



[2022] JMSC Civ. 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV03440

BETWEEN	THE ASSETS RECOVERY AGENCY	APPLICANT
AND	ANDREW HAMILTON	1ST RESPONDENT
AND	DOROTHY HAMILTON	2ND RESPONDENT
AND	ANDRE HAMILTON	3RD RESPONDENT
AND	ANDREW HAMILTON CONSTRUCTION LIMITED	4TH RESPONDENT
AND	ANDREHAN SEAFOODS COMPANY LIMITED	5TH RESPONDENT
AND	DEVON CLEARY	6TH RESPONDENT
AND	JANET RAMSAY	7TH RESPONDENT
AND	PAULETTE HIGGINS	8TH RESPONDENT
AND	ADMINISTRATOR-GENERAL FOR JAMAICA (as Administrator Ad Litem, Estate ANNMARIE CLEARY, deceased)	9TH RESPONDENT

IN CHAMBERS

Mrs. Caroline P. Hay Q.C. and Mr. Zurie O. Johnson instructed by Caroline P. Hay, Attorneys-at-law for the Claimant/Applicant

Mr. Ian Wilkinson Q.C. and Mr. Lenroy Stewart instructed by Wilkinson Law, Attorneys-at-law for the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Defendants/Respondents

Ms. Geraldine Bradford instructed by the Administrator General's Department for the 9th Defendant/Respondent

Mr Kwame Gordon instructed by Samuda and Johnson, Attorneys-at-Law for the Interim Receiver, Kenneth Tomlinson (Interested Party)

Heard on May 2, and July 8, 2022

Sections 55, 56, 57, 58, 84, 85, 86, 87 and 89 of the Proceeds of Crime Act - Rules 8.3 (1), 10.8, 10.9, 10.10 of The Judicature (Supreme Court) (Proceeds of Crime) Rules, 2021 - Parts 10 and 12 of the Civil Procedure Rules, 2002- Application for Leave to Enter Judgment in absence of Defence - Civil recovery orders- Recoverable property - Unlawful conduct - Default judgment

STEPHANE JACKSON-HAISLEY J.

BACKGROUND

- [1] The legal framework that governs the investigation, identification and recovery of the proceeds of crime is the Proceeds of Crime Act, 2007 (hereafter the “POCA” or “the Act”), the purpose of which is to combat any organized system through which an individual or entity is benefitting financially from criminal conduct or unlawful conduct. The authorities that act under the POCA operate to detect, identify, investigate and where possible, recover profits or proceeds that have been generated by said criminal or unlawful conduct.
- [2] This Claim originated by Claim Form and Particulars of Claim on June 6, 2013 which was amended on June 25, 2013 by way of an Amended Claim Form and Amended Particulars of Claim. The Claim is undefended as none of the Respondents have filed a Defence in the matter.

THE AMENDED CLAIM

- [3] The essence of the Amended Claim is that the Claimant seeks civil recovery orders against the Respondents in respect of their real and personal assets pursuant to section 57 of the POCA. The Claimant also seeks restraint orders pursuant to sections 32 and 33 of the Act and Rule 17.1(f) of the Civil Procedure Rules (CPR) and an Order, pursuant to section 33 (6) of the Act permitting them to enter certain

of the properties to inspect and take photographs, and an Order, pursuant to Rule 17.1(1)(g) of the CPR to disclose full particulars of the nature and location of all their assets, whether or not owned by them or identified in the claim and make disclosure of those assets to the Claimant. What remains to be dealt with here is the request for civil recovery orders.

- [4] On November 23, 2020 the Claimant filed a Notice of Application for Leave to Enter Judgment supported by affidavit evidence of Selvin Hay, the Chief Technical Director of Financial Investigations Division (FID). Leave was sought to enter judgment as there is in place a restraint order made pursuant to section 33 of the POCA and the same will need to be discharged upon the entry of judgment in the Claim and also because of the interim receiver who was appointed. The root of the application is that after all this time, the claim remains undefended as none of the Respondents has filed a Defence. There has also been no indication that any of the Respondents intends to defend the claim.

THE PARTIES

- [5] The Claimant now Applicant, the Assets Recovery Agency (ARA) is established by virtue of section 3 of the POCA and has as its primary functions the institution of proceedings in the Supreme Court against any person that it believes holds recoverable property.
- [6] The 1ST Respondent Andrew Hamilton was born on October 25, 1970. At eighteen years old, he was employed as a Postman at the Central Sorting Office, where he earned Four Hundred and Thirty-Four Jamaican Dollars and Seventy Cents (J\$434.70) per fortnight. By September 1, 1990, he was earning a salary of Two Hundred and Eighty-Six Jamaican Dollars and Fifty-Four Cents (J\$286.54) per week. In February 1991, he was admitted to the Jamaica Constabulary Force, where he served for just over one year before migrating to the United States of America.

