[2015] JMSC Civ. 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV04760

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**UPERT SMITH**	**FIRST RESPONDENT**
AND	**GWENDOLYN SMITH**	**SECOND RESPONENT**
AND	**REBECCA MILLS SMITH**	**THIRD RESPONDENT**
AND	**ROJAY McKAY**	**FOURTH RESPONDENT**
AND	**RODERICK McKAY**	**FIFTH RESPONDENT**

IN CHAMBERS

Charmaine Newsome and Susan Watson Bonner for the applicant

Hadrian Christie instructed by Patterson Mair Hamilton for the second and third respondent

Michael Lorne for fourth and fifth respondents

August 5 and 13, 2015

PROCEEDS OF CRIMES ACT – SECTION 32 – RESTRAINT ORDER – NON-DISCLOSURE – WHETHER RESTRAINT ORDER SHOULD BE DISCHARGED

SYKES J

[1] Mr Hadrian Christie and Mr Michael Lorne are seeking the discharge of a restraint order granted without-notice on the ground of material non-disclosure. Mr Christie made the primary submissions which Mr Lorne adopted. The court agreed with the submissions and discharged the restraint order. These are the reasons.

The dangers of without-notice (ex parte) applications

[2] Without-notice applications are fraught with danger. It has very strict rules which the courts must enforce. An ex parte order is made without hearing from the affected party. While it may be true that the affected party should not believe that the ex parte order will be discharged for trivial breaches of the full and frank disclosure principle what the affected party should be sure of is that if there is really material non-disclosure the courts will act. This approach is not just for the benefit of the affected party but also for the courts. It protects the courts' powers from misuse and abuse and reminds ex parte applicants of the high duty of candour placed on them. The principle does not depend on whether the applicant is deliberately deceiving the court. Innocent non-disclosure invokes the principle. If there is evidence of deliberate deception, it makes the case for discharge irresistible.

[3] The most recent statement of principle on this from the Court of Appeal of Jamaica is the judgment of Morrison JA in **Venus Investments Ltd v Wayne Ann Holdings Ltd** [2015] JMCA App 24 at paragraph 25:

> *There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the*

applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty extends not only to material facts known to the applicant, but also any additional facts which he would have known had he made proper enquiries. Material facts are those which it is material for the judge hearing the without notice application to know and the issue of materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure.

[4] The ex parte applicant is not only under a duty to state all the material facts known to him but he must make all reasonable enquiries that may be relevant to the application before the application is actually made to the judge so that he has all necessary information to assist the judge who is called upon to exercise the discretion to grant a without-notice order. In **Brink's Mat Ltd v Elcombe** Ralph Gibson LJ held at pages 1356 - 1357:

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the

case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92-93.

If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners'; case [1917] 1 K.B. 486, 509.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners'; case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not

known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. (emphasis added)

[5] As can be seen from this passage, the court must be alive to all the circumstances of the case. It may be that counsel received instructions very late not only in terms of time of day but in relation to the harm that the applicant is trying to forestall. The court fully appreciates that counsel, in these circumstances, may not have full information. In some instances the urgency may be so great that counsel attends court without properly drafted affidavits or any affidavits at all. However, as will be seen the degree of urgency that may lead a court to take a benign view of the non-disclosure does not arise on the facts of this case. The applicant had at least three months between the receipt of the relevant information and the application. The application is an extremely intrusive and disruptive one which ought to have heightened the awareness of the applicant of the need for making enquiries before the application so that all information was to hand.

[6] The duty of non-disclosure has been re-emphasised generally and in particular in the case of restraint orders. This court fully agrees with Hughes LJ dictum at paragraph 191 in **In re Standford International Bank Ltd** [2011] Ch 33:

> *191 Whilst I respectfully agree with the view expressed by Slade LJ in Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge.* ***That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a***

> ***third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.*** *This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example.* (emphasis added)

[7] When his Lordship was elevated to the Supreme Court of England and Wales, the opportunity to restate his position arose in **Re Assets Recovery Agency** (2015) 85 WIR 440 - an appeal from the Court of Appeal of Jamaica. Lord Hughes held at paragraph 21:

> ***All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant****. That is especially so when, as here, the financial institutions may well have little interest beyond ensuring that anything they are required to do is covered by the order of the court, whilst the persons whose affairs are under investigation may not find out about the order until long after the event.* ***The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought.*** (emphasis added)

[8] These are not the only passages that speak directly to ex parte applications for restraint orders. There are others. There is now specific guidance regarding

restraint orders that it would do well for the without-notice applicants for restraint orders to heed. In the Court of Appeal of England and Wales Hooper LJ **In re Windsor** [2011] 2 Cr App R 7 and paragraph 59:

> *59 Given that applications of this kind are made ex parte and given the draconian consequences of restraint orders and receivership orders, it is vitally important, in the interests of the absent alleged offenders, that the hearing is as fair as is possible in the circumstances. Giving those affected an early opportunity to apply to set aside or vary the restraint orders and receivership orders (whilst important) is not a substitute for a fair ex parte hearing.*

[9] In **Barnes v Eastenders Cash & Carry** [2015] AC 1 Lord Toulson took the matter further and laid down guidelines for the thought processes of those who wish to apply for without-notice restraint orders. His Lordship held at paragraph 122:

> *122* ***Before making an application order for a restraint order*** *...* ***the prosecutor must consider carefully the statutory conditions for making such order****. There must be reasonable cause to believe that the prospective defendant has benefited from criminal conduct (section 40(2)(b)) and there must be a good arguable case that the assets which it is sought to restrain must be realisable property held by him. Both conditions require careful thought about who is alleged to have been party to the criminal conduct under investigation. Careful thought must also be given to the potential adverse effect on others who are not alleged to be party to the criminal conduct and possible*

means of avoiding or limiting it. (emphasis added)

[10] So seriously have the courts taken this question of material non-disclosure that the very strict general rule is that any advantage gained by the ex parte applicant should be immediately set aside without any consideration of the merits of the case. Scrutton LJ held in **R v Kensington Commissioners** [1917] 1 KB 486, 513 - 515:

> ***Now that rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it*** *- the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.* ***This rule applies in various classes of procedure. One of the commonest cases is an ex parte injunction obtained either in the Chancery or the King's Bench Division.*** *I find in 1849 Wigram V.-C. in the case of Castelli v. Cook 21 stating the rule in this way: "A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any*

material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go." The same thing is said in the case to which the Master of the Rolls has referred of Dalglish v. Jarvie. 22 A similar point arises in applications made ex parte to serve writs out of the jurisdiction, and I find in the case of Republic of Peru v. Dreyfus Brothers & Co. 23 Kay J. stating the law in this way: "I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made." A similar statement in a similar class of case is made by Farwell L.J. in the case of The Hagen24 : "Inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application." (emphasis added)

[11] As can be seen the rule applies to all ex parte applications and it is a rule of long standing. It is also rigourously policed and breaches of the full and frank disclosure are taken extremely seriously. The additional citations from judges in the just quoted massage makes this point.

[12] So the law is very clear on the duty of the ex parte applicant.

The allegations

[13] In this case the allegation was that Mr Upert Smith and Mr Roderick McKay were arrested and charged in August 2014 with possession with intent to distribute marijuana and conspiracy to possess with intent to distribute marijuana in the United States of America. Mr Smith was also charged with making false declarations on an application for a United States passport and for making false claims of citizenship of the United States. This information was received from law enforcement authorities in the United States of America in September 2014.

[14] The court pauses to make an observation. If it was indeed the case that the information was first received in September 2014 and all that was said was that the two gentlemen were arrested then that information received from the United States law enforcement agency was extremely misleading because, as will be shown, the criminal charges were terminated in August of 2014 which would mean that at the time the information was told to the Jamaican law enforcement authorities the two gentlemen were no longer under a criminal charge. In effect, the law enforcement agency of the United States provided incomplete information to the Agency.

