable property.

Submissions

[14] Counsel for the applicant, Mr Hugh Wildman, in his submissions before this court on the motion for conditional leave to Her Majesty in Council, reiterated the submissions

made before this court on the application for permission to appeal Laing J's judgment.

He stated that the two critical questions which arose for determination were as follows:

- “(i) Whether the definition of criminal conduct contained in Section 2 of the Proceeds of Crime Act has any bearing on the definition and interpretation of section 57 of the Proceeds of Crime Act which deals with Civil Recovery Order.
- (ii) Whether Section 55(3) of POCA overrides the provision of Section 2 of POCA, insofar as the Civil Recovery Order is concerned under section 57 of POCA.”

However, as can be seen, these issues were worded differently in the notice of motion.

[15] In his submissions before us, Mr Wildman asserted that based on the definition of “criminal conduct” in section 2 of POCA, and “unlawful conduct” set out in section 55, the legislators intended “to reconcile the definition of unlawful with criminal conduct in Section 2 of POCA”. He argued that before any act can be regarded as unlawful conduct, it must be a crime, and crime takes its meaning from section 2 of POCA. The definition of “unlawful conduct”, counsel submitted, is “not at large”, as “it is circumscribed by the plain language in Section 2 of POCA”. As a consequence, counsel submitted, “if the Respondent cannot establish a crime in the definition of unlawful conduct, there is no basis to apply for a Civil Recovery Order under Section 57 of POCA”.

[16] Counsel submitted that section 55(3) of POCA only deals with recoverable property and does not attempt to redefine criminal or unlawful conduct. He also stated that it permitted the respondent to apply for a civil recovery order against someone

who had committed unlawful conduct, but that conduct must be a crime within the definition of section 2 of POCA. He stated that, contrary to the position taken by counsel for the respondent, it is not true that when dealing with a civil recovery order under POCA one was not concerned with criminal conduct. It was a condition precedent that a crime must be established. Section 55(3), he said, assumes that unlawful conduct has been established. That is why it is only after unlawful conduct has been established, which includes a crime under section 2 of POCA, that section 55(3) of POCA can be invoked. Once the unlawful conduct is established then one can seek and obtain a civil recovery order, and that order can be obtained irrespective of whether the property was owned by the person before the appointed day of 30 May 2007.

[17] Counsel contended that in spite of the dictum of Sykes J (as he then was) in **The Assets Recovery Agency v Adrian Fogo and Others** [2014] JMSC Civ 10, and the statements issued out of this court in the instant case cited at [2019] JMCA App 30, the true and proper interpretation of sections 2 and 55 of POCA in particular, remain unsettled, and ought to be submitted to Her Majesty in Council for consideration.

[18] Counsel therefore submitted that, questions of great general or public importance have arisen with regard to the true and proper interpretation that ought to be accorded those specific provisions of POCA. Rowe P in **Vehicles and Supplies Limited and Another v The Minister of Foreign Affairs, Trade and Industry** (1989) 26 JLR 390 indicated that when determining whether questions of great general or public importance arise, *inter alia*, serious questions of law must be raised in the appeal. Such questions may relate to whether the practice and procedure in court has

been settled. It was counsel's contention that serious questions of law were raised in the appeal, and since POCA was a "relatively new piece of legislation", it had "far-reaching implications in its applicability in the administration of justice both in the criminal and civil sphere". He also stated that when juxtaposed with section 15 of the Charter of Fundamental Rights and Freedoms (the right to property) it is even more important that this matter be referred to Her Majesty in Council.

[19] Counsel for the respondent, Miss Alethia Whyte, described Mr Wildman's submissions as "entirely misconceived". She reminded the court that these submissions were made before and had not found favour with Sykes J in **Assets Recovery v Fogo**, nor with either Laing J (on the application to set aside the default judgment), or this court on the application for permission to appeal the decision of Laing J cited at [2019] JMCA App 30. She submitted that Mr Wildman's construction of the relevant provisions of POCA was without merit and just plainly wrong.

[20] Counsel submitted that in the light of this court's pronouncement in respect of the interpretation of unlawful conduct in the context of civil recovery, the questions raised by the applicant in this motion do not raise any difficult or serious issues of law which need to be clarified. She therefore urged the court to dismiss the motion with costs to the respondent.

Discussion and analysis

[21] In the judgment of this court, McDonald-Bishop JA on behalf of the court first criticised Mr Wildman for changing arguments mid stream, and putting forward for

consideration a construction of the relevant provisions of POCA for the first time, on the application for permission to appeal. That notwithstanding, the court examined the relevant provisions of POCA. Firstly, section 56, which dealt with the purpose of Part IV of POCA, which was to enable the enforcing authority to recover in civil proceedings, property obtained through unlawful conduct. In section 56(3) the court must decide on a balance of probabilities whether, *inter alia*, any matters alleged constitute unlawful conduct. The court referred to section 57 which provides that the enforcing authority may bring proceedings against a person who it believes holds "recoverable property".

