[2012] JMSC Civ 137

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2008 HCV 04971

BETWEEN	**THE ASSET RECOVERY AGENCY**	**CLAIMANT**
AND	**YOWO SENHI MORLE**	**FIRST DEFENDANT**
AND	**HAZEL ELAINE CLARKE**	**SECOND DEFENDANT**
AND	**LINTON LLOYD CLARKE**	**THIRD DEFENDANT**

CONSOLIDATED WITH

CLAIM NO. 2011 HCV 03670

IN THE MATTER OF AN APPLICATON TO VARY A RESTRAINT ORDER PURSUANT TO SECTION 24 OF THE PROCEEDS OF CRIME ACT, 2007

BETWEEN	**THE ASSET RECOVERY AGENCY**	**CLAIMANT**
AND	**IN THE ESTATE OF YOWO MORLE**	**FIRST DEFENDANT**
AND	**HAZEL CLARKE**	**SECOND DEFENDANT**

AND	**IN THE ESTATE OF LINTON CLARKE**	**THIRD DEFENDANT**
AND	**NOMORA MORLE**	**FOURTH DEFENDANT**

IN CHAMBERS

Charmaine Newsome, Susan Watson Bonner and Nataeline Robb-Cato for the claimant

Chumu Paris for the second defendant

July 30, September 13 and October 4, 2012

PROCEEDS OF CRIME ACT – SECTION 33 – RESTRAINT ORDER - VARIATION OF RESTRAINT ORDER – TEST FOR VARIATION OF RESTRAINT ORDER

SYKES J (DELIVERED BY FRASER J)

[1] This is an application by Miss Hazel Clarke to vary the terms of a restraint order imposed by the Supreme Court in November 2008. She is asking that she be allowed to use some of the restrained property to pay reasonable legal fees and reasonable living expenses for herself and her grandchild.

[2] The restraint order was granted at a time when Miss Clarke and her son, Mr Yowo Morle, were facing charges of money laundering and obtaining property by false pretences. There were two developments which resulted in the termination of criminal charges against Miss Clarke and Mr Morle. Mr Yowo Morle was murdered in December 2008. Mrs Tamanaha, one of the intended witnesses in the criminal trial,

has developed Alzheimer's disease and so is unable to travel to Jamaica to testify. ARA then decided to pursue civil recovery which does not require a conviction for a criminal offence.

[3] The variation is sought solely in respect of four accounts held at the National Commercial Bank. These are:

a. account number 434-503-906;

b. account number 436-479-670;

c. account number 437-256-640;

d. account number 719-72101

The Restraint Order

[4] This application is coming at a time when the civil recovery application in respect of the named accounts and other properties is set down to be heard in May 2013. In opposing the application, the Assets Recovery Agency (ARA) relies on affidavits of Mr Keith Darien, a senior forensic examiner of ARA. These affidavits were filed in support of a civil recovery application and so were more detailed than the affidavits filed by ARA in the initial restraint application in 2008. The result is that the information coming from ARA is much more fulsome than would normally be expected on an interlocutory application. This state of affairs has had a profound impact on the submissions made by ARA in opposing the application. The submissions sounded much like those expected at the civil recovery hearing. ARA is saying to the court that, based on its investigation, there is a strong possibility that the civil recovery order will be granted and so the restraint order ought not to be varied.

[5] ARA contends that Miss Clarke could not possibly have earned the amount of money in the accounts from any legitimate source. The bases for this conclusion are:

a. in respect of Miss Clarke's work in the United States of America (USA), her gross earnings for the year ending December 2006, including overtime, were US$4,717.77. When statutory deductions were made the net earnings were US$3,819.65;

b. there is no evidence that Miss Clarke had any other source of income other than her employment in the USA;

c. the investigations showed that as at December 31, 2005 Miss Clarke and Mr Yowo Morle had accumulate bank balances of JA$3,205,251.31. This was also said to be their net worth. Also at the end of 2005, neither person was recorded as owning any real estate or having any legal or equitable interest in any real property;

d. by December 31, 2006, Miss Clarke and her son, Mr Yowo Morle, had an increased net worth of JA$13,147,136.39. The only known source of legitimate income for either of them was Miss Clarke's earning of JA$256,489.50 for the year 2006. It is not clear whether this Jamaican currency figure given by Mr Darien is Jamaican currency equivalent of US$3,819.65 which was said to have been earned by Miss Clarke in the USA for the year 2006. The difference between the net worth for the years 2005 and 2006 in Jamaican currency is JA$9,941,885.08. According to Mr Darien, there is no evidence of legitimate earnings by either Mr Yowo Morle or Miss Clarke that could account for this staggering increase in net worth. Mr Darien asserts, inferentially, that Miss