- [7]** Since the 2000s, the United States Drug Enforcement Administration (DEA) has had the 1ST Respondent under surveillance and thereafter joined with FID and the Major Organized Crime and Anti-Corruption Taskforce (MOCA) in conducting a joint money laundering and civil recovery investigation into the conduct of the 1ST Respondent, based on his suspected involvement in drug trafficking and money laundering. Based on investigations, there has been no indication that he has been gainfully employed since migrating to the USA however he is believed to have acquired property with an estimated accumulated market value of Jamaican Four Hundred Million Dollars (J\$400,000,000.00).
- [8]** Certain family members and known associates of the 1ST Respondent were also suspected of being involved in assisting him with concealing the proceeds of his unlawful activities by having the real properties, motor vehicles and heavy duty equipment transferred into their names. Some of these persons are the other Respondents in this claim.
- [9]** Dorothy Hamilton is the 2ND Respondent and the mother of the 1ST Respondent. She is eighty-two years old and resides at 35 Range Crescent, Norman Gardens, Kingston 2. At the time the relevant property at Lot 999, Bridgeport, St. Catherine was transferred to Ms. Hamilton, she was a housewife. She used to work as a Domestic Helper and is currently a pensioner. No legitimate income of Ms. Hamilton has been identified to show that she had the means to purchase the property, and it is therefore believed that Andrew Hamilton, the 1ST Respondent is the beneficial owner of the properties registered in her name.
- [10]** Andre Hamilton is the 3RD Respondent and was born on July 8, 1994. He is the son of the 1ST Respondent and the 9TH Respondent. He was a student and minor when properties had been purchased and transferred in his name.
- [11]** Andrew Hamilton Construction Limited the 4TH Respondent was incorporated on February 3, 2003. Based on checks conducted at the Inland Revenue Department (IRD) and a letter from the director of the company, Annmarie Cleary, the 9TH

Respondent, the company commenced operation in May 2008. However, on March 2, 2004, Andrew Hamilton Construction Limited purchased Lots 8 and 8A Forest Hill, Kingston 19 for Two Million Five Hundred Thousand Jamaican Dollars (J\$2,500,000.00). It was suspected that the money used to purchase the lots came from the 1ST Respondent. Checks also revealed that Andrew Hamilton Construction Limited had not been conducting any significant business activity since its incorporation in 2003. The inference to be drawn from these facts is that since the company had not been generating any income that warranted any filing or reporting to the Companies Office of Jamaica or Tax office, it would not have been able to acquire said properties.

- [12]** Andrehan Seafood Company Limited the 5TH Respondent was incorporated in 2008. However, there had been no records at Tax Administration Jamaica that the company had filed any tax return since and there had been no indication that the company was operating or conducting any business activity.
- [13]** The investigators therefore believed that the companies, Andrew Hamilton Construction Limited and Andrehan Seafood Company Limited were set up and incorporated to facilitate the 1ST Respondent in laundering proceeds from his illegal drug trafficking. They base this on their knowledge that companies, normally referred to as “shell companies” are usually used to create a façade of a legitimate operating business but in reality are a “front” and have no real legitimate business activity or trade operating. They exist as a shell to hide another company’s or person’s illegal activities.
- [14]** Devon Cleary, the 6TH Respondent is the brother of Annmarie Cleary, the 9TH Respondent. In 2009, the property at Lot 94 Edgewater, Valerie Way, Bridgeport, Portmore, St. Catherine was transferred to his and Annmarie Cleary’s names. It is believed that although Devon and Annmarie Cleary’s names were placed on the title, the true beneficial owner of the property is Andrew Hamilton.

