[2015] JMSC Civ 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03627

IN THE MATTER OF AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR A RESTRAINT ORDER PURSUANT TO SECTION 32 (1) (a) OF THE PROCEEDS OF CRIMES ACT, 2007

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**MICHAEL BROWN AKA ERDLEY BARNES**	**FIRST RESPONDENT**
AND	**PATRICK OSWALD PRINCE**	**SECOND RESPONDENT**
AND	**VALRIE YEE (NEE WEATHERLY)**	**THIRD RESPONDENT**
AND	**ANTHONY CLARKE**	**FOURTH RESPONDENT**
AND	**TYRONE GRANT**	**FIFTH RESPONDENT**
AND	**CONROY ROWE**	**SIXTH RESPONDENT**
AND	**DAVID BROWN**	**SEVENTH RESPONDENT**
AND	**COURTNEY MEREDITH**	**EIGTH RESPONDENT**

AND	**UDELL ELVIRA DOYLEY**	**NINTH RESPONDENT**
AND	**MINETTE SMITH**	**TENTH RESPONDENT**
AND	**TEVAUGHN PRINCE**	**ELE 'TH RESPONDENT**
AND	**KERRY ANN WATSON**	**TW ' FTH RESPONDENT**

IN CHAMBERS (WITHOUT NOTICE TO THE RESPONDENTS)

Suzanne Watson Bonner, Charmaine Newsome and Mr James Glanville for the applicant

July 22, 23 and 28, 2015

PROCEEDS OF CRIME – SECTIONS 2, 32, 33, 92, 94 OF PROCEEDS OF CRIME ACT – RESTRAINT ORDER – WITHOUT-NOTICE APPLICATION

SYKES J

[1] This is a without-notice application made by the Assets Recovery Agency ('ARA or the Agency) to restrain property it says represents the benefit from drug trafficking related crimes committed in Canada by Mr Erdley Barnes, Mr Patrick Prince and Mr David Brown. The property (real and personal) are said to be held by the three named gentlemen either by solely, or jointly among themselves or by each of them along with other persons.

[2] Before turning to an examination of the law and facts of this case the court is compelled to make some observations about the draft order submitted. On more than one occasion in the past the court has indicated to the Agency that the terms of the draft orders are too sweeping and lead to unnecessary litigation and dissipation of resources particularly that of the defendant. The present state of the statue prohibits the defendant from using any of the restrained property to defend himself in respect of matters arising under Proceeds of Crimes Act ('POCA'). There is the real possibility that an entirely innocent defendant may be hampered in refuting the state's assertions because the resources available may have to be consumed in seeking variations of the restraint order.

[3] Section 33 (4) of POCA makes provision for the court to make allowance for reasonable living expenses. The court has suggested, on more than one occasion, even in the absence of an application by the affected party, the draft order should make provision for reasonable living expenses. The court has suggested that a good starting point, in the absence of evidence of what the expenses of the affected parties are, is the minimum wage or some similar data that would indicate the cost of living of persons in Jamaica. If this figure turns out to be insufficient then the affected party can seek to vary the sum by way of agreement between the parties once the court order is designed to make that possible.

[4] An example of an order that can be modified as appropriate is found in the appendix of one of the reputable texts in this area (**The Proceeds of Crime**, Millington and Sutherland (4^{th})). In the precedent in the text there is this exception clause:

> *This order does not prohibit the defendant, on the proviso that he is not in prison, from spending up to [sum stated] a week towards his ordinary living expenses, up to the date of the making of any confiscation order. Before starting to withdraw money in respect of his living expenses, the*

defendant must contact the prosecutor to nominate a bank account or source of income from which such monies will be drawn and must obtain consent of the prosecutor in writing to the use of that account or income for that purpose.

[5] The human resource of the Agency is also limited. The financial resources available to the Agency are not unlimited. Prudence would therefore suggest that if the law permits orders to be framed in a way that much of the anticipated challenges to a restraint order (other than a discharge) can be resolved outside of court then the practice ought to be that reduces avoidable costs and consumption of court time.