Clarke's earnings from the USA (US$3,819.65) cannot account this increase;

e. by December 31, 2007, the net worth of Miss Clarke and Mr Morle had increased from JA$13,147,136.39 to JA$26,509,393.56. This increase was over one hundred percent in a single year. Other than Miss Clarke's employment in the USA during 2006 and 2007 (the earnings there have been stated above), no other legitimate source of money was identified to account for this increase. ARA is alleging that the difference between Miss Clarke's and Mr Morle's net worth in 2005 and 2007 is JA$23,304,142.25. King Croesus would undoubtedly approve of the fact of the increase in wealth if not the alleged means;

f. it is believed that Miss Clarke's and Mr Morle's sudden and unexplained increase in net worth came from defrauding a Mrs Alice Tamanaha, an elderly citizen of the USA. The fraud, it is believed, began 2006 and continued into 2007;

g. it is also believed that Mrs Tamanaha sent several cheques between June 2006 and August 2007 totaling US$622,350.00 or approximately JA$41,961,677.05. The further breakdown shows that she sent US$224,350.00 (JA$14,977,767.05) in 2006 and US$398,000.00 (JA$26,983,910.00) in 2007.

The defence

[6] In response to ARA's civil recovery application, Miss Clarke has pleaded a full defence. The defence pleaded to the civil recovery application is not being relied on in support of her application although it must be said that some aspects of the

defence bear more than a striking similarity to the contents of the affidavits relied on in her variation application.

Miss Clarke's case for variation.

[7] Miss Clarke filed three affidavits in support of her application. The particulars will be revealed when the court is examining the evidence in detail to see whether the variation should be granted. At this stage a quick summary of her evidence is all that is necessary.

[8] Miss Clarke states that she has mounting expenses (legal and living) and she needs access to her hard earned savings to meet her financial obligations. She outlined that she owes school fees, transportation bills and legal fees. She also speaks to her monthly expenses for food and utilities. Miss Clarke states that the munificence of friends and family cannot be relied on indefinitely. Miss Clarke speaks to her great embarrassment financially and socially because of the restraint order.

[9] Also in her affidavits, it is evident that Miss Clarke undertook to send her grandson to a private school after the restraint order was in place. The transportation bill is in relation to the cost of sending her grandson to school. She mentions other expenses but these are minor when compared with the cost of the private school.

[10] Miss Clarke's counsel, Mr Chumu Paris, took the view that at this interlocutory stage he need not set out chapter and verse of any response to ARA's case because the full scale hearing is set for May 2013. All he needs to do is to establish that (a) she has legitimate expenses; (b) there is money standing in accounts and (c) the property has not yet been found to be criminal property.

[11] As this court understood Mr Paris's submissions, learned counsel's position was that despite the apparent strength of ARA's case, no court has yet accepted the allegations as proven facts and it would be wrong, in principle, for this court to use the strength of the allegation as a basis for denying Miss Clarke access to her

money when the hearing has not yet taken place. In any event, he submitted, a defendant should have access to money to defray reasonable living expenses and reasonable legal fees regardless of the overall strength of the case against the defendant.

ARA's response to the application

[12] Mrs Susan Watson Bonner, counsel for ARA, stressed that ARA had done an exhaustive investigation and found that Miss Clarke could not have possibly earned the money standing in her account from any legitimate source. She vigorously submitted that permitting Miss Clarke access to these funds would defeat the very purpose of the legislation which was, she reminded the court, to take the benefit derived from criminal activity. If the court permitted Miss Clarke to use the funds, then she would, in effect, be benefitting from the proceeds of crime. Implicit in Mrs Watson Bonner's submission was the unstated proposition that if this court acceded to this application then just about every person whose property was under restraint would turn up and say, 'No court has found that the money in my account is the proceeds of crime and until such time I have living expenses and legal bills that have to be met. Until my property has been condemned as the benefit from criminal activity, there is no legitimate reason why my expenses cannot be met from these moneys.'

[13] For Mrs Watson Bonner, it would be unseemly and would grate well-thinking persons the wrong way to see an alleged fraudster or beneficiary of the fraudster's activities living the high life when there is cogent evidence that strongly suggests that the life style rests on a solid foundation of criminality. It would send the wrong signal if this court were to even contemplate varying the order.