- [15]** Janet Ramsay, the 7TH Respondent was employed at the Central Sorting Office since 1982. In 2004, Ms. Ramsay's post was a Postwoman, and earned a salary of Five Thousand One Hundred and Fifty-Five Thousand Jamaican Dollars (J\$5,155.00) per week. Ms. Ramsay at the time had been acting in the post of Inspector since November 2012, and earned a weekly salary of Ten Thousand Eight Hundred and Thirteen Jamaican Dollars and Seventy-Three Cents (J\$10,813.73).
- [16]** Paulette Higgins, the 8TH Respondent is the sister of the 1ST Respondent and was employed to the Jamaica Telephone Company (now LIME) from 1986 to 2000 and since 2002 employed to Sagicor Life Jamaica Ltd. Her average income at LIME and Sagicor is about Two Hundred and Forty Five Thousand Jamaican Dollars (J\$245,000.00) and Jamaican Nine Hundred and Fifty Thousand Dollars(J\$950,000.00) respectively.
- [17]** On March 11, 2019, the 9TH Respondent, Anmarie Cleary died and the Claimant applied under Rule 21 of the CPR to have a representative of her estate appointed in the claim. A consent order was made appointing the Administrator-General for Jamaica as the personal representative of Ms. Cleary's estate. Therefore, the Administrator-General for Jamaica represents her estate for the purposes of these proceedings.
- [18]** Ms. Cleary was the mother of two of the 1ST Respondent's children, namely Andrene Hamilton (now deceased) and Andre Hamilton, the 3RD Respondent. Andrene Hamilton was born on December 30, 1990 and died on February 3, 2011. Ms. Cleary's address is listed as both 33 Moreton Park Avenue, Kingston 10, Jamaica and 15900 Crenshaw Boulevard, Suite 203 Gardenia, California 90249, USA. The California address is the same address listed for the 1ST Respondent. Ms. Cleary was in a relationship with the 1ST Respondent for over twenty years and it was believed that based on the circumstances, she was aware of Mr. Hamilton's illegal drug activities and was also believed to be involved with money laundering with him. Ms. Cleary was known as a Hairdresser and Businesswoman.

Based on checks at Tax Administration Jamaica, income tax returns were filed on behalf of Ms. Cleary between 2005 – 2011, which totalled Two Million Eighty Thousand Four Hundred and Fifty-Seven Jamaican Dollars (J\$2,080,457.00).

[19] The gravamen of the Applicant’s case is that the 1ST Respondent was involved in the trafficking of narcotics and money laundering in the United States of America and as a result, he gained monetarily from his unlawful, ‘criminal’ conduct, allowing him to use the proceeds gained from his conduct to acquire what are now identified as fourteen different real properties and thirteen pieces of personal properties, (motor vehicles and a fleet of heavy duty equipment) including a 2007 black Mercedes Benz and a 1999 white International Series Truck. All the real and personal estate that have been located through investigations carried out by entities working on behalf of the FID, and which are also the subject of the Application for Judgment are identified in Tables 1-3 below.

Table 1 – Real Property						
Cons. #	Description of Property	Owners (Joint Tenants)	Volume/ Folio	Date of Transfer	Purchase Consideration	Market Value or estimated Market Value
1	Lot 999, Bridgeport, St. Catherine	Andrew Hamilton Dorothy Hamilton	1106/952	02/10/2002	J\$2,400,000.00	9,000,000.00
2	Lot 512 Cardiff Hall Plantation, Unity Pan P.O., St. Ann	Paulette Lorraine Higgins	1031/403	12/12/2005	J\$10,500,000.00	40,000,000.00
3	Lot 4 Providence Ironshore Montego Bay St. James	Paulette Higgins Akeem Pierre Hamilton Andrew Paul Hamilton, Jnr	1398/296	07/02/2007	US\$250,000.00	US\$300,000.00
4	Lot 5 Norbrook Ritz, Kingston 8	Paulette Higgins Andre Hamilton Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Paul Hamilton, Jnr	1420/626	02/03/2008	J\$3,000,000.00	42,000,000.00
5	Lot 2 Norbrook Ritz, Kingston 8	Paulette Higgins Andre Hamilton Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Paul Hamilton, Jnr	1420/623	18/06/2008	J\$3,000,000.00	42,000,000.00