[6] Court time is difficult to secure and these applications with multiple defendants and extensive property have tended to take up a lot of court time because the Agency tends to apply for the restraint of property in sweeping terms and without any out of court mechanism for variation of some of the terms of the order. In many instances the affected persons are unable to gain access to bank accounts and the courts for many months. When access to the court is finally granted, the hearing is very prolonged. It would seem that the Agency ought to consider including in the draft order a mechanism that can vary the amount for living expenses by a letter jointly signed by the Agency and the affected party or the party's representative or an attorney at law addressed to the relevant financial institution. That has been done in previous cases and this court has no report that the mechanism itself failed. There is this precedent in Millington and Sutherland:

The defendant … may agree with the prosecutor that the above spending limit be varied or that this order be varied in any other respect but any such agreement must be in writing

[7] The point is that the Agency must begin to adopt practices that enhance efficiency, save time, costs and result in better utilisation of it limited human and financial resources.

The legal standard

[8] In this case, ARA is alleging that Mr Barnes, Mr Patrick Prince and Mr David Brown have not only possessed but have dealt with cocaine in such a manner that it can be said that they are drug dealers. In order for ARA to take advantage of POCA it has to be establish that the (a) conduct in question occurred on or after May 30, 2007; (b) the conduct constitutes an offence in Jamaica and (c) where the conduct occurs outside of Jamaica it would constitute an offence had the conduct occurred in Jamaica (section 2 (1) of POCA).

[9] The first point to note about this requirement is that it refers to conduct and not offence. It is immaterial whether the conduct amounts to an offence in a foreign country if the conduct in question took place there; the crucial thing is that the conduct, wherever it occurs, must amount to a crime in Jamaica. The implication is that the practice of ARA of simply saying that the offender 'has been charged and convicted on several occasions for drug related offence' is not helpful (para 10 of the first affidavit of Carol Kerridge (Det Sgt)). What is stated is a conclusion and not a narrative or summary of the conduct engaged in by the alleged offender. Thus telling the court the names of the charges which Mr Barnes and Mr Patrick Prince faced in Canada is not very helpful. The label attached to the conduct by Canadian law enforcement agencies, respectfully, is legally irrelevant; what is to be supplied is the narrative of what the person did. The purpose of POCA speaking to conduct is that it is recognised that what is really crucial is the actual narration of what the defendant did, particularly overseas, so that an assessment can be done on whether what he did amounts to an offence under Jamaican law.

[10] The second point to note is that the conduct must have taken place on or after May 30, 2007. Until the second day of this without-notice application there was no clear unambiguous statement that Mr Barnes' conduct took place after the stated date. The court was being asked to infer that the conduct must have taken place after May 30, 2007. The Agency should not be relying on inference; it should be able to say with a high degree of certainty when the conduct took place. If it cannot then there is no assumption to be made that it took place on or after May 30, 2007.

[11] In an attempt to meet the observations made by the court during the hearing, the Agency pointed to paragraph 10 of Det Sgt Kerridge's first affidavit. That paragraph referred to Mr Barnes' 'traffick[ing] in Schedule 1 Substance' and 'possession of a Schedule 1 Substance for the purpose of trafficking.' What does this mean? What is a Schedule 1 Substance?

[12] In an attempt to assist the court with what is a Schedule 1 substance, Det Sgt Kerridge filed a second affidavit in which he deponed that he downloaded the relevant statute from the Government of Canada Justice Law's website. Respectfully, this is not of much value because there is no one who can vouch for the authenticity of the site and the accuracy of its content for court purposes. How would the court know whether what is presented is genuine and if genuine whether the Schedule has been altered? This court will not encourage the use of such material and this court will say that it did not take the exhibit attached to the police officer's affidavit into account.

[13] When making a without-notice application under POCA the Judicial Committee of the Privy Council has indicated the standard expected of the applicant. The Board has also stated the role of the judge. At paragraph 21 of **Assets Recovery Agency (Ex parte) (Jamaica)** [2015] UKPC 1, Lord Hughes said:

> *These conclusions do not mean that these evidence-gathering orders, including a CIO, are available to the*

prosecution or Agency whenever they want them. The Act expressly makes them available only when the judge determines that they ought to be granted. ***The role of the judge is crucial****. Moreover, the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. 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 persons 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.* ***The role of the judge is to ensure that the order is justified****. In the context of a CIO that means:*