The legal principles

[14] There is no doubt that the court has the power to vary a restraint order (section 34 (1) of the Proceeds of Crime Act (POCA)). There is no doubt that the court has the

power to make exceptions in a restraint order for reasonable living expenses and reasonable legal expenses (section 33 (4) of POCA).

[15] POCA provides no guidance regarding the exercise of the power to vary a restraint order except that which is implicit in the purpose of restraint powers. The clear purpose of this power is to preserve property by preventing dissipation so that it is available for confiscation, for meeting any pecuniary penalty order made by the court, to satisfy the sum identified as representing some person's benefit from criminal activity or for satisfying any civil recovery order that may be made. What this means is that any exercise of the power to vary a restraint order should be exercised cautiously so that a much of the property is preserved to meet any order made by the court.

[16] What has just been stated draws support from **In re Peters** [1988] QB 871. That was a case under the Drug Trafficking Offences Act 1986 (UK) where the court was speaking in respect of a restraint order made under that Act. However, the underlying rationale is the same for all restraint orders regardless of the specific wording of the legislation. Lord Donaldson MR said at page 874:

> *[Restraint orders] are designed to prevent an accused rendering a confiscation order inappropriate or nugatory by disposing of his assets between the time when an information is about to be laid against him and the making of a confiscation order in the event of conviction.*

[17] In the same case Mann LJ stated at page 881:

> *In my view the purpose of a restraint order is to prevent the dissipation of realisable property which may become subject to a confiscation order. In my experience a restraint order*

does not, and properly does not, prevent the meeting of ordinary and reasonable expenditure.

[18] Despite the change in legislation in England and Wales (the Drug Trafficking Act 1986 was overtaken by the Drug Trafficking Act 1994) the concept of the restraint order was retained and an examination of the cases shows that the general purpose of a restraint order as stated in **In re Peters** is still regarded as good law (**In re P (Restraint Order: Sale of Assets)** [2000] 1 WLR 473, 479 – 480, (Simon Brown LJ). This court adopts the dicta of the two judges quoted above.

[19] This court is fully aware that in the two cases cited there was what is called a legislative steer (section 13 (2) in respect of the Drug Trafficking Act 1986, and section 31 (2) of the Drug Trafficking Act 1994), that is to say, specific statutory provisions stating explicitly to the court that when it is exercising its restraint powers, it should do so with a view to preserving as much of the realizable property as possible to meet any order that may be made. There is no similar provision in the Jamaican legislation in relation to restraint powers nonetheless, the common sense of the statute does indeed suggest that the courts are to make every effort to preserve as much of the property as possible to meet any order which may be made at the end of all the proceedings. In other words, the absence of a legislative steer in the Jamaican POCA restraint provisions does not make the principle expressed by the English legislative steer any less applicable to Jamaica. The legislative steer is simply formulating explicitly what common sense has already made known.

[20] One significant development in the law relating to restraint orders occurred in the case of **In re M (Restraint Order)** [2000] 1 WLR 650. This was a case under the Proceeds of Crime Act 2002 (UK). Among the issues that arose was whether legal fees could be regarded as reasonable living expenses. The Court of Appeal held that legal fees and reasonable living expenses were mutually exclusive and each expense should be dealt with separately.

[21] From what has been said so far, it is reasonable to conclude that the law and practice demand that an application for variation of a restraint order should be carefully examined. The careful examination is directed at (a) preventing dissipation or (b) denial of access to property in appropriate cases.

[22] Mrs Watson Bonner's position is not new to the courts. The Court of Appeal of England and Wales had to deal with an identical hard-line position adopted by the Crown Prosecuting Service (CPS) in the matter of **Regina v AW** [2010] EWCA Crim 3123 (delivered, 9th November 2010). The CPS wrote to the defendant's solicitors in the following terms (see paragraph 12 of the judgment of Rix LJ):

> *"As the monies in the accounts were obtained by fraud, it is not appropriate that they be made available for your client to dissipate".*

[23] Just like Mrs Watson Bonner, the CPS was advancing the proposition that a defendant should not have access to property believed to be derived from or representing the benefit from criminal activity.