Table 1 – Real Property

Cons. #	Description of Property	Owners (Joint Tenants)	Volume/Folio	Date of Transfer	Purchase Consideration	Market Value or estimated Market Value
6	Unit A2 Retreat aka 11 Seaview Avenue, Monte Carlo Isles. Strata lot # 01 Kingston	Ann-Marie Cleary Andrene P. Hamilton Andre Paul HAMILTON, Adrian Malik HAMILTON, Amelia Marie Hamilton	1412/19	June 19, 2008	J\$11,000,000.00	19,000,000.00
7	Unit D4 Retreat aka 11 Seaview Avenue, Monte Carlo Isles. Strata Lot # 27 Kingston	Andrene Hamilton Paulette Higgins	1412/45	June 19, 2008	J\$12,000,000.00	19,000,000.00
8	Unit C2 Retreat aka 11 Seaview Avenue, Monte Carlo Isles. Strata Lot # 18 Kingston	Andrene Hamilton Paulette Higgins	1412/36	19/06/2008	J\$12,000,000.00	19,000,000.00
9	Unit C4 Retreat aka 11 Seaview Avenue, Monte Carlo Isles. Strata Lot # 16 Kingston	Ann-Marie Cleary Andrene Hamilton Andre Paul HAMILTON, Adrian Malik HAMILTON, Amelia HAMILTON	1412/34	19/06/2008	J\$11,000,000.00	19,000,000.00
10	Lot 11 Norbrook Ritz, Kingston 8	Paulette Higgins Andrene Hamilton Akayla Parie Hamilton Akeem Pierre Hamilton Andrew Pierre Hamilton Andrew Paul Hamilton, Jnr	1420/632	24/06/2008	US\$300,000.00	42,000,000.00
11	Unit D5 Retreat aka 11 Seaview Avenue, Monte Carlo Isles. Strata Lot # 28 Kingston	Andrene Hamilton Paulette Higgins	1412/46	25/06/2008	J\$12,000,000.00	21,000,000.00
12	Lot 94 Edgewater, Valrie Way, Bridgeport, P.O. Portmore, St. Catherine	Ann Marie Cleary Devon Cleary	1434/361	01/10/2009	8,000,000.00	16,000,000.00
13	Lot 69 Florence Hall, Trelawny	Ann Marie Cleary Adrian Malik Hamilton, Amelia Marie Hamilton	1444/521	31/01/2011	J\$1,000,000.00	13,000,000.00

Table 1 – Real Property

14	11 Seaview Avenue, Monte Carlo Isles, Strata Lot 26, Kingston 6	Andrene Hamilton (deceased) and Paulette Higgins	1412/44	05/03/2008	J\$12,000,000.00	19,000,000.00
	Total					J\$319,700,000 US\$300,000.00

Table 2

Cons. #	Description of Vehicle	Registration	Acquisition Date	Registered Owner
1	2005 Gray Honda Civic	1681FR	30/11/2009	Annmarie Cleary
2	2000 Honda CRV Motor Car	6871ED	20/11/2003	Annmarie Cleary
3	2007 Black Mercedes Benz	5055FR	22/12/2009	Joseph Arnold
4	1999 White International Series Truck SN:IHTSCAAN4XH5 85616 Model # 7400, DT466E		13/08/2008	Andrew Hamilton Construction Limited
5	1990 Blue and White Saigon 85' Fishing Vessel, Hull #DLZ11960F008	DL7025 AB	31/03/2009	Andrehan Seafoods Limited
6	2006 White Toyota Tundra Motor Truck	5941 DL	02/06/2011	Rose-Marie Higgins Campbell
7	1987 D11N yellow Caterpillar Disassemble Dozer SN: 74Z371 Model #24355	N/A	30 th April 2008	Andrew Hamilton Construction Limited
8	1987 D10N yellow Caterpillar Disassemble Dozer SN: 2YD00783 Model #26161	N/A	30 th April 2008	Andrew Hamilton Construction Limited

9	1987 Disassembled Caterpillar Dozer D11		18 th August 2008	Andrew Hamilton Construction
10	1987 Disassembled yellow Caterpillar Disassemble Dozer SN: 2YD00343 D10		18 th August 2008	Andrew Hamilton Construction Limited
12	1990 Blue and White Saigon 85' Fishing Vessel, Hull #DLZ11960F008		22 nd August 2008	Andrew Hamilton Construction Limited
13	1954 Rogers Lowboy with 4 wheels S/N: 634ITPG60DS29		22 nd August 2008	Andrew Hamilton Construction Limited

Table 3

Financial Institution	Branch	Amount	Remarks
NCB Capital Markets Limited	721932	\$82,659,850.00	Escrow account in which net proceeds of the sale of 7 Liguanea Avenue, Kingston 6 and Apartment 6 Monte Carlo Isles, Kingston 5 were placed.