(a) in both forfeiture and money laundering investigations, ensuring that the condition in sections 121(a) or (c) is met, and there are objectively reasonable grounds for believing, as the case may be, either that the person specified has benefited from his criminal conduct or has committed a money laundering offence; this will normally mean asking the applicant to show what criminal conduct, or what money laundering offence, is believed to have been committed, and

requiring a brief outline of the grounds for suspecting benefit or money laundering, as the case may be. (emphasis added)

[14] This was spoken in the context of an application for a customer information order under POCA but the underlying theme of the passage is of general application. No order is available as and when the Agency wants it. The judge is to ensure that the orders sought are justified. He does this may insisting on the statutory conditions being met and even if they are met the judge is consider whether in all the circumstances the order should be granted. The judge retains the discretion (conferred by the statute) to deny the application (see section 32 (1) of POCA where it says that the judge 'may make a restraint order if any of the following conditions are satisfied'). The standard of 'reasonable cause to believe' means that the cause for the belief must be objectively grounded and not based on the subjective views of the applicant.

[15] ARA is under a duty to lay before the judge anything which the affected person could properly urge against the grant had he been present at the hearing.

[16] In addition to the on-or-after-May 30, 2007 requirement, there must be reasonable cause to believe that an alleged offender has benefited from his criminal conduct and a criminal investigation must have been started in Jamaica with regard to the offence (section 32 (1) (a) (i)).

[17] In this case, the Agency's case theory is that Mr Barnes, Mr Patrick Prince and Mr David Brown are persons who committed the predicate crime and all the other respondents are participants in the laundering process. It is therefore appropriate to have regard to Lord Hughes' dictum in **Asset Recovery Agency (Ex parte) Jamaica** at paragraphs 7 – 9:

The Proceeds of Crime Act 2007 creates new substantive offences of money laundering. They are contained in sections 92-93. Under both sections, the offences created

consist of doing specified acts (with the prescribed state of mind) in relation to "criminal property". In turn, "criminal property" is defined in section 91(1)(a) as follows:

> *91 (1) For the purposes of this Part –*
>
> *(a) property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct);*

This definition therefore depends in part on the meaning of the expression "criminal conduct", for which one turns to section 2, where it is defined as follows:

> *'criminal conduct' means conduct occurring on or after the 30th May, 2007, being conduct which -*
> *(a) constitutes an offence in Jamaica;*
>
> *(b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;*

8. There can be no doubt that this means that before a substantive offence of money laundering can be committed, there must have been an antecedent (or "predicate") offence committed by someone, which generated the criminal property concerned. The antecedent offence might of course be one of several different types. Fraud, drug trafficking,

smuggling and the management of prostitution are no doubt common kinds of offence which generate money benefits which fall within the definition of criminal property, but there are also many others. So, for a prosecution for a substantive money laundering offence to succeed, the Crown must prove that such an antecedent offence was committed by somebody. The House of Lords so held in relation to similar earlier English legislation in R v Montila [2004] UKHL 50; [2004] 1 WLR 3141.

9. It does not, however, follow that for a defendant to be convicted of a substantive offence of money laundering, there must have been a conviction for the antecedent offence. What has to be proved is that an antecedent offence was committed, not that a conviction followed. It may quite often happen that there has been no conviction, for example if the antecedent offender has died before he could be prosecuted, or has escaped to a place from which he cannot be extradited. A conviction is only one way of proving that an offence has been committed.

[18] Lord Hughes has pointed out that when one speaks of money laundering then it necessarily means that one is saying that an antecedent criminal offence has been committed by someone which generated the property that is now being laundered. In light of how ARA has constructed its case it means that the Agency must establish that there is reasonable cause to believe that an antecedent crime was committed which has generated what may now be called criminal property and it is that property that alleged predicate criminal is seeking to launder with the assistance of the other respondents.

[19] Money laundering is defined in sections 92 and 93 of POCA. Under section 92 (1) money laundering is committed whenever a person engages in a transaction, conceals, disguises, disposes of or brings into Jamaica, converts, transfers or removes any such property from Jamaica with knowledge or having reasonable grounds to believe that the property is criminal property. According to section 92 (2) any person who becomes concerned in an arrangement which that person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person commits an offence. If that were not enough section 92 (3) states that concealing, disguising property includes concealing or disguising the nature of the property, its source, location, disposition, movement or ownership or any rights with respect to the property.