[24] In analysing this position Rix LJ stated in paragraph 12:

> *We cannot help observing that that contention begs two critical questions. One is whether the monies were obtained by fraud, because of course the appellant has yet to stand trial and be convicted, and must at this point be granted the presumption of innocence; and the other question that is begged is whether the amounts being asked for under the section 41(3) rubric of reasonable living expenses were a matter of dissipation. Almost ex hypothesi, monies which are reasonable living expenses, or are allowed by a court as constituting reasonable living expenses, are not monies of mere dissipation. In our judgment, therefore, that was not a*

> *very helpful contention, unless of course the Crown was in the position, which it was not yet in, to show that the monies in question were simply a matter of dissipation.*

[25] His Lordship identified the circularity of CPS's reasoning. The CPS was treating the very fact in issue as if it were proven. The fact in issue was whether the defendant had committed a criminal offence and thus his property could be treated as his benefit from that crime. Until this was decided, the CPS could not, in advance a court deciding the issue in favour of the CPS, act as if it was already proven.

[26] His Lordship also held that making provision for reasonable living expenses cannot normally be considered dissipation as that expression is commonly understood. Dissipation of assets carries with it the connotation of action being taken to deliberately consume the asset in order to frustrate any order that may be made against the property, that is to say, waste by misuse.

[27] The unstated foundations of the learned Lord Justice's analysis were the presumption of innocence and the presumption that property was legally acquired, that is to say, in the pre-judgment period, the court should not conclude that the defendant was a criminal or acquired his property from crime. In the pre-judgment period, the restraint order is sought on the basis that it is hoped that at the end of the legal proceedings which precipitated the restraint order the court will grant orders which are then enforced against the restrained property. It is usually granted at a time when the outcome of the case is not known. The presumptions of innocence and legally acquired property have greater sway in this period. In the post-judgment period, the Crown would have secured a judgment in its favour and so there is now an actual judgment which can be enforced against the restrained property. The difference between the two periods is quite significant and should be borne in mind when applications for variation of restraint orders are being considered.

[28] Some eighteen years earlier, Hutchison J was confronted with an almost identical argument as that put forward by Mrs Watson Bonner in this case and the Crown Prosecuting Service in **AW**. In **Re D** (delivered 28th October 1992), the defendants applied for a variation of a restraint order. It was opposed on the basis that no variation should be granted unless the defendants could show that the money they wished to use came from legitimate sources. Hutchison J rejected the submission on two bases. First, his Lordship observed that regardless of how the submission was dressed up, at its root, it assumed that the defendants were in fact guilty. Second, in the confiscation system what the court does is to assess the benefit from the underlying criminal activity and then seek to recover that sum from whatever property is available and until that is done the property remains that of the defendants. His Lordship further observed that the provision for reasonable legal expenses and reasonable living expenses will inevitably reduce the amount available to meet any confiscation order made.

[29] This reasoning by his Lordship was the result of giving effect to the presumption of innocence and presumption that property is legally acquired. Ultimately, 'whether the allowances come from money found in the loft or in a building society or bank account; or whether they come from the sale of some assets; whether they come from what the Customs would describe as the direct proceeds of drug trafficking or what the Customs would describe as legitimate money; it all goes to diminish the sums available in the event of conviction to meet a confiscation order' (by Hutchison J). Hutchison J also stated that since the defendants were presumed innocent until proven guilty then a corollary of that was that the moneys restrained belong to them and not the Crown. Consequently, once they made the case for their living and legal expenses then the order should be made.

[30] So the legal position is very clear. It is not sufficient to oppose an application for variation to say that the defendant has not shown that he did not make his money from illegitimate sources. It is equally not sufficient, in opposing the application to vary, for the Crown to say that it has a strong case so therefore the defendant must

show that he can refute the case. This is particularly so in the pre-judgment period. What about the post-judgment period?

[31] The law relating to the post-judgment period was addressed by the English Court of Appeal in the case of **The Revenue and Customs Prosecutions Office v Robert William Briggs-Price** [2007] EWCA Civ 568 (delivered 14th June 2007) where the defendant was convicted and a confiscation order was made against him. He sought access to restrained money to pursue his appeal. Counsel opposing the application submitted that since there was a valid confiscation order in place then nothing should be done in the post-conviction period which would undermine the enforcement of the order against the property. In other words, the presumptions of innocence and legally-acquired property have been overturned by the fact of conviction and a confiscation order and so there was an even stronger case, at this stage, against variation of the order.

[32] Wall LJ pointed to the weakness of the argument – another circular argument. His Lordship stated that the submission assumed the very thing to be decided, namely, whether there was 'a valid confiscation order which will be maintained and remain in force after that appeal has been heard' (paragraph [31] of judgment). Wall LJ was saying that to oppose the application on the ground proffered assumed that the conviction and confiscation order would stand which was the very thing to be decided on appeal. Therefore, even in the post-judgment period, reasonable legal expenses can be granted provided the defendant makes the case. An identical decision was made in the earlier case of **Customs and Excise v Norris** [1991] 2 All ER 395.

