



[2020] JMSC Crim 7

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CRIMINAL DIVISION**

**CLAIM NO. CACT2020CR00109**

<b>BETWEEN</b>	<b>ASSETS RECOVERY AGENCY</b>	<b>APPLICANT</b>
<b>AND</b>	<b>OMBRETHA DUFFUS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ALANDO HOWELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN OPEN COURT**

**Mrs Ann Monique Bailey Hutchinson for Assets Recovery Agency.**

**Ms Tamara Lovelace for the Defendants.**

**Heard 15<sup>th</sup> July, 27<sup>th</sup> July, 29<sup>th</sup> July and 23<sup>rd</sup> October 2020.**

**Proceeds of Crime-Application for Pecuniary penalty order- Proceeds of Crime Act Sections 2,5,6,7 and 8- Standard of proof - Burden of proof**

**SHELLY WILLIAMS J**

### **Background**

[1] On the 1<sup>st</sup> day of May 2018, the Assets Recovery Agency filed an Amended application for Forfeiture/ Pecuniary penalty order against the two named defendants. This application arose out of the conviction of the two defendants on the 5<sup>th</sup> of February 2018. The first defendant Ms Ombretha Duffus pleaded guilty to the offences of :-

- a) caused to be used an access devise to transfer money,

- b) using an access device to transfer money and
- c) knowingly possessing identity information

contrary to the Law Reform (Fraudulent Transactions) (Special Provisions) Act in the Clarendon Circuit Court.

**[2]** The second defendant Mr Alando Howell pleaded guilty to the offences of :-

- a. unauthorized access contrary to the Cybercrimes Act,
- b. using device to transfer money and
- c. obtaining money by means of False Pretences

contrary to the Law Reform (Fraudulent Transactions) (Special Provisions) Act.

**[3]** The applicant filed an application on the 22<sup>nd</sup> of March 2018 for a Forfeiture and/or a pecuniary penalty order. This application was amended on the 1<sup>st</sup> of May 2018 where the applicant is now only seeking a pecuniary penalty order.

**[4]** In support of their application the Asset Recovery Agency filed four statement of information, the first filed on the 30<sup>th</sup> of November 2018, a supplemental filed on the 1<sup>st</sup> of May 2019, a second supplemental filed on the 25<sup>th</sup> of July 2019 and the third supplemental statement of information filed on the 23<sup>rd</sup> of February 2020.

**[5]** The first defendant filed her first response to the statement of information on the 21<sup>st</sup> of March 2019. Attached to the first affidavit were a number of letters from:-

- a. Martin Myles.
- b. Rene Smith David.
- c. Ronald Evan.
- d. Simone Edwards

e. Carmen Reid and

f. Hasbourne Ferguson

[6] The contents of these letters sought to show the reasons the remittances were sent. The reasons included the payment of taxes, housing taxes, loans, renovation for houses, birthday presents, unofficial saving scheme (partner), purchase of clothing and the maintenance of the first defendant's grandmother. Attached to the affidavit of the first defendant dated the 21<sup>st</sup> of March 2019 were a number of receipts including payments to National Housing Trust (NHT) in the sum of \$7,979.00, one Jamaica Public Service receipt in the sum of \$1,000.00, the payment of school fees to one institution in the sum of \$17,000, one property tax receipt covering on number of years in the sum of \$15,000.00 and receipts for vendor's arcade in the sum of \$26,500.00.

[7] In further defence of this application, the first defendant filed a second affidavit on the 16<sup>th</sup> of September 2019, the second defendant filed his response on the 29<sup>th</sup> of January 2019, and three affidavits filed on behalf of the defendants. The additional affidavits were filed by : -

a. Mr Martin Marshall Myles.

b. Ms Claudine Brown.

c. Ms Rene Smith David.

### **The Application**

[8] The application is for a pecuniary penalty order for the sum of: -

a. \$2,424,449.79 from the first defendant and

b. \$552,022.82 from the second defendant.

[9] This sum for the first defendant is broken down into: -

1. \$309,911.87 which is the value of the fraud.
2. \$1,266,990.63 which is unexplained cash deposits.
3. \$770,776.41 which is unexplained remittances
4. \$76,761.88 which is unexplained cash payments to COK Sodality Co-operative Credit Union Ltd. (COK) in relation to a loan.

[10] The sum for the second defendant is broken down into: -

1. \$372,544.79 which is the value of the fraud.
2. \$101,762.07 which is unexplained cash deposits.
3. \$77,716.06 which is unexplained remittances received.