[20] Under section 93 (1) money laundering is also committed when any person acquires, uses or has possession of criminal property if that person does these acts with knowledge or has reasonable grounds to believe that the property is criminal property.

[21] ARA must therefore have the belief and must present evidence justifying its belief and this evidence must be reasonable when viewed objectively. The object of requiring that the belief be reasonable is to prevent subjective views alone. The only subjectivity permitted to the Agency is that it must have the belief, honestly held, which must be based on reasonable grounds.

[22] As far as restraint orders are concerned it must be remembered that the restraint order is not restricted to property directly or indirectly connected to or derived either the predicate crime but extends to any property, even if lawfully acquired. The reason is that all realisable property may be used to satisfy the amount assessed to be the benefit derived by the person from either the predicate crime or the money laundering offence. POCA is directed at benefit from crime and not profit. Thus the expression ‘taking the profit out crime’ while catchy is legally incorrect. Once that benefit is quantified and captured in a dollar

figure then any property held by the defendant, legally or illegally acquired, may be used to satisfy that benefit which has been stated in dollar terms. Therefore it is quite permissible for ARA to seek restraint orders against all property of the defendant that may be available to meet any sum assessed to be his benefit from his crime.

The property and allegation in respect of each property

[23] As noted earlier, the property in question consists of real and personal property. It is appropriate to examine more closely what is alleged against each one of these gentlemen as well as the other respondents to see whether ARA has met the legal standard.

[24] Mr Barnes is said to be serving 14 years for drug trafficking activity. The court was told that Mr Barnes' conduct that led to his conviction was possession of cocaine for the purpose of trafficking. The cocaine was said to be more than two kilogrammes. He has other identical charges pending. All the offences were committed after May 2007. That conduct had it been committed in Jamaica would have amounted to an offence in Jamaica. This is the antecedent crime necessary for money laundering to arise.

[25] There are six parcels of real estate in the name of Mr Erdley Barnes and others. One is jointly owned with Mr Tyrone Grant. Another is jointly owned by Mr Conroy Rowe. Four are jointly owned with Mr Conroy Rowe, Mr David Brown and Mr Courtney Meredith.

[26] Mr Barnes is the holder of an account at a local financial institution and at another institution he holds the account jointly with Mrs Valerie Yee and Mr Tyrone Grant.

[27] On the face of it, even if the other persons contributed to the acquisition of the real estate and also deposited money in the account with Mr Barnes' name, the fact of his name being on the registered titles for the real estate and on the

account, without more, indicates that he has both a legal and equitable interest in the property and the account. The legal position is that legal and equitable titles run together unless there is some reason to separate them. Lord Browne-Wilkinson in **Westdeutsche Landesbank Girozentrale v. Islington London Borough Council** [1996] AC 669 at page 706

> *A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title.*

[28] This means that, until shown otherwise, these properties, even if acquired legally may be used to meet any benefit sum arrived at in respect of Mr Barnes. These properties including the account can be restrained and it is so ordered.

[29] Mr Patrick Prince was arrested and charged in June 2014 with possession of cocaine for the purpose of trafficking in cocaine arising from the search of his home in Canada. One kilogramme of cocaine was found in a car on the premises. Mr Patrick Prince and the other persons were charged with the offence just named and two other offences. Mr Prince is said to be in Jamaica. From the material presented it can be said that these activities took place on or after May 30, 2007 . On the material presented Mr Patrick Prince is the holder of numerous accounts at a local financial institution. He holds one account jointly with Miss Kerry Ann Watson. This account will be dealt with when dealing with Miss Watson below.

[30] Mr Patrick Prince is the registered owner of two motor vehicles. There is also evidence that between 2000 and 2008 he stated to the tax authorities that he did not earn for those years.

[31] Mr Patrick Prince is a director and shareholder of a company known as PRL Limited ('PRL'). The company has an account at a local bank. The evidence is that the company has been removed from the companies' registry.