[33] Having established that opposition to a variation cannot rest on the basis put forward by Mrs Watson Bonner, is there any basis on which such an application can be resisted? The answer is provided by Sir Anthony Clarke MR while dealing with an appeal from an order which varied a restraint order made under the Criminal Justice Act 1988 in **Serious Fraud Office v X** [2005] EWCA Civ 1564 (delivered 25th November 2005). It should be noted that in that case the court took the view that the

applicant had other assets outside of the United Kingdom which he could use to mount his defence and so the Serious Fraud Office's (SFO) appeal against variation was successful. This statute also had a legislative steer (section 82 (2) which was more or less the same as section 13 (2) of the Drug Trafficking Act 1986).

[34] The test drew, once again, on the freezing order analogy. The Master of the Rolls said at paragraphs 33 – 35:

> *33 That decision [In re Peters] shows that in a case of this kind the court should have regard to the "legislative steer" and thus to the purpose of the restraint order, which is that the defendant's realisable assets should be preserved so as to be available to satisfy any confiscation order that may subsequently be made.* ***However, while having that purpose in mind, the court should approach an application to vary a restraint order in a similar way to that in which it would approach an application to vary a freezing order.***
>
> *34 By Article 6.1 of the European Convention on Human Rights, in the determination of any criminal charge against him, everyone is entitled to a fair trial. That plainly involves his having a fair opportunity to defend himself and, as Lord Donaldson put it, he should be able to fund the costs of his defence. Equally, as both the common law and Article 6.2 of the European Convention on Human Rights recognise, everyone charged with a criminal offence shall be presumed innocent until proved guilty in accordance with the law.*
>
> *35* ***If a defendant against whom a restraint order has been made wishes to vary the order in order to enable***

> ***him to use the funds or assets which are the subject of the order, which I will call "the restrained assets", in order to pay for his defence, it is for him to persuade the court that it would be just for the court to make the variation sought. I would call that the burden of persuasion. For example, if it were clear that the defendant had assets which were not restrained assets, the court would not vary the order because it would not be just to do so consistently with the underlying purpose of the restraint order.***

[35] The Master of the Rolls while recognising the importance of the presumption of innocence (and this court would add, the presumption that property was legally acquired), that was not the decisive factor in resolving these kinds of applications. It should be noted that rationale for restraint orders was not, in and of itself, sufficient to defeat a variation application. His Lordship adopted the flexible test of whether it would be just to vary the order. At the end of the day, the Master of the Rolls was not convinced that the defendant had made the case for variation despite the wrong test applied by the judge. His Lordship inferred that the defendant had access to property even though the property was not clearly identified. His Lordship's conclusion was an inference drawn from the material presented.

[36] The rest of the reasoning and analysis of the Master of the Rolls (paragraphs 35 – 51) in response to submissions made by Queen's Counsel, Mr Andrew Mitchell (a world leading expert and author in this field) are instructive and provide useful guidance in this area.

[37] At this point, the court will refer extensively to the trial judge's reasons for rejecting the SFO's position as well as to Sir Anthony Clarke's rejection of the trial judge's reasoning. This is being done because Mr Darien said that he believed that Miss Clarke had possession of or control of assets even though the restraint order in 2008

was cast in wide terms to capture disclosed and undisclosed assets. The Master of the Rolls deals with the argument which states that if the state has this information then it should take steps to bring proceedings for contempt and also to seek to get control of the property and any failure to take action by the state should count against it. At paragraphs 23 and 24 is found the following:

> *He [the judge] summarised the SFO's argument thus in paragraph 5 of his judgment:*
>
> > *"(1) There are grounds for believing that the applicant has substantial assets overseas which he has concealed. (2) In those circumstances the applicant should use the secret assets overseas rather than the specific assets identified in paragraph 4 of the restraint order for the purpose of funding his criminal defence. In this way more of the assets identified in paragraph 4 of the restraint order will be preserved in order to meet any future confiscation order. (3) In order to achieve this objective, the court should refuse to grant the variation of the restraint order which the application seeks. Indeed section 82 of the Criminal Justice Act 1988 requires the court to refuse the applicant's application."*
>
> *24 In paragraph 6, the judge said that the SFO's argument was unsound, and he rejected it for four reasons as follows:*
>
> > *"(1) All of the applicant's assets (both disclosed and undisclosed) are caught by the restraint order. (2) Accordingly even if the applicant is going to use*