[15] The affidavit containing this information was sworn to on October 6, 2014. There was a second affidavit sworn in December 2014 adding more information. The application was heard in January 2015 and a restraint order granted. The time between the receipt of the information and the application should be noted. Clearly, the application was not made shortly after the information was made which would suggest that the Agency had sufficient time to double check the information and to check on its continued accuracy at the time the presentation was being made to the ex parte judge. The application was for the draconian restraint order. There can hardly be any reasonable excuse for not checking on the status of the alleged defendants in the case in the United States of America. The net effect was that when the application was being presented to ex parte judge in January 2015 the Agency did not inform him that the two gentlemen

were not longer charged with any criminal offences that could activate the provisions of POCA having regard to the conviction-based case theory that the Agency was pursuing.

[16] The Agency says it did not have this information in hand at the time the application was made in January 2015. This may well be true and the court is not saying that there was a deliberate attempt to deceive the restraint judge but surely this information, by any measure, must be considered material to the exercise of the discretion whether to grant as draconian an order as a restraint order. It went to the very foundation of the application. Once the gentlemen were no longer charged then a very serious issue arose as to whether there was any reasonable cause to believe that any predicate crime had been committed which is necessary for there to be even a whiff of money laundering to say nothing of whether someone benefited from the antecedent crime. This is so because the very proof of money laundering involves proving that a criminal offence has been committed and property from that crime (now called criminal property) has been generated and some person is doing some proscribed act to the property and at the time he or she is doing the act he or she has the requisite intention. The equation is simple: no predicate crime means no money laundering; predicate crime means money laundering may have been committed. Had the dismissal of the charges been told to the judge there is no question that the judge would have asked for further information.

[17] It is appropriate at this point to make an observation. The statute requires that there be 'criminal conduct' which is defined as conduct that has occurred either in Jamaica or outside of Jamaica and that conduct must amount to a crime under Jamaican law. What has been happening in some of these applications is that the local authorities rely on the label or charges laid against the person in the overseas country and do not describe the actual conduct of the defendant. This, as has happened here, can cause problems. In this case, the Jamaica authorities relied on the arrest and charge by the law enforcement agencies in the United

States of America. There was no description of the actual conduct engaged in by the two gentlemen. Had this been done it may be that the restraint order would be sustainable even if full and frank disclosure had been made because the statute does not require the person to be charged overseas or even in Jamaica for the predicate crime for there to be money laundering. What is required is evidence of conduct, even if committed overseas, which would be a crime under Jamaican law. The overseas law enforcement agency may have had the charges dismissed for a variety of reasons. It may be that a deal was struck or a crucial witness has gone missing or on further investigation no crime was committed.

[18] For some reason, the case fell by the wayside. The charges were dismissed. It is not clear why they were dismissed but the point is that to date the documents before the court have not disclosed what Mr Upert Smith and Mr Roderick McKay actually did. It may well have been that what was alleged did not amount to crime in the United States but that does not necessarily mean that what was done was not a crime in Jamaica. Thus the fact that a case was not proceeded with in a foreign country is not necessarily the end of the road of money laundering investigation in Jamaica. This is why perhaps it is more prudent to say what the person did so that the Jamaican court has not just a label or a name of the offence charge or contemplated in the foreign state but also a narrative of the allegations so that the judge in Jamaica can decide, based on the actual allegations, whether what was done amounts to an offence under Jamaican law.

[19] In addition to what has already been said, Mr Hadrian Christie identified other areas of non-disclosure. The second one was that the Agency failed to disclose that Miss Gwendolyn Smith had disclosed to the police that the money she had at her house was used to be used to repay a loan made to her for her medical bills and defray expenses related to her business. Instead, the picture presented to the court was that Miss Smith had no legitimate source of income despite the fact that the police knew that she operated an internet café. This court finds that this was indeed another material non-disclosure. Even if the police thought that

the income generated from the business was insufficient to cover her expenses, it ought to have been told to the judge so that its weight and value could be assessed. Full disclosure must be given. All facts, favourable and unfavourable to the applicant, must be laid before the court.

[20] It is not just a matter of bringing the naked facts to the attention of the court. The implication and significance of the fact must be brought home to the judge.