EVIDENCE RELIED ON

[20] Further affidavits were relied on from Robin Sykes, the then Chief Technical Director of the FID, Ronald Rose, Forensic Examiner and an authorized Financial Investigator; Dharwin Diaz, an Intelligence Research Specialist and E. Ryan Dorsey, a special agent assigned to the DEA in California.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[21] Queen's Counsel, Mrs. Hay commenced her submissions by highlighting that in order for the Court to enter judgment the Court has to be satisfied of the evidentiary basis to support the claim despite there being no defence filed by any of the

Respondents. She indicated that the Court would have to consider whether the response amounts to a defence in keeping with the CPR and if it does not then the Claimant is entitled to judgment. She submitted that the Court's concern should be whether the identified properties are recoverable property.

[22] Queen's Counsel further emphasized that the affidavits of Ronald Rose, Dharwin Diaz and E. Ryan Dorsey filed in support of the claim provide clear and convincing evidence that satisfies the statutory requirements that must be met for the granting of the civil recovery orders sought. She contended that when the affidavits are examined there is sufficient material to show that the 1st Respondent is the main character and that a clear connection had been established between him and the property owners, the other Respondents. She asked the Court to examine the genealogy report which shows the connection between the Respondents. She highlighted certain portion of the affidavits relied on to include the exhibited indictments which show the unlawful conduct on the part of the 1st Respondent.

[23] She further advanced that the investigations into the conduct of the 1st Respondent which commenced from as far back as 2012 revealed unlawful conduct on his part. Further, that a search conducted linked him to a number of illegal firearms and ammunition. She contended that there is evidence to support the fact that he had no legitimate source of income that would substantiate the acquisition of the properties, the subject of this investigation. Based on the fact that the evidence demonstrates that the lawful income of the 1st Respondent is not demonstrably capable of acquiring these assets then it leads to the irresistible inference that the assets acquired are not lawful.

[24] She referred to the provisions of the newly enacted Judicature (Supreme Court) (Proceeds of Crime) Rules (hereafter "POCA Rules") and submitted that even taking that into account the position remains the same as there is a requirement under Part 10 for a Defence to be filed which the Respondents have failed to do. Having filed no Defence they have submitted to the jurisdiction of the Court and are therefore bound by Rule 10.

[25] Queen's Counsel submitted further that according to Part 10, a party who intends to defend a claim must file a Defence and if a Defence is not filed, judgment may be entered and therefore, the requirements for entering default judgment, as set out under Part 12 of the Civil Procedure Rules have been satisfied and on that basis, the application for judgment to be entered should be granted.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[26] Mr. Lenroy Stewart submitted that even in the absence of a Defence the Applicant is not entitled to judgment unless the Court is satisfied that the properties listed represent recoverable property by showing that they were acquired by unlawful conduct. Further, that the Applicant bears the burden of proof and the Respondents do not have a reverse burden.

[27] He contended that there is no evidence that at the date of acquisition of the properties that they were obtained through unlawful conduct and that the inability of the Applicant to locate legitimate income is not proof of the lack of legitimate income. There is no evidence at all in relation to any of the Respondents save for Andrew Hamilton and even in his case the evidence led is insufficient. Not only is there no evidence but the pleadings themselves are devoid of any reference to the properties being obtained through unlawful conduct on the part of the 2nd to 9th Respondents. The absence of such evidence is fatal to the request for a civil recovery order. Everything flows from the pleadings and the parties are not at large but are confined to the pleadings.

[28] He criticized the evidence contained in the affidavit of Ronald Rose by emphasizing that he speaks largely to his beliefs without stating the source of his beliefs. His averment that whilst the 1st Respondent was in the United States of America he was unemployed is unsubstantiated by any evidence so no weight ought to be attached to it. The evidence he has supplied amounts to mere averments and there is no indication that the conduct would amount to unlawful conduct under Jamaican law. Similarly, he submitted that the affidavit of Darwin

Diaz does not take the case any further as it is totally irrelevant to the question of whether the properties were acquired through unlawful conduct.

[29] The affidavit of Ryan Dorsey also does not assist and in particular there is no evidence of any unlawful conduct attributable in any of the other Respondents and so there is a lacuna in the case.

[30] He submitted with force that the Respondents have not submitted to the jurisdiction of the Court and relied on the authorities of **Asset Recovery Agency v Adrian Fogo and others** [2014] JMSC Civ. 10 and **Asset Recovery Agency v Ouida Desrene Stennett** [2017] JMSC Civ 120 to support his point that the ARA must provide evidence to support their claim. The mandatory requirement for the Registrar to enter default judgment would not be applicable as the Judge has to consider the merits of what is being advanced. There is also the issue of pending criminal charges and so if the Respondents are convicted that would be a factor in their favour.