undisclosed overseas assets in order to pay his lawyers, it will still be necessary to vary the restraint order in the manner sought so as to enable the applicant to do so. (3) If the SFO believe that the applicant has undisclosed assets overseas, they should take proper steps to deal with the matter. For example they should pursue the applicant for breach of paragraph 10 of the restraint order. The SFO should also seek to identify those overseas assets and add them to paragraph 4 of the restraint order. It will be recalled that paragraph 4 already includes assets situated [abroad]. (4) If this court refuses the variation which is sought, such refusal will create a serious impediment to the conduct of the applicant's defence in respect of serious criminal charges. In my view that would give rise to a breach of Article 6 of the Convention on Human Rights. Section 82 of the Criminal Justice Act must be construed in a manner which is in conformity with Article 6 of the Convention."

[38] It is clear that the SFO had advanced at the forefront of its argument opposing the restraint that there was good reason to believe that the defendant had access to assets despite the restraint order. The judge rejected the SFO's position on the basis that since the restraint order applied to all assets (disclosed and undisclosed), to say that the defendant should use his undisclosed assets contains an inherent contradiction which was this: to use the undisclosed assets required a variation of the order since the order applied to all assets and if this was the case then the order should be varied in any event. The judge also reasoned that if the SFO had thought that the defendant had undisclosed assets available for use and he was using them, then it should have taken steps to haul the defendant before the court for contempt

since his actions would amount to contempt. The judge granted the variation and this led to the appeal.

[39] The learned judge was held to be wrong in his approach for these reasons found at paragraph 52:

> *52 The judge did not approach the application in accordance with the principles I have identified. He did not consider all the circumstances of the case at all. On the contrary, he said that it was for the SFO to institute proceedings for contempt of court. I must say something about his four reasons. As to the first, it is common ground that all X's assets are caught by the restraint order. They are all restrained assets. As to the second, it is of course correct that some variation of the order is required before Mr Smith can use restrained assets to fund the reasonable costs of his defence. It follows that he needs a variation before he can use any of his assets for the purposes of his defence. He is in principle entitled to some variation of the order since he cannot otherwise lawfully expend any monies on his defence. He wanted a variation which would permit him to use monies from the specific account referred to in paragraph 4(d) of the order for his defence. The question was therefore whether it was just for him to use those assets or whether in all the circumstances of the case he should explain the facts in more detail before such a conclusion could properly be reached. The judge did not approach the matter in that way. In my judgment he should have done so.*

[40] In respect of the judge's third and fourth reason, Sir Anthony Clarke stated at paragraphs 53 – 55:

53 As to paragraph 3, I accept that it was open to the SFO to take such steps as it thought appropriate to deal with any alleged breach of paragraph 10 of the order. Equally I recognise that there is a strong case for the argument that, if it was the SFO's case from the outset that X had specific assets outside the jurisdiction, it should have specified them in the draft order, as it did with other assets both inside and outside the jurisdiction. However, I do not accept the submission that the SFO was obliged to take such a step before resisting an application by X to vary the order in the manner sought.

54 In giving his fourth reason the judge concluded that the refusal of the application

> *"will create a serious impediment to the conduct of [X's] defence in respect of serious criminal charges … that would give rise to a breach of Article 6 of the Convention on Human Rights."*

55 For my part I do not think that that conclusion is justified. My reasons are shortly these. It appears to me that even if X cannot use restrained funds to pay for his defence there will be no infringement of his right to a fair trial under Article 6 because he is entitled to public funding for the reasons I gave earlier. However the SFO does not take its stand on that point. It recognises, to my mind correctly, that where a defendant can show that he has no funds other than the restrained funds it will ordinarily be just to permit him to use the restrained funds in order to pay for the reasonable costs of his defence. For the reasons given earlier it is my view

that he must persuade the court that it would be just to allow him to use identified funds such as those referred to in paragraph 4(d) of the order.