[32] In light of the offences allegedly committed, the absence of any declared income, being the registered owner of two motor vehicles and the holder of accounts with balances, it would seem that that the statutory threshold for restraint has been met, therefore, all the accounts in the name of Mr Patrick Prince alone can be restrained. The motor vehicles can also be restrained. They may be used to meet any quantified benefit from his alleged criminal conduct.

[33] Regarding the company, the account is not restrainable in light of the current information available. The company is a separate legal personality from Mr Patrick Prince and it has two other directors. In the normal course of things assets of the company do not represent realisable property, without more. The 'more' has not been provided.

[34] In respect of Mr David Brown all of his convictions occurred between 1992 and 1998. Since 2000, it appears that he has a coat of teflon, nine lives of a cat and the skill of Houdini. In respect of the five charges laid against him since 2000, two were withdrawn, he was acquitted in another, discharged on a fourth and proceedings stayed in a fifth. What this means is that ARA has no reasonable basis for its belief that Mr Dave Brown has committed an antecedent criminal offences for the purposes of money laundering investigations under POCA. If property in his name is to be restrained it would have to be on the basis that other persons have committed the predicate crime and he or they have engaged in money laundering in respect of criminal property from the antecedent crime.

[35] The further allegation against Mr Brown is that he 'is a known criminal associate of [Mr Barnes] and has been arrested for various drug offences in the Toronto province (para 37 of the first Kerridge affidavit). The basis of this statement has to be the convictions prior to 2000 and not any since 2000.

[36] Continuing with the review of the evidence against Mr Brown, the next paragraph of significance is paragraph 45 of the first Kerridge affidavit. There the Detective Sergeant states his belief that all the property identified represents 'the respondents' benefit derived directly or indirectly from the criminal conduct of the [Mr Barnes , Mr Patrick Prince and Mr David Brown]' and that the 'respondents are believed to have benefited from criminal conduct of [Mr Barnes, Mr Patrick Prince and Mr David Brown], to wit, drug trafficking and through their collective efforts have laundered the proceeds obtained and have acquired several parcels of real estate, motor vehicles and the monies contained in accounts.'

[37] In light of the failure to convict or prove Mr Brown committed any of the offence with which he was charged since 2007, the question is what is the basis for believing that Mr Brown has benefited from his own criminal conduct when on the face of it he has to be regarded as a person who has not committed any antecedent criminal act? In addition, the affidavit has not described the conduct allegedly done by Mr Brown in Canada in order for this court to determine whether what he did amounts to an offence in Jamaica. What we have are acquittals, withdrawals and stays of proceedings in the criminal matters. This is of importance because ARA's case is based on the conviction-based theory of POCA, that is to say, ARA is putting its case on the basis that criminal conduct has in fact taken place, criminal property has come into existence and has been laundered. ARA is not proceeding under the civil recovery theory what is also found in POCA.

[38] As is common in these applications, the Agency asserts that Mr Brown has no income that would permit him to acquire the assets that are presently in his name. This assertion by itself takes us nowhere because the statute and how it has been interpreted have established that the absence of income without more is nothing to the point. Were it otherwise, the statute would become oppressive in the hands of the malevolent. In the eyes of some, anyone who appears to be enjoying material prosperity is a criminal and everything they do smacks of

criminality. Human experience has shown that persons given great power tend to abuse it in the name pursuing some perceived greater good. According to Lord Hughes in **Asset Recovery Agency** at paragraph 19, reasonable grounds means:

> *Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds.*

[39] But some conduct there must be. This passage does not mean that no conduct is required. From the material presented it is not clear what the criminal conduct is. While it is true as Lord Hughes has said that proof of an offence is not necessary the court must exercise caution where the offences charged based on the alleged conduct have been withdrawn, ended in acquittal, discharged or stayed. None of these circumstances actually tell what the actual conduct was. In light of this, what reasons, (other than suspicion) that are objectively grounded, are there for believing that Mr Brown has benefited from his own criminal conduct or committed a money laundering offence? No other information has been presented against Mr Brown other than he is an associate of Mr Barnes. The fact of association with the now-convicted Mr Barnes is not sufficient. The fact of the assertion that Mr Brown has no income that could substantiate the acquisition of properties is not sufficient by itself or taken together with his association with Mr Brown to show that that the Agency has reasonable cause to believe that Mr Brown committed either the predicate crime or money laundering bearing in mind that there is no affirmative evidence that Mr David Brown has engaged in any conduct since May 30, 2007 in Canada that would amount to an offence in

Jamaica had the conduct occurred in Jamaica. The reason for this conclusion is that Mr Brown's conduct was not described in the affidavit so that the court could assess whether what he is alleged to have done amounted to a crime in Jamaica. The uncertainty in the Agency's case in respect of Mr Brown must mean that the court must refuse to grant the restraint order against property in his name alone or in his name and any other person other than Mr Barnes and Mr Patrick Prince.