RESPONSE ON BEHALF OF THE APPLICANT

[31] Mrs Hay in response stressed that there is no need to demonstrate a nexus between the named owner of the property and the unlawful conduct and that once a property is acquired by unlawful conduct it is recoverable and it does not matter who participated in the unlawful conduct.

ISSUES

[32] Two issues arise for my consideration. They are as follows:

1. Whether the Applicant has satisfied the provisions of the POCA for the grant of a civil recovery order.
2. What is the effect of the Respondents' failure to file a Defence?

DISCUSSION

ISSUE ONE

Whether the Applicant has satisfied the provisions of the POCA for the grant of a civil recovery order?

[33] Under the POCA, the ARA is the enforcing authority empowered to apply to the Supreme Court pursuant to section 57 for civil recovery orders against property deemed “recoverable property”. Section 84(1) stipulates that property obtained through unlawful conduct is recoverable property.

[34] Section 55 (1), defines “property obtained through unlawful conduct” as –

“property obtained directly or indirectly by or in return for or in connection with unlawful conduct, and for the purpose of deciding whether any person obtains property through unlawful conduct-

- (a) *it is immaterial whether or not any money, goods or services were provided in order to put the person in a position to carry out the conduct;*
- (b) *it is not necessary to show the particulars of the conduct.*

It further defines “unlawful conduct” as follows:

- (a) *conduct that occurs in, and is unlawful under the criminal law of, Jamaica; or.*
- (b) *conduct that -*
 - i. occurs in a country outside of Jamaica and is unlawful under the criminal law of that country; and*
 - ii. if it occurred in Jamaica would be unlawful under the criminal law of Jamaica.*

[35] Section 58 is also relevant and provides as follows:

58.-(1) If in proceedings under this Part the Court is satisfied that any property is recoverable, the Court shall make an order under this section (hereinafter called a recovery order).

(2) Subject to subsection (8), the recovery order shall vest the recoverable property in the Agency. (3) If each of the conditions in subsection (4) is met, the Court shall not make in a recovery order

any provision in respect of recoverable property unless it is just and equitable to do so.

[36] The meaning of recoverable property within the provisions of sections 84 - 89 is property that has been obtained through unlawful conduct, even if the person who obtained that property unlawfully disposes of it in whole or in part, mixed with any other property belonging to said person or some other person. There are exceptional circumstances in which property is not recoverable property, and one of those exceptions is mentioned under section 88 (5) (a) and (b), which include that property is not recoverable while a restraint order is in existence under section 33 or a forfeiture order pursuant to any law in force in respect of the property. Property is also not recoverable if it has been taken into account in deciding the amount of that person's benefit from criminal conduct for the purpose of making a forfeiture or pecuniary penalty order. Recoverable property ceases to be recoverable if it has been disposed of and the party who obtains it upon disposal does so in good faith for valuable consideration without notice that the property was recoverable property.

[37] Therefore, in determining whether to grant a civil recovery order, the Court must consider what it means to obtain the property through unlawful conduct. In **Norris Nembhard v Assets Recovery Agency** [2019] JMCA App 30, McDonald-Bishop JA considered the meaning of "unlawful conduct" under section 55 (1). She stated at paragraph [37] that, "at the core of the civil recovery regime is property which is, or which represents property obtained through unlawful conduct.

[38] In analysing the issue before the Court of Appeal relating to whether unlawful conduct was criminal conduct under the POCA, McDonald-Bishop JA in agreeing with Counsel Miss Whyte for the Assets Recovery Agency, continued at paragraph [38] by stating that:

"Miss Whyte was correct in her submissions that the only criteria to be satisfied for a civil recovery order is that the predicate or antecedent conduct being relied on by the respondent occurred in Jamaica and is unlawful under the criminal law of that country."

[39] Although the definition of unlawful conduct under Part IV of the Act includes conduct that is in breach of the criminal laws of Jamaica or some other country, it does not include a consideration of criminal conduct. The considerations relating to what is unlawful conduct falls under a different regime from what would be considered 'criminal conduct' or 'particular criminal conduct' warranting a criminal lifestyle under the Act. It is also clear that the Part IV governing civil recovery proceedings under the Act is clearly distinguishable from Part V which deals with money laundering and with proving criminal guilt of a particular Defendant.

[40] This means that in civil recovery proceedings, the standard of establishing and proving unlawful conduct is on a balance of probabilities as expressly provided for in section 56 (3) as follows:

(3) The Court mentioned in subsection (1)(a) or (b) shall decide on a