[41] There are some important observations to be made regarding Sir Anthony Clarke's analysis of the judge's reasons for granting the variation. It is clear that the SFO strongly felt that there were undisclosed assets somewhere. Those assets were indeed caught by the terms of the order but, of course, there was the practical matter of the SFO not knowing with any certainty where they were. While it was accepted, in theory, that there would need to be a variation of the restraint order before the applicant could lawfully use the undisclosed restrained assets, Sir Anthony Clarke was concerned about the lack of details provided by the applicant in his disclosure affidavit. It is also critical to observe that even though the applicant was eligible for public funding of his case, the SFO resistance to the variation was not based on that factor at all but rather on the lack of particularity in the disclosure affidavit. The lack of particularity combined with the view that the defendant had access to undisclosed assets was sufficient to reverse the trial judge's decision. In other words, it appears to be the case that an applicant for a variation of restraint order must make full, very full and frank disclosure in his affidavit. If he fails to do so then that may be a reason for declining to vary the order because the lack of full and frank disclosure when linked with the access to undisclosed assets is sufficient to cause great discomfort for any court.

[42] The reason for this approach is not hard to justify. If the primary purpose of the restraint is to make the property available to meet any order made by the court then it follows that the court must examine the application for variation to make sure that the applicant is not taking advantage of any information gap in the court's knowledge to use known restrained assets while saving undisclosed assets for later use, thereby rendering any order the court may make which requires enforcement against the restrained property pointless. For these reasons this court entirely agrees with the approach of Sir Anthony Clarke.

Practical matters

[43] The cases show that it is indeed standard practice for the initial restraint order to make provision for reasonable living and reasonable legal expenses even without an application for variation. In other words, ideally, a properly drafted restraint order should, from the initial stage, make provision for reasonable living expenses and reasonable legal expenses unless there is good reason not to do so or the exception to provision for legal expenses found in section 33 (4) applies. However, failure to make these provisions is not incurably bad. The defendant can apply for variation of the order.

[44] The court can appreciate the tactical position of Mrs Watson Bonner regarding making provision for these expenses in the initial restraint order. The initial application for a restraint order is usually made ex parte and it is in the ex parte order that the disclosure order is usually found. The purpose of the disclosure order is to extract information from the defendant which may supply addition information to the Crown. He may disclose assets that the Crown did not know about. The court readily understands the Crown's reluctance to provide access to some of the known property before the disclosure affidavit is filed but nonetheless, good practice does suggest that provision be made for reasonable living and reasonable legal expenses in the initial restraint application.

[45] In all this a practical question remains: how does the court know what are reasonable living and reasonable legal expenses in order to make provision for these expenses in the order? The answer seems to be that, at the earliest stage when the first restraint is sought, usually ex parte, the applicant for the restraint order may properly use data from relevant government agencies which measure the cost of living. These agencies usually have information on the amount of money it costs to feed and clothe families of various sizes. In respect of legal expenses, the applicant ought to give some indication of fees at the time of the application or use

the legal aid fees for criminal matters to come up with a figure. There is no legal aid for civil matters.

Should the restraint order be varied in this case?

[46] As this court understands the instant case, no provision was ever made for Miss Clarke to have reasonable living expenses or legal expenses. This is her first application for these expenses. This context is important because it serves to distinguish the facts here from some of the English cases where provision was already made in the initial order and the defendant is seeking a further sum for increased living expenses or legal expenses. Also in England, unlike Jamaica, there was, at the time some of the cases referred to above were decided, the possibility of public funding for this kind of litigation.

[47] Mr Darien stated in his affidavit that he believed that the defendant may have control or possession of property from her unlawful conduct because his investigations have accounted for just JA$23,227,652.75 out of the JA$41,961,677.05 allegedly defrauded from Mrs Tamanaha. The court observes that the conclusion does not necessarily flow out of the premise since the person may simply have squandered the money and in fact does not have any left.

[48] In further support of the view that Miss Clarke has undeclared property, Mr Darien stated that Miss Clarke was born in 1960 and in 2001 gave her occupation as a casual worker when she applied for a Tax Payer Registration Number. He also stated that checks with the Ministry of Labour and Social Security which manages National Insurance contributions show that Miss Clarke contributed for only twenty eight weeks in 1985 and thirty nine weeks in 2002. The contributions are based on a percentage of earnings but the affidavit did not reveal that any attempt was made to work backward in order to calculate the likely total earnings from which the contributions came.

[49] The court has examined all the affidavits relied on in this application by ARA and Miss Clarke. In the affidavit of March 23, 2012, Miss Clarke speaks to working nineteen years in the USA and funding her lifestyle from that income as well as goods she imported into Jamaica and sold. The court notes that there is not the accompanying documentation that one would expect to see in support of these assertions especially from a person who alleged that she worked in and paid taxes in the USA.