[21] Miss Gwendolyn Smith has brought to the attention of this court via affidavit evidence that the police officer in this case filed an affidavit in proceedings before the Resident Magistrate's Court for the parish of St Catherine which has this paragraph (para 6):

> *I am of the view that the … account from which cash was withdrawn represents recoverable property. Hence assistance was sought from the USA authorities, which indicated that Upert Smith has a criminal history dated as far back from 1998 and he is currently serving time in prison in the USA after he was arrested towards the end of last year for drugs and other offences.*

[22] This affidavit was sworn in May 2015. Clearly, in light of what is now known, this paragraph is inaccurate. The court makes no further observation except that this now-acknowledged erroneous information should be brought to the attention of the learned Resident Magistrate, at the earliest opportunity, in the appropriate manner, so that he or she can reconsider the detention of the cash in light of the new information.

[23] The starting point for seeking a restraint order where it is being alleged that some crime has been committed is that there must be reasonable cause to believe that (a) the defendant has committed an offence; (b) he benefited from

the offence and (c) the property would be dissipated unless the restraint order is granted.

[24] The court finds it necessary to remind the Agency of how the statute is structured. It places the burden of proof on the state to establish that the property to be taken was either criminal property or can be used to meet any benefit assessed. The statute bars the following illegitimate form of reasoning which seems to have coloured the view of the Agency in this and other applications with which this court has had to adjudicate upon. The illegitimate reasoning goes like this: A has no legitimate income so far as the Agency can determine; A has property; since A has no legitimate income to acquire the property therefore A must have acquired it through crime. The next step in the illegimate reasoning is this: the property can be restrained for ultimate taking and if A does not want this to happen then A must prove that he acquired it legitimately. The deep and profound flaw in this reasoning is that nowhere is the Agency even required to establish at the lowest level of legal proof (balance of probabilities) that A committed a criminal offence or he benefited from the commission of a criminal offence.

[25] The absence of income per se does not prove that the property is the benefit from criminal activity or was derived directly or indirectly from criminal activity. There may be many explanations but the legal starting point is that the state must make the case. It must provide the evidence for concluding that the property can be used to satisfy a benefit order or a civil recovery order. It is this insistence that provides protection against oppressive conduct from the Agency.

[26] It would be helpful if the Agency were to have in mind the rightly famous judgment of Sullivan J in **The Director of Assets Recovery Agency v Green** [2005] EWHC 3168 where his Lordship had to consider this submission in the context of civil forfeiture at paragraph 1:

The Director submits that the answer to both limbs of the question posed in the preliminary issue is in the affirmative. She does not have to identify or prove any specific acts of unlawful conduct, and may simply invite the court to infer that the property in question was obtained through some unidentified unlawful conduct in the absence of a satisfactory explanation from the respondent as to how the property was obtained.

[27] Sullivan J did not accept this proposition. What is remarkable about the Agency's position is that the very reasoning in its written submissions seek to advance was considered and rejected by the Supreme Court of Jamaica (**ARA v Fogo** [2014] JMSC Civ 10). The statute is only concerned with property alleged to be the benefit of criminal activity and property alleged to be derived directly or indirectly from criminal activity. In the case of the former, property that may be restrained includes property obtained lawfully. The reason is that the benefit is as a value-based, that is, the court seeks to find out what is the value (in dollars and cents) of the benefit the defendant obtained from his criminal conduct. Once that value is determined it can be collected by enforcement against any realisable property, that is, property available to pay the value assessed. This requires a conviction. In the latter case, what is sought is a civil recovery order which does not require a conviction but undoubtedly requires that there be criminal conduct from which the property (called criminal property) comes. A civil recovery order is not a value-based recovery. It is the recovery of the actual property derived, directly or indirectly, from the criminal conduct.

[28] As Sullivan J pointed out the fact that the Director did not have to specify what type of criminal offence was in view did not mean that the Director had no obligation '**to describe the conduct which is alleged to have occurred in such terms as will enable the court to reach a conclusion as to whether**

that conduct so described is properly described as unlawful conduct' (para 17) (emphasis added).