[40] What has been said about property in Barnes' name applies to property in the name of Mr Patrick Prince whether singly or jointly held. The allegations provide reasonable grounds for believing that he has benefited from criminal conduct.

[41] In respect of Mrs Valrie Yee, Mr Anthony Clarke, Mr Grant, Mr Conroy Rowe, Mr Courtney Meredith, Miss Udel Doyley, Miss Minnette Smith, Mr Tevaughn Smith and Miss Kerry Ann Watson, the Agency is not saying that these persons committed any antecedent crime. The proposition is that they are involved in money laundering by permitting criminal property that represents the benefit of criminal conduct engaged in by Mr Barnes, Mr Prince and Mr David Brown to be placed in their names. It has already been concluded that Mr David Brown has not engaged in any antecedent criminal conduct on or after May 30, 2007

[42] Mr Conroy Rowe and Mr Courtney Meredith are Canadian nationals. It has already been pointed out that these two gentlemen hold four parcels of real estate jointly with Mr Barnes. These properties can be restrained on the basis of the case made against Mr Barnes. It has already been decided that these four properties can be restrained.

[43] Mrs Valerie Yee is described as a nurse practitioner who is now retired. She is Mr Barnes' mother and Mr Tyrone Grant's aunt. She is the registered owner of five motor vehicles acquired between 2010 and 2014. Two of those vehicles were purchased in Jamaica. The other three were imported from Canada. Of the three imported from Canada one was exported by Mr Barnes. The affidavit lists

the market value of the vehicles in Jamaica but the crucial information would be the price at the time of the acquisition. Even though two of the vehicles were bought in Jamaica, the information presented does not say who bought them and at what price. The market value of the five vehicles in JA$21.2m.

[44] Mrs Yee also has three accounts at two local financial institutions. The evidence is that she operates a clothing store. One of the accounts appears to be a trading account for this business. Another is held jointly with Mr Tyrone Grant and a third is held jointly with Mr Barnes and Mr Grant. Other than being Mr Barnes' mother and the aunt of Mr Grant nothing else is stated that would suggest that she is engaged in money laundering. If she has worked as nurse practitioner, now retired, and presently operates a business why could she not have acquired vehicles with a total current market value of JA$21.2m? As presently advised, there is no basis for granting a restraint order against the properties in her name alone. Detective Sergeant Kerridge has not stated any reasonable grounds for his belief that she is laundering property derived from any antecedent criminal conduct and there is no evidence to suggest that she has benefited from the activities of Mr Barnes, her son, or is holding property in her name alone in circumstances where it can be said that there are reasonable grounds for believing that the property represents benefit from criminal conduct. It follows that the application to restrain the motor vehicles in her name is refused. The account that appears to be the trading account for her business is not restrained.

[45] This leaves the two accounts held jointly, one with Mr Barnes and the other with Mr Tyrone Grant and Mr Barnes. Mr Grant is dealt with below. The material presented does not make it possible to conclude that there is reasonable cause to believe that the account held jointly with Mr Tyrone Grant alone should be restrained on the basis that it represents anybody's benefit from criminal conduct and therefore could not be used to meet any quantified benefit of any one. This joint account is not to be restrained.

[46] The court now comes to the account jointly held by Mrs Yee, Mr Barnes and Mr Tyrone Grant. There is no evidence indicating the source of the money in this account. The Agency accepts, so far, that Mrs Yee was gainfully employed as a nurse practitioner and also operates a business. Mr Tyrone Grant is said to be a taxi driver. The fact that Mr Barnes' name is on the account, without more, does not mean that the funds there are from his alleged criminal conduct. Mr Barnes is the son of Mrs Yee. However, since his name is on the account it means that Mr Barnes has acquired the right to dispose of whatever is there and this right may well represent his benefit from the offences allegedly committed by him (**R v May** [2008] 1 AC 1028). Also, whatever interest he may have in the account may be used to meet any benefit amount assessed. Mrs Yee's account with Mr Barnes' name can therefore be restrained.