[11] The two defendants have argued that these sums should not be the subject of a pecuniary penalty order.

[12] Before the court can proceed to make the order requested, the applicant has to establish not only that they are in a position to make the application, but also that the defendants fall under the category of persons for which such an order can be made.

## The Law

[13] The application for pecuniary penalty is made under the Proceeds of Crime Act (POCA). The starting point in relation this application is to ascertain whether or not the applicant falls under the category of persons who can make the application. Section 2 of POCA states that:-

*– (1) In this Act – “Agency” means the Assets Recovery Agency referred to in section 3;*

*“authorized financial investigator” means-*

- a) *A member of the Constabulary Force so designated by the Commissioner of Police;*
- b) *An officer of the Agency; or*

c) *Any other person so designated by the Minister;*

[14] The application was filed by the Assets Recovery Agency and as such the court is satisfied that they can properly pursue the current application.

[15] The court would then be directed by Section 5 of POCA as to how to proceed with such applications. Section 5 (1) states that: -

*“5(1) Subject to subsection (9), the Court shall, upon the application of the Agency or the Director of Public Prosecutions, act in accordance with subsection (2) if the Court is satisfied that a defendant is-*

- a) convicted of any offence in proceedings before the Court; or*
- b) committed to the Court pursuant to section 52 (committal from Resident Magistrate’s Court with a view to making forfeiture order or pecuniary penalty order).”*

[16] The applicant would then have to establish whether the offences for which the defendants were charged fall under POCA. The defendants were charged with offences under the Law Reform (Fraudulent Transactions) (Special Provisions) Act, the Cybercrimes Act and the Larceny Act.

[17] The Second Schedule of POCA lists a number of offences that would cause the defendants to be the subject of an order. In particular Sections 11 and 14 of the second schedule clearly places the defendants under the category of persons for which such an order can be made. Sections 11 and 14 speak to : -

*11. An offence under Part II of the Cybercrimes Act.*

*14. An offence under the provisions of the Law Reform (Fraudulent Transactions) (Special Provisions) Act.*

[18] The court has to first determine if the defendants have a criminal lifestyle. Section 5 (2) of POCA states that: -

*“5(2) The Court shall:*

- (a) *determine whether or not the defendant has a criminal lifestyle and has benefitted from his general criminal conduct;*
- (b) *if the Court determines that the defendant does not have a criminal lifestyle, determine whether or not the defendant has benefitted from his particular criminal conduct; and*
- (c) *Identity any property used in or in connection with the offence concerned and make an order that that property be forfeited to the Crown."*

**[19]** Criminal lifestyle is defined by POCA in Section 6 which states that :-

- "6. (1) *A defendant shall be regarded as having a criminal lifestyle If the offence concerned-*
- (a) *is specified in the Second Schedule;*
  - (b) *constitutes conduct forming part of a course of criminal activity, from which the defendant obtains a benefit; or*
  - (c) *is committed over a period of at least one month and the defendant has benefitted from the conduct which constitutes the offence. "*

**[20]** Whilst criminal conduct is defined in Section 2 of POCA as: -

*"criminal conduct" means conduct occurring on or after the 30<sup>th</sup> May. 2007, being conduct which-*

- a) Constitutes an offence in Jamaica;*
- b) Occurs outside of Jamaica and would constitute such an offence of the conduct occurred in Jamaica;*

**[21]** In light of the conviction of the defendants in relation to the abovementioned offences under the Second Schedule of POCA they can be defined as having a criminal lifestyle.

**[22]** Once the court is satisfied that the defendants had either engaged in criminal conduct or have criminal lifestyles then the court can then proceed to make certain assumptions in relation to them. These assumptions are detailed in the section 8 of POCA. Section 8 which states that: -

- (1) *Subject to subsection (3), where the Court determines under section 5 that a defendant has a criminal lifestyle, the Court shall make the assumptions listed in subsection (2) for the purpose of-*
  - a *determining whether the defendant has benefited from his general criminal conduct; and*
  - b *identifying his benefit from that conduct.*
- (2) *The assumptions referred to in subsection (1) are that-*
  - (a) *any property transferred to the defendant at any time after the relevant day was obtained by him-*
    - i. *as a result of his general criminal conduct; and*
    - ii. *at the earliest time from which the defendant appears to have held it;*
  - (b) *any property held by the defendant at any time after the date of conviction was obtained by him-*
    - i. *as a result of his general criminal conduct; and*
    - ii. *at the earliest time from which the defendant appears to have held it;*
  - (c) *any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct; and*