[22] McDonald-Bishop JA stated clearly that "[a]t the core of the civil recovery regime is property which is, or which represents, property obtained through unlawful conduct". The court said that the only criteria to be satisfied for a civil recovery order is "that the predicate or antecedent conduct being relied on by the respondent occurred in Jamaica, and is unlawful under the criminal law in Jamaica or, if it occurred outside of Jamaica, would be unlawful under the criminal law of that country". So, there is no doubt that the conduct being alleged and relied on by the respondent must be unlawful under the criminal law. But that does not mean that it must be "criminal conduct", as defined in section 2 of POCA, which has a specific limitation date.

[23] The court examined section 2 of POCA, and Mr Wildman's submissions particularly with regard to his alleged interplay between the definition of "criminal conduct" in section 2 of POCA, and "unlawful conduct", in section 55 of POCA and the remaining provisions in Part IV of the Act. The court found that Parliament had given

“criminal conduct” and “unlawful conduct” specific and different definitions, and stated that both concepts had been defined in separate and discrete provisions.

[24] There were also specific provisions in relation to limitation of actions in Part IV of POCA which had relevance to “unlawful conduct”. The court specifically addressed section 55(3) of POCA, and concluded that “the court, in determining whether property was obtained through unlawful conduct, is to act on the assumption that POCA was in fact in force at the time of the acquisition of the property in question”. The court referred to and endorsed the dictum of Sykes J in **Assets Recovery Agency v Adrian Fogo**, particularly with regard to section 55(3) referred to earlier, and section 71 of POCA, which states, *inter alia*, that time limits established by the Limitation of Actions Act shall not apply to any proceedings under Part IV of the Act dealing with the civil recovery of property obtained through unlawful conduct. Section 71 of POCA also states that proceedings under Part IV shall not be brought after the expiration of 20 years from the date on which the respondent’s cause of action accrued, which in the case of recoverable property, accrued when the property was obtained.

[25] The court concluded at paragraphs [45] and [46] as follows:

[45] The definition of 'criminal conduct' in section 2(1), relied on by the applicant, has no bearing on the civil recovery regime, provided by Part IV of the POCA. The respondent’s cause of action would have accrued at the time the property alleged to have been obtained through unlawful conduct, was acquired. This could have been prior to the passing of the POCA. The applicant cannot successfully rely on section 2(1) of the POCA to escape the tentacles of the civil recovery regime invoked by the respondent.

[46] Sections 55(3) and 71 of the POCA provided a complete answer to the applicant's principal contention, on a matter of substantive law, in his proposed grounds of appeal. None of the authorities relied on by Mr Wildman availed the applicant. In fact, the Privy Council in **Assets Recovery Agency (Ex-parte) (Jamaica)** [[2015] UKPC 1] laid down no rule that 'criminal conduct', as defined in section 2(1), is applicable to civil recovery under Part IV. Their Lordships were careful to point out at paragraph 4(ii) of the judgment that its decision had nothing to do with civil recovery."

[26] The court stated that there was no merit in the applicant's proposed ground of appeal that POCA did not have retrospective effect to cover unlawful conduct that predated 30 May 2007.

[27] This court and the Supreme Court have therefore made it clear that there are two particular regimes set out in POCA. The definition of "unlawful conduct" in relation to the civil regime is different from "criminal conduct" in relation to the criminal regime. Therefore 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 20 years from the time of acquisition of the property (see Sykes J in **Assets Recovery Agency v Adrian Fogo**). As a consequence, there is absolutely no issue requiring any clarity in relation to those provisions. There is no basis on which one could say that the applicant has posed any questions of great general or public importance or otherwise, relative to the true and proper interpretation of any provisions of POCA.

[28] With regard to the phrase, “of great general or public importance or otherwise”, there have been several cases from this court which deal with how this phrase ought to be viewed and applied. In **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, this court referred to several of the cases decided previously, and indicated that such a question should be one that was capable of being the subject of serious debate. It should be an important question of law affecting the rights of persons generally and not just particular litigants. It ought to be a matter of gravity involving the public interest, and should not be merely a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords may agree with the Court of Appeal or see the matter differently.

[29] Bearing in mind the position taken by this court and the courts below on the interpretation of several of the provisions of POCA, there would seem to be no question capable of serious debate, or of any gravity, or any matter of public interest worthy of submission to Her Majesty in Council.

[30] In the light of all of the above, the motion for conditional leave to appeal to Her Majesty in Council ought to be refused with costs to the respondent to be taxed if not agreed.

SINCLAIR-HAYNES JA

[31] I have read in draft the judgment of my sister Phillips JA and agree.

SIMMONS JA (AG)

[32] I too have read the draft judgment of my sister Phillips JA. I agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The motion for conditional leave to appeal to Her Majesty in Council is refused.
2. Cost to the respondent to be taxed if not agreed.