



[2017] JMSC Civ 197

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 03657

BETWEEN	THE DIRECTOR OF PUBLIC PROSECUTIONS	APPLICANT/ RESPONDENT
AND	LINCOLN HUGH ASQUITH WHYTE	1ST RESPONDENT
AND	JANET DAWN FOSTER	2ND RESPONDENT/ APPLICANT
AND	HERBERT WHITE	3RD RESPONDENT
AND	GEORGE BARDOWELL	4TH RESPONDENT

IN CHAMBERS

Mrs. Yanique Gardener Brown and Ms. Patrice Hinkson Assistant Directors of Public Prosecutions instructed by the Director of Public Prosecutions for the Applicant/Respondent

Ms. Alethia Whyte instructed by the Asset Recovery Agency, Interested Party

Mr. Hugh Wildman instructed by Hugh Wildman & Co. for the 2nd Respondent/Applicant

October 18, November 10 and 27, 2017

Application to register foreign forfeiture order – relevant considerations for the Central Authority and the Court – circumstances when appropriate to apply repealed legislation – effect of s. 25(2) of the Interpretation Act – preservation of status quo relevant to the time period when repealed legislation in effect – other interpretation would precipitate absurdity and uncertainty – no contrary intention shown in current Act to negate general principles applicable to repealed legislation – subsequent enforcement action pursued under POCA – no conflict with reliance on DOFPA for registration of foreign order

D. FRASER J

The Application

[1] This is an application by Ms. Janet Dawn Foster, the 2nd respondent in the substantive matter and sister of the 1st respondent, to set aside the order of this court made on the 31st day of July 2015. That order registered a foreign restraint order and a foreign forfeiture order (described in the order as a foreign confiscation order). The foreign confiscation order included a property at 3 Sewell Avenue, Montego Bay, St. James of which the applicant is a joint owner. The registration was pursuant to sections 2 and 27 of the **Mutual Assistance in Criminal Matters Act (MACMA)** and the **Drug Offences (Forfeiture of Proceeds) Act (DOFPA)** (repealed). On November 10, 2017 an oral judgment was delivered refusing the application with written reasons to follow. That promise is now fulfilled.

[2] The narrow issue raised by this application, is whether or not in granting the order effecting registration, the court was correct to hold that section 25(2) of the **Interpretation Act** operated to preserve certain attendant rights and obligations of parties, (in this case the State and a private citizen), under the **DOFPA**, which had been repealed by the passage of the **Proceeds of Crime Act, 2007 (POCA)**.

The Background

[3] The matter arose in this way:

- a) The 1st respondent was convicted on March 31, 2004 in the United Kingdom (UK) of separate counts of conspiracy to import and to supply class A drugs. He was sentenced to imprisonment for 25 years;
- b) Flowing from those convictions, restraint and confiscation orders were subsequently made in the UK relating to property in Jamaica including the

property at 3 Sewell Ave. The confiscation order was made by the Crown Court sitting at Kingston upon Thames on October 28, 2005;

- c) By letter of request from the UK Central Authority to the Jamaican Central Authority under the **MACMA**, (The Director of Public Prosecutions (DPP) for most purposes including registration of foreign orders), it was requested that the foreign orders be registered and enforced in Jamaica;
- d) As previously indicated, on July 31, 2015 the Supreme Court granted an order registering the foreign restraint and confiscation orders;
- e) On July 19, 2017 the 2nd respondent/applicant filed this application to set aside the order registering the foreign orders.

The Submissions

Counsel for the 2nd respondent/applicant

- [4] Counsel for the 2nd respondent/applicant, submitted that, to enable the Court to make an order registering the foreign confiscation order, dual criminality had to be established. He argued that the operative legislation at the time for the determination as to whether the pre-condition of dual criminality was established, was the **POCA** which came into effect May 30, 2007.
- [5] Counsel relied on the fact that the **POCA** stipulated in section 2 that criminal conduct relates to what occurred from May 30, 2007 onward and does not capture conduct such as that of Lincoln Whyte which took place before that relevant date. Counsel contended that **POCA** superseded all other Acts, having repealed **DOFPA** and the **Money Laundering Act** of 1996 (**MLA**). Counsel submitted that had the **POCA** not specified a date from which criminal conduct could be considered, the Interpretation Act might have been relevant. The date having been stipulated however, he maintained that any recourse to the **DOFPA**, **MLA** or any other legislation pre-dating May 30, 2007, was ousted and section 25(2) of the **Interpretation Act** could not be prayed in aid to secure their

application. Counsel cited in support the Judicial Committee of the Privy Council case of **ARA (Ex Parte) Jamaica** [2015] UKPC 1.

- [6] Counsel bolstered his argument by advertng to the fact that the respondent had successfully applied under the **POCA** for a Director's receiver to be appointed. He argued that the respondent could not on the one hand say they were relying on **DOFPA** while simultaneously utilising the **POCA**.
- [7] Counsel cited the cases of **Strachan v Gleaner Co Ltd & Anor** (2005) 66 WIR 268 and **Evans v Bartlam** [1937] A.C. 473, in support of the submission that this court had the power to set aside the registration order made by another judge of co-ordinate jurisdiction.

Counsel for the applicant/respondent

- [8] Counsel for the applicant/respondent submitted in response that section 25(2) of the **Interpretation Act** applied and that no contrary intention was shown why it should not.
- [9] Accordingly based on section 25(2), **DOFPA** was the legislation that applied and the application for registration was correctly premised on dual criminality having been established under **DOFPA**.
- [10] Counsel further submitted that the fact that the **POCA** defines criminal conduct was not what the DPP had to address when the order was registered. The relevant issues were:
- (1) whether the court was satisfied that the 1st respondent was convicted of an offence to which the foreign forfeiture order related; and
 - (2) if that offence had been committed in Jamaica, a forfeiture order could have been made by a Jamaican court; and
 - (3) that the 1st respondent's conviction and the order were not subject to further appeal in the relevant foreign state.