(d) *for the purpose of valuing any property obtained, or assumed to have been obtained, by the defendant, he obtained the property free of any other interests in it.”*

[23] There are of course limits that have been placed on these assumptions as detailed in Section 8 (3) of POCA which states; \_

(3) *The Court shall not make an assumption under subsection (2) in relation to a particular property or expenditure if –*

a) *the assumption is shown to be incorrect; or*  
b) *there would be a serious risk of injustice if the assumption were made.*

(4) *Where the Court does not make one or more of the assumption set out in subsection (2), the Court shall state its reasons.*

[24] Once the applicant has satisfied the court that the defendants are properly before the court, having the criminal lifestyle, and has attained a benefit then the court is entitled to make the assumptions detailed in Section 8 of POCA.

[25] The burden then shifts to the defendants, who then have the evidential burden to rebut these assumptions on a balance of probability. The method by which these assumptions may be rebutted have been opined upon in a number of cases. These include the English Court of Appeal decision of **R v Wilkes** [2003] EWCA Crim 848 where Gross J stated at paragraph 26 that: -

*“The purpose of the assumptions that the offender's source of income is the proceeds of crime is to shift the burden to the appellant to show (on balance) that it was not from criminal conduct. The Prosecutor does not have to point to a single criminal offence during the relevant period where the appellant has acquired or secured property; the trigger to enable the court to make the assumption is whether the offences are qualifying offences within the statutory definition . . .*

*There is no requirement that any item of income should be referable to any particular piece of criminality, to require such an*

*exercise would defeat the purpose of the statutory assumption in section 72AA(4)(b). The safeguard for the appellant is that the assumption can be displaced by him on a balance of probabilities by showing that his expenditure was supported by income from legitimate sources.”*

[26] In the case of **Mahmood v R** [2013] EWCA Crim 325 **Cranston J** at paragraph 14 stated that: -

*“He had produced nothing in the way of hard facts or documentation to support any legitimate earnings and no witnesses.”*

[27] This was also opined on in the case of **The Assets Recovery Agency v Ralph Gregg** [2018] JMCS Crim 1at paragraph 74 where V Harris J stated; - (**single line spacing**)

*Mr. Gregg, I observe, bears the evidential burden of proof on a balance of probabilities to show that that each property he obtained or expenditure that he made, after the relevant day or at any time after the date of his conviction, came from legitimate sources. If this is accomplished the court is to refrain from making the section 8(2) assumptions as it would be incorrect to do so. Similarly, where there would be a serious risk of injustice, if the assumptions are made, the court shall not do so. I note, however, that the phrase “serious risk of injustice” does not include circumstances where a defendant has been adjudged to have benefitted from his general criminal conduct (or from the particular offence for which he was convicted) but has no assets.*

[28] The order being sought is subject to Section 7 of POCA, which states that: -

- (1) *“A person benefits from conduct if he obtains a benefit as a result of or in connection with the conduct.*
- (2) *For the purpose of making a pecuniary penalty order, a person who obtains a non-pecuniary advantage as a result of or in connection with conduct shall be deemed to have obtained as a result of or in connection with the conduct, a sum of money equal to the value of the non-pecuniary advantage.*

- (3) *References to property or a non-pecuniary advantage obtained in connection with conduct, include references to property or a nonpecuniary advantage obtained both in that and some other connection.*
- (4) *If a person benefits from conduct, his benefit is-*
  - (a) *for the purposes of making a forfeiture order, the property obtained as a result of or in connection with the conduct;*
  - (b) *for the purposes of making a pecuniary penalty order, the value of the benefit obtained as a result of or connection with the conduct.”*

**[29]** A pecuniary penalty order speaks more to benefits that the defendants would have gained as opposed to the forfeiture order which speaks to property obtained as a result of the conduct.