[29] Sullivan J posed this question at paragraph 16, 'how does one know if the conduct which is said to have occurred in the United Kingdom (or abroad) was unlawful under United Kingdom criminal law (or the criminal law of both the foreign country and the United Kingdom) unless one is given some information as to what the conduct is said to have been?' Clearly absence of legitimate income without more is not proof that the conduct being relied on to establish that the conduct was unlawful under Jamaican criminal law for the simple reason that there is no offence known as 'having property without legitimate income.' What the Agency is seeking to do is to establish a reverse burden without legislative backing. This must be firmly rejected. This court decisively rejects this approach to the statute.

[30] Sullivan J continued at paragraph 25 in clear refutation of the Director's submission:

> *Part 5 proceedings are not concerned with any property, however obtained. They are concerned only with property which has been obtained through conduct which is unlawful under the criminal law. It would be surprising if a claimant in civil proceedings, who had to allege criminal conduct as a necessary part of his claim in rem, was not required to give the respondent and the court at least some particulars of what that conduct was said to be.*

[31] If this is so in relation to civil recovery then clearly having regard to the scheme of the statute it could not be otherwise if the conviction-based approach is being taken which is what the Agency's case is about.

[32] Returning now to the issue of non-disclosure. The two non-disclosures mean that the very foundation of the restraint has been greatly eroded. It appears that the dismissal of the charges only came to the Agency's attention when Miss Gwendolyn Smith filed an affidavit in response which means that the Agency did not make any further enquiries after the initial information was given or if it did, then no answer came forth indicating what the true position was.

[33] Ralph Gibson LJ has stated that the applicant must make proper inquiries before the application. The duty of disclosure embraces any additional matter that would have been known had the inquiries been made. The court must say that it is somewhat remarkable that in the three months between the receipt of the information and the application no inquiries were made of the source of the information about the case of the two gentlemen.

[34] The proposition of the Agency is that Messieurs Smith and McKay committed the crimes and the other respondents were either innocent agents or part of the money laundering operation. It was not being said that they committed the predicate drug crime. Once the information is that the drug charges forming the foundation of the restraint were dismissed then the basis for the order is significantly undermined.

[35] The Agency sought to say that the conviction of Mr Smith for the false statements about the passport and citizenship may be considered to sustain the order. The problem with this submission is that the Agency's case is not that Mr Smith was doing this in large way of business. He did this in relation to himself alone and there was no evidence pointing to any benefit he derived from these offences.

[36] The Agency then referred to offences committed before 2007. This will not do either since the legislation states that conduct before May 30, 2007 is excluded from the operation of the Proceeds of Crime Act when one is going the route of a conviction-based approach. There is a bit of refinement that can be made to this

statement if one considers civil recovery but it is sufficiently accurate for the purpose of this case.

[37] The restraint order then is discharged on two grounds. First, the very, very material non-disclosures which have been pointed out above. Second, the erosion of the basis of the restraint.

[38] The Agency has an application for the restraint order to extend to other property but in light of the court's ruling on the discharge application this application was withdrawn.

[39] The court is aware that there are decisions that suggest that non-disclosure in the context of a public body enforcing a statute should not be visited with the same consequences as that which is imposed between party and party. In the view of this court, the non-disclosures are too fundamental to apply that principle. By the same token the Court does not consider it appropriate to re-impose the restraint order even if that were possible. The Agency must not be left with the impression that this or any other court will treat material non-disclosure less seriously because it occurred in a law enforcement context. To take any other position may have the unintended consequence of encouraging the belief that non-disclosure by the Agency is treated benignly.

Disposition

[40] The restraint order discharged in its entirety. Costs of this application to Miss Gwendolyn Smith, Miss Rebecca Mills Smith, Mr Rojay McKay and Mr Roderick McKay.

[41] In respect of the withdrawn application, costs of preparing for the application and attendance at chambers for one day to Miss Gwendolyn Smith, Miss Rebecca Mills Smith, Mr Rojay McKay, Mr Roderick McKay, Mr Demoy McKay, Mr Rushane McKay and Miss Evadne Gordon. Although some of these other names do not appear in the title of this claim, these persons had to seek counsel

to represent them because they had notice of the intention of the Agency to apply for an extension of the restraint order to apply to property in which they had an interest. For this reason they were awarded costs.

[42] Costs in both instances to be agreed or taxed.