[50] In addition to what has been said about Miss Clarke's affidavits filed in this application, it must be noted that she spoke about lodging money to various accounts in various financial institutions. She did not disclose which financial institutions these were. She spoke only about her accounts with the National Commercial Bank. Miss Clarke did not produce any documentation in support of her assertion that she lodged money at various financial institutions. It is true that ARA unearthed a number of accounts in a number of institutions but Miss Clarke's affidavit in support of her application for variation did not speak to the other financial institutions with any degree of specificity. There was nothing in her affidavit to indicate whether the institutions identified by ARA were same ones she had in mind.

[51] The court notes that Miss Clarke stated (in the affidavit dated June 14, 2012) that her grandson was in grade 2 at a private school. The restraint order has been in place since 2008. If her grandson was in grade two and assuming normal progression (and this is the assumption the court makes), it would mean he began school in the year 2010 which would mean he would have been in grade one for the academic year 2010 – 2011, and then grade two for the academic year 2011 – 2012. He would have begun going to school approximately two years after the restraint order was in place. According to Miss Clarke she now owes a total of JA$218,700.00 to the school (accumulated at the rate of approximately JA$32,500.00/term and add a further sum for extra lessons). Miss Clarke also said that she has been relying on the generosity of friends and family. If this is so, why would a rational person send the child to a private school two years after it is claimed that he or she has no

access to money to pay the fees? What would cause a rational person to think that he or she could engage the services of a school without money to pay?

[52] Miss Clarke also stated that she engaged the services of a taxi operator at the rate of JA$2,000.00/week and as at June 2012 she owed JA$56,000.00. This would be fares for twenty eight weeks. Again why would a rational person who has no access to money incur these expenses?

[53] It was Hutchison J in **Re D** who stated that some belt tightening may be necessary when one is the subject of a restraint order. It is one thing to ask for a variation to meet expenses that arose before and continued after the restraint but quite another to undertake additional expenses when alleging that one does not have the means to meet either pre-restraint or newly incurred expenses. There was no explanation for sending the grandson to a private school when there were state schools in the parish of St James which he could have attended.

[54] While it is true that restraint order does not give the Crown any legal or equitable interest in the property and while it is equally true that the fact that the property is restrained does not bar a defendant from seeking to use the property to meet reasonable legal and reasonable living expenses, surely an explanation from the defendant of how she intended to pay for private education of her grandson two years after the property is restrained would not be asking too much in this context. If she is acting rationally, and there is no reason to believe that she is not, is it not rational to conclude that she must have had some means of meeting these new expenses? Most rational persons when faced with down turn in income or where denied access to money would be reducing expenditure but in this case Miss Clarke has done the opposite and in the absence of some reasonable and rational explanation, it was perhaps not unreasonable for Mr Darien to have concluded that she has possession of or access to undisclosed property. As Sir Anthony Clarke observed in **Serious Fraud Office** at paragraph 43:

> *The question for the judge was whether X discharged the burden of proof or, as I would prefer to put it, the burden of persuasion. That depends upon an analysis of the facts. As I see it, on an application to vary a restraint order in a case of this kind, where the order relates to all the defendant's assets, the position in principle is that it is for the defendants to satisfy the court that it would be just to permit him to use funds which are identified as being caught by the order. If the court concludes that there is every prospect of the defendant being able to call on assets which are not specifically identified in the order, or assets which others will provide for him, I do not think that the court is bound to vary the order in the terms sought.*

[55] As can be seen from this passage, if there is something to suggest that the applicant for the variation may be able to rely on assets not specifically named in the order or on assets provided by others then the court is not bound to vary the order. To put it another way, the court should tread very carefully lest the purpose of the restraint order is undermined. The court will confess that initially the decision was in favour of granting the variation but on closer examination of the affidavit evidence, more questions were raised than answers provided and so the court has formed the view that it would not be just to vary the restraint order.

[56] The court has taken into account that this is her first application. The court has also takes into account that in the normal course of things the initial restraint should have made provision for her reasonable living and reasonable legal expenses. Overall, Miss Clarke’s financial conduct since the restraint is more consistent with access to undisclosed assets than lack of access to such assets. The most reasonable explanation for her sending her grandson to a private school at time when she alleges that she did not have access to money is that she had some means of paying for his education or believed that she had some means of meeting this

expense. There is an untold story of what passed between Miss Clarke and the private school principal which would have caused the school to admit the child. It is extremely unlikely that the school would have admitted the child if it was known that the guardian had no means of paying the child's tuition fee.

Disposition

[57] The application to vary the restraint order is dismissed with costs to ARA to be agreed or taxed.