**[30]** In granting any order the court has to ascertain the time period that is, the starting point at which any such order may be made. Section 8 (5) of POCA defines what is referred to as the relevant date. Section 8 (5) of POCA states that: -

*“2. the "relevant day" is defined in section 8(5) as follows:*

*“(5) For the purposes of this section-*

- (a) where no previous forfeiture order or pecuniary penalty order has been made against the defendant in relation to benefit from general criminal conduct, the relevant day" is the first day of the period often years ending with —*
  - (i) the day when proceedings for the offence concerned were started against the defendant; or*
  - (ii) if there are two or more offences and proceedings for them were started on different days, the earliest of those days;”*

**[31]** POCA places a date as to when any orders under this act can be made. Section 2 (10) of POCA states that:

*“(10) Nothing in section 5 (making of order), 6 (criminal lifestyle), 7 (conduct and benefit), 8 (assumptions for determining benefit from general criminal conduct), 9 (effect of forfeiture order), 10 (voidable transfers), 20 (reconsideration of case where no order was made), 21 (reconsideration of benefit where no order was made), 22 (reconsideration of benefit after order is made) or 30 (court's powers on appeal) refers to conduct occurring, offences committed or property transferred or obtained, before the 30th May, 2007.”*

### **Applicant's submission**

**[32]** The applicant's submission is that the defendants have a general criminal lifestyle. Based on this premise they are applying for the following sums to be included in the pecuniary penalty order. These sums are :-

1. the amounts illegally taken from the accounts of several individuals,
2. all the deposits in the bank accounts of the defendants and
3. remittances received from the 30th of May 2007 by the defendants.

**[33]** The applicant further submitted that they had eliminated all legitimate sources of income for the two defendants and as such all other unaccounted sums are to be included in the order. They further submitted that despite the fact that the defendant placed some affidavits from third parties before the court and called one witness, there was no supporting documentary evidence placed before the court by the defendants. In light of that, their submission was that the defendants have not satisfied their evidential burden.

### **Defendants' submission**

**[34]** The submission of the Defendants is that they do not have a general criminal lifestyle and as such the order should not be made. They further submitted, that if the court rejected their initial submission, that:-

1. the application should be limited to the sums illegally taken from the accounts of the various persons that presented statements to the court and had become the subject of the indictment. They submitted that the sum ought not to be extended to a larger amount for which no statement had been taken from the complainants.
2. Most of the individuals who sent remittances to them had presented affidavits or letters, and as such these sums had been adequately explained. The remittances should therefore not be the subject of the order.
3. The sums in the various accounts can be traced to legitimate sources of income and as such should not be the subject of the order.
4. In the instances where they were unable to produce documentary evidence, this was due to the fact that most persons do not ordinarily retain certain receipts.

## **Issues**

**[35]** There are a number of issues in this case which include: -

1. Could the amount of the fraud that were perpetrated by the two defendants be considered a benefit?
2. If the answer to the first question is yes, what then would be the true benefit that they derived? Was it the sum that was the subject of the indictment or the larger amount disclosed in the statements of the police officers?
3. Can the deposits to the bank accounts of the defendants be the subject of the pecuniary penalty order?
4. Can the remittances be the subject of the pecuniary penalty order?
5. If the affidavits of the third parties are not supported by documentary evidence can this be accepted by the court?

6. Can the loans of the defendants be the subject of the order that is being requested?

### **Analysis**

#### **What is the sum to be considered by the court in relation to the fraud?**

- [36] The indictment that the defendants were charged with and for which they pleaded guilty detailed the amount that they had defrauded from the respective complainants. The amount in relation to the first defendant was for \$ \$309,911.87, whilst for the second defendant it amounted to \$372,544.79.
- [37] The suggestion from the applicant was that although the Crown was in possession of six statements which disclosed the sum defrauded by the defendants, the court may wish to consider additional information disclosed in the statement of the police officers.
- [38] The question to be decided is what is the benefit that the defendants derive from their illegal activity? The answer to that is that it can only be gleaned from the statements of the complainants that were before the court. The court is aware that it may take into consideration hearsay evidence. This was clearly stated in a number of cases including the case of **R v Clipston** [2011] EWCA Crim 446. The offences that the defendants were charged with dealt with the unauthorised removal of sums from the accounts of unsuspecting persons. In this particular case, the applicant would need to prove, with the use of statements from the complainants, that these sums were in fact removed illegally from their accounts. In the absence of such statements, it would not be prudent to take these other reports into consideration. The only sums to be considered are the amounts that were included in the statements which formed the subject of the indictment.