[47] Turning now to Mr Anthony Clarke. Mr Clarke is said to be an associate of Mr Barnes. He is the registered owner of five motor vehicles acquired in 2013 and 2014. The value of the vehicle is JA$23.1m approximately. All the vehicles were exported from Canada. Two were exported by Mr Barnes. It is also said that he is the property manager of an apartment complex said to be owned by Mr Barnes, Mr Conroy Rowe, Mr David Brown and Mr Courtney Meredith. These are the same properties in Mr Barnes referred to earlier which the court indicated could be restrained because Mr Barnes' name appeared on the title and the evidence presented give reasonable cause for believing that Mr Barnes has benefited from his cocaine dealing activities. The Agency's submission is that Mr Barnes is the beneficial owner of the vehicles in Mr Clarke's name. The only material presented is that Mr Clarke is an associate of Mr Barnes. Nothing more is said about him other than his date of birth, his TRN number and where he lives. There is no information concerning the purchase of the vehicles in Canada and the cost of acquiring them. In this court's view, this is not sufficient material to conclude that there is reasonable cause for believing that Mr Clarke is participating in money laundering by lending his name to a scheme in which Mr Barnes is seeking to disguise the source and origin of criminal property, namely, the motor

vehicles. Neither is there sufficient evidence to say that there is reasonable cause to believe that these cars represent some person's benefit from criminal conduct. The application for restraint orders against the motor vehicles in Mr Anthony Clarke's name is refused.

[48] Mr Tyrone Grant is the cousin of Mr Barnes. He is listed as a taxi driver. He is listed as jointly owning three parcels of real property. The purchase prices are JA$15m (acquired 2002), JA$1.5m (acquired 2003) and JA$5.5m (acquired 2008) respectively. Mr Grant is now forty one years old. The properties are held by him and another. The joint owners in respect of the three properties are different. Nothing is known about two of them. One of the properties is held jointly with Mr Barnes. That is the one bought for JA$15m.

[49] The Detective Sergeant expressed the conclusion that the two other properties are 'believed to have been purchased with the benefits derived by [Mr Barnes] from his criminal conduct as [Mr Tyrone Grant's] income is not commensurate with the purchases made during the stated period of acquisition' (para 35 of the first Kerridge affidavit). This conclusion has no foundation. These two parcels are located in St Mary and St Catherine. No information has been presented about the two joint owners. To say that Mr Grant could not afford to purchase these properties, in the circumstances where there are two joint owners who may have contributed all or some of the purchase money is not sufficient for a restraint order to be granted. The court is prepared to restrain the real estate jointly held with Mr Barnes on the same premise spoken of earlier in respect of Mr Barnes, namely, even if it was legally acquired it may be used to meet any benefit amount assessed against Mr Barnes.

[50] There is property held in the name of Miss Udel Doyley who is the grandmother of Mr Barnes. The evidence is that on November 11, 2014, five parcels of real property were transferred to her by way of gift by Mr Barnes. It appears that these parcels of land would fall within the definition of tainted gift in section 2 (2) (a) (ii) of POCA. A gift is tainted if it was made by the defendant at any time and it

was property obtained by the defendant as a result of or in connection with the defendant's general criminal conduct. General criminal conduct means all of the defendant's criminal conduct occurring after May 30, 2007 and criminal conduct, in this case, means conduct occurring outside of Jamaica which had it occurred in Jamaica would be an offence (section 2 (1). These definitions then link to the definition of realizable property which means any free property held by the defendant or any free property held by the recipient of a tainted gift (section 2 (1) of POCA). Realizable property is property that can be used to satisfy the amount assessed as the defendant's benefit. Section 33 (2) permits the restraint of any realizable property held by a specified person.