- [11] Counsel maintained that for the interpretation put forward by the applicant to be correct, **POCA** would have had to have gone further to say that no conduct can be considered criminal conduct before 2007. She contended that nothing in **MACMA** precluded reliance on **DOFPA** before 2007.
- [12] Concerning the fact that some subsequent action has been taken under **POCA**, counsel submitted that the issue the DPP was dealing with was whether the confiscation order was properly registered. That counsel contended did not affect any current action under **POCA** concerning enforcement. Counsel noted that in any event **DOFPA** had been silent in relation to the enforcement of orders. Counsel maintained that registration and enforcement of the order were separate and distinct issues.

Analysis

- [13] The resolution of this matter turns on the interpretation of Section 25(2) of the **Interpretation Act**. Paragraphs b, c, d and e of Section 25(2) read:

Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not-

- a)
- b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or
- c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or
- d) affect any penalty, fine, forfeiture, or punishment, incurred in respect of any offence committed against any enactment so repealed; or
- e) affect any investigation, legal proceedings, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid,

and any such investigation, legal proceeding, or remedy, may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

- [14] Section 25(2) of the **Interpretation Act** was created to address just such an eventuality as has occurred in this case. It is a vital and critical section. It operates as a savings clause to ensure that, unless the contrary intention is shown, when legislation is repealed the effect of the repeal does not operate to invalidate rights, liabilities and obligations flowing from conduct that occurred at a time when the legislation was in force. It preserves the status quo relative to the time period when the repealed legislation was in effect.
- [15] Were this not the case, all repeals of legislation could potentially have retrospective effect. And where would that end? Conceivably, if the interpretation urged upon this court by counsel for the applicant were correct, potentially all actions which were legal at the time they occurred could be rendered invalid by the fact that the legislation under which they were taken, had subsequently been repealed. That would lead to manifest absurdity and pervasive uncertainty.
- [16] The submission of learned counsel for the respondent, the court holds reflects the correct interpretation of the relevant legal position. The **DOFPA**, (in particular sections 2, 3 and the Schedule), was the applicable law for the consideration of the question of dual criminality at the time Mr. White was convicted of the offences that grounded the confiscation order made in the UK. It was this established dual criminality that formed the basis on which the request for registration of that UK order could be granted under section 27 of **MACMA**. Section 25(2) of the **Interpretation Act** makes it clear that in the circumstances outlined, the **DOFPA** would still apply, despite its having been repealed at the time of the application for registration, given that it was the relevant legislation in effect in Jamaica, at the time of the 1st respondent Lincoln White's conviction.

- [17] Further, there is nothing in **POCA** to even remotely suggest a contrary intention that would supersede or negate the general principles that would apply to all repealed legislation, contained in section 25(2) of the **Interpretation Act**. Accordingly, I am of the view that the court was correct to hold that **DOFPA** was the appropriate legislation to consider in determining whether the pre-condition of dual criminality had been satisfied, to ground the application for registration.
- [18] The significance of the stipulation of May 30, 2007 as the date from which criminal conduct as defined under **POCA** can be considered, relates to the detailed and intricate confiscation regime established under **POCA**. It circumscribes how that regime is to operate under **POCA** in terms of what is criminal conduct and from what date that conduct can be taken into account for various considerations and computations under the Act. The date of May 30, 2007 and the definition of criminal conduct do not however have anything to do with applications, such as the one under consideration in this matter, which owe their life to the provisions of the **DOFPA**. They are separate and distinct and the **POCA** has not redefined or circumscribed anything that happened when the **DOFPA** was in effect.
- [19] In that regard counsel's reliance on the case of **ARA (Ex Parte) Jamaica** is misconceived. That case primarily concerned the evidential and procedural requirements to support the application for different types of investigative orders under **POCA**. The case also confirmed that pursuant to section 2(1) of **POCA**, criminal behaviour that occurred before May 30, 2007 could not constitute criminal conduct under **POCA** and therefore could not generate criminal property **for the purposes of POCA** (my emphasis). See paragraphs 7 and 23(iv). The case does not in any way support the interpretation advanced by counsel for the applicant, which in effect is, that the creation of the concept of "criminal conduct" under **POCA** extinguished all criminal conduct, (used in the plain not the technical meaning of those words under **POCA**), that occurred prior to the passage of **POCA**.

[20] Further, the court accepts that the issue of the grounding of the application for registration of the confiscation order, is a consideration completely separate and apart from the legal framework existing for the management of assets subject to a confiscation order. One of the weaknesses of the **DOFPA** was that it did not contain any provisions for the enforcement of orders, or for the management of assets subject to forfeiture orders. **POCA** addressed that lacuna. **DOFPA** having been silent on enforcement, no possibility of any conflict could exist with enforcement action taken pursuant to **POCA**.

[21] I therefore see nothing inconsistent in the current legal framework for an asset subject to a confiscation order by virtue of the operation of the **DOFPA**, to be susceptible to management pursuant to the provisions of the **POCA**. The application for registration was made possible through **DOFPA**. The recourse to **POCA** to manage the assets confiscated cannot in anyway change, modify or undermine that legal and historical fact.

[22] Based on my conclusion, there is no need to consider the question of the court's power to set aside the order of a court of co-ordinate jurisdiction, addressed in cases such as *Strachan v Gleaner Co Ltd & Anor* and *Evans v Bartlam*.

Order

[23] The application is therefore refused, with costs payable by the 2nd respondent/applicant to the applicant/respondent, to be agreed or taxed.