#### **Should the money withdrawn from the accounts be the subject of this order?**

- [39] The second question to be considered is whether the sums removed from the accounts of the complainants can be considered a benefit? This was considered in a number of cases and the simple answer to that is yes. The case of **R v Islam**

[2009] UKHL 30 was an appeal from the judgment at first instance where the judge included in his order the value of the cocaine that had been seized from the Defendant. The decision was appealed to the House of Lords where the majority in their decision stated that: -

*"For the purpose of calculating a defendant's benefit, as distinct from the available amount, in confiscation proceedings under the Proceeds of Crime Act 2002, goods of an illegal nature obtained by him did not have to be treated as having no value."*

[40] This position was followed in the case of **The Assets Recovery Agency v Ralph Gregg** [2018] JMSC Crim. 1, para 70 where V Harris J made reference to the House of Lords decision of **R v May** [2008] 1 AC 1028 which was delivered by Lord Bingham considering the meaning of benefit. At paragraphs 9 and 48 he stated that:

*"Where, however, a criminal has benefitted financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained.*

*The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators."*

[41] The submission of the defendants is that most of the items that were purchased utilising the stolen sums were recovered by the police and as such they have not benefitted from them. However, as in keeping in the decision of **R v May** the Defendants are to be deprived of assets equivalent to the value of the benefit even if they no longer possess it. These are the sums that the defendants pled guilty to and as such are to be deemed benefits they derived even if they are no longer in possession of them.

**[42]** The sum of \$309,911.87 is to be made a part of the pecuniary penalty order for the first defendant whilst the sum of \$372,544.79 is to be made part of the pecuniary penalty order for the second defendant.

### **Remittances**

**[43]** The applicant is requesting remittances in the sum of \$770,776.41 in relation to the first defendant, and the sum \$77,716.06 in relation to the second defendant to be the subject of this application. These remittances had been sent to the defendants over a number of years. The applicant acknowledged that there were affidavits provided that sought to give some explanation with regards to these remittances, but they argue that the source of income of the affiants was not disclosed. The applicant has submitted that these remittances, are unexplained.

**[44]** The defendants' submission is that these remittances are from known persons, that these persons have provided some details as to the source of their income, and as such the remittances cannot be deemed to be unexplained.

**[45]** The defendants placed before the court a number of affidavits with some supporting documentation. All the affiants produced identification to verify that they in fact exist. Only one affiant produced documentation showing her income, however those documents did not disclose her income for the time she sent the remittances to the defendants. The affidavits were mostly in a standard form indicating that the persons resided overseas, ie mostly in St Maarten and that they were the persons who had sent the remittances to the defendants. Some of the affidavits detailed why the remittances were sent eg for school fees, to pay land taxes, to look after their grandmother, or to assist the first defendant. There were a few receipts that showed the payment of land taxes, one payment of school fees, two NHT payments and one receipt which sought to show a payment to the Jamaica Public Service. There were several payments to a vendor's arcade

although there was no mention in any affidavit of anyone renting any facility at any arcade. These receipts, excluding the sum for the vendor's arcade amounted to \$39,976.00. The receipts for the vendor's arcade amounted to \$26,500.00.

- [46] The defendants were provided with the documentation concerning these remittances months before they filed their responses. There was no attempt by either the defendants or the affiants to indicate which school the children were attending and the school fees that were being paid. There was no attempt to identify the land the taxes were to paid towards. Except in one instance, there was no attempt to show the affiants' source of income. The first defendant indicated that some of these remittances were placed in bank accounts. There was however no indication as to the accounts they were placed in.
- [47] The witness for the defendants Ms Renee Smith David indicated to the court that she had been a security officer during the requisite period, however due to a hurricane in St Maarten she was unable to produce any documentation concerning her income. Her evidence was that her house had been destroyed, the company she worked for had closed down and as such she was unable to produce the requisite salary slips.
- [48] Whilst the court sympathises with the plight of Ms David as she described her ordeal during the hurricane in St Maarten, it seemed remarkable that she was unable to produce any documentation concerning her employment during this period. She did not even produce any document that would indicate that the company she worked for had even existed at the requisite time. I observed her demeanour and did not find her to be a credible witness. I therefore reject her evidence as it related to the source of the remittances that were sent by her.
- [49] The court is aware that there are some expenses that do not lend themselves to the production of documentation, especially as it relates to daily household expenses. However, since the defendants have the evidential burden as it relates

to these remittances, there must be some attempt to assist the court in relation to these sums. There was no attempt to indicate :-

- a. the portion if any of the remittances used for paying of bills,
- b. the portion used for other household expenses.

**[50]** The evidence produced by the defendants has not satisfied the court that these remittances were not being utilised in the general criminal lifestyle of the defendants. These expenses remain unexplained as such will be the subject of the pecuniary penalty order.