[51] In respect of the properties held in Miss Doyley's name the same result is arrived at if the definition of particular criminal conduct is used. Particular criminal conduct means all of the defendant's conduct occurring on or after the appointed day which constitutes the offence concerned (section 2 (1) of POCA). The court recognises that the entire definition may make it possible to make an argument that particular criminal conduct is referring to, in the context of this case, an antecedent crime triable in the Jamaican courts. However, until that arises the court is of the view that such a contrary argument is likely to fail.

[52] Miss Minette Smith is the mother of Mr Patrick Prince. She is the holder of two parcels of real estate that were transferred to her on September 12 and 25, 2014 by a company to which Mr Prince paid substantial sums of money which could, at this stage, be regarded as the purchase price of the properties. The considerations that applied to Miss Doyley apply here as well and need not be repeated.

[53] In respect of both Miss Doyley and Miss Smith it is possible to make the argument that the persons who put up the purchase money hold the equitable interest and in that event the equitable interest would be sufficiently strong to subvert the legal title thus making the holder of the equitable interest the more powerful of the two property holders. That is to say, in the event of a dispute

between the legal title holders and the providers of the purchase money it may be that a court may order that both ladies are holding on trust for the purchase money providers; in fact that is the default position of equity unless there is evidence to the contrary. This was the position articulated as far back as 1788 by Eyre CB in of Dyer v. Dyer (1788) 2 Cox, Eq.Cas. 92, 93, 94:

> *The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive - results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence.*
>
> *The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence.*

[54] The point being made is that on the material presented it is possible to say that Mr Barnes and Mr Prince hold an interest in the properties in the names of both ladies (section 2 (8) of POCA) and therefore would fall within the definition of realizable property which means any free property held by the defendant. Free property means property in respect of which no forfeiture order is in force under any other law (section 2 (1) of POCA). The property in the names of the two ladies fall within the definition of free property. The court concludes that properties held by both ladies are restrainable whether viewed under general criminal conduct, particular criminal conduct or as free/realizable property.

[55] In respect of real property in the name of Mr Tevaughn Prince the evidence is that the property was purchased by Mr Patrick Prince in November 2013 and then gifted to Mr Tevaughn Prince in July 2014. This may fall within the definition of tainted gift and the reasoning stated above applies here as well. In addition, Mr Patrick Prince may well be regarded as the equitable owner since he provided the full purchase price. If that is correct then he has an interest in the property sufficient for it to be restrained on the basis that it is realisable property that may be used to satisfy any benefit assessed to have been made from his alleged criminal activities.

[56] In all the instances where Miss Doyley, Miss Smith and Mr Tevaughn Prince hold property jointly with Mr Barnes and Mr Patrick Prince, they may well be seen as an part of an attempt to conceal the source and ownership rights in relation to these properties. Money laundering concerns dealing with criminal property in the manner described in section 92 and 93 of POCA with the specified intent. Criminal property is property from an antecedent crime that represents the defendant's benefit from that crime. Even if the properties were acquired legitimately they could be used to satisfy any benefit proved to have been derived from their alleged criminal activities. Such property is restrainable under section 32. Therefore all the real estate held by these three persons jointly with Mr Barnes and Mr Patrick Prince is restrainable.

[57] Finally, there is Miss Kerry Ann Watson. She holds a joint account with Mr Patrick Prince. She also holds property in her own name and has given Mr Patrick Prince a power of attorney in extremely wide terms. The first Kerridge affidavit states that Miss Watson is an associate of Mr Patrick Prince. There is no evidence to suggest that Miss Watson did not purchase the real property as asserted by a letter from an attorney at law. Until that is done the court has to conclude that she bought it and bought it legitimately. The fact of knowing Mr Patrick Prince is not a sufficient basis to resile from this prima facie conclusion based on the material presented at this time. The joint account held by Mr Patrick Prince may represent a benefit to him and even if it does not it would make Mr Prince's interest in the account available for satisfying any benefit assessed is therefore subject to restraint (**R v May**).

Disposition

[58] Restraint orders are granted in respect of the properties (real and personal) identified in these reasons for judgment. Counsel for the Agency is to submit a draft order to reflect the decisions regarding the properties held by each respondent. In addition the draft order is to reflect the provision for reasonable living expenses and a mechanism for variation as explained earlier in these reasons.