**[51]** One of the assumptions that can be made under POCA is that: -

*“any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct.”*

**[52]** The Defendants have failed to rebut this assumption and as such this sum will be included in the order.

### **Deposits to bank accounts**

**[53]** The applicant has submitted that there are a number of unexplained deposits to the bank accounts of the defendants that ought to be the subject of this order. The amount that is being referred to as unexplained by the applicant is the sum of \$1,266,990.63 for the first defendant and the sum of \$101,762.07 for the second defendant.

**[54]** In relation to the first defendant these sums were placed in a number of accounts namely:-

- a. National Commercial Bank account number 564442283 in the sum of \$138,300.00. This account showed among other things an alleged loan from National Growth. The evidence placed before the court is that National Growth is no longer in existence.

- b. JN Bank account number 000011065880 which had deposits in it amounting to \$894,435.00.
- c. JN Bank account number 01001041166 with deposits amounting to \$28,000.00.
- d. JN Bank account number 010010411667 with deposits amounting to \$28,000.00
- e. JN Bank account number 010010411668 with deposits amounting to \$38,000.00
- f. JN Bank account number 00209437548 with deposits amounting to \$10,000.00.
- g. COK account number 6317588 with deposits amounting to \$130,255.63

**[55]** In relation to the second defendant there were deposits to National Commercial Bank account number 564641545 in the sum of \$101,716.06.

**[56]** The defendants,' evidence is that the deposits were legitimate and they should not be the subject of any order. The evidence of the first defendant was that she had various sources of income which included working at a doctor's office, she raised chickens, received remittances and sold clothing. The sums she earned were deposited into her various accounts. I note that as it related to her employment at the doctor's office there was documentary evidence as to:

1. How much she earned.
2. For what period she worked at the office.
3. Which, if any account, she deposited any of her income into.

In relation to the chicken farm there was no documentary evidence as to:

1. The amount of chickens she reared.
2. Who she sold them to.
3. The amount she earned from this enterprise.

- [57] The first defendant gave evidence that she had a clothing business. I will just say that there is a dearth of information as it relates to it.
- [58] In relation to the remittances, although there is evidence that the defendants did receive them, there were no direct corresponding deposits to any of the accounts of the defendants. There was not even an explanation as to how much and to which accounts, the remittances were deposited to.
- [59] The second defendant had produced salary slips which showed his income as a security guard and as such the original amount had was being requested to be the subject of a pecuniary penalty order was reduced by those sums. During the hearing before the court the second defendant gave evidence as to additional sources of income. He claimed that among other things to have been a disc jockey. He gave evidence that he had given the first defendant money which she had deposited to her accounts. There was no documentary evidence to support these assertions.
- [60] Counsel for the defendats in cross examination of Ms Paula Walters referred to some withdrawals from bank accounts and corresponding deposits in other accounts for the defendants. The suggestions were made in cross examination that this would show either the sources of some deposits or that the applicant may be double counting in relation to the deposits. What is surprising is that the defendants gave no evidence to these withdrawals and deposits. There was no evidence to substantiate the suggestions made in cross examination.
- [61] An assumption that may be made under POCA is that: -
- “any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct.”*
- [62] The defendants again have not refuted this assumption. The defendants have not satisfied the court as to the source of these deposits and as such the sums of

\$1,266,990.63 for the first defendant and \$101,762.07 for the second defendant will be included in the order.

### **Cash payment to COK**

**[63]** The sum in question amounts to \$76,761.88, made to COK by the first defendant. The applicant has submitted that it is unexplained and as such should be the subject of the order. The first defendant has given evidence that it was the repayment of the loan that she had sourced from COK. The first defendant had made broad statements that the sums deposited to this account were from her chicken business or from remittances, however she has produced no documentary evidence to support this assertion.

**[64]** One of the assumptions that the law allows me to make is that:-

*“any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct. “*

**[65]** There was no evidence submitted by the first defendant to rebut that assumption and as such this sum will be subject to the order. This would be considered to be a benefit received by the first defendant and will be part of the order.

### **Order**

- a. The first defendant is to pay the sum of \$2,424,449.79 as a pecuniary penalty order.
- b. The second defendant to pay the sum of \$552,022.82 as a pecuniary penalty order.
- c. Cost to the Applicant to be agreed or taxed and this sum is to be taken from the sums received.
- d. The defendants have requested time to pay and in light of that they will be given four months to pay. If the sums are not paid within four months, they

are to serve three years. The order is for the sums to be paid on or before the 23rd February 2021 or 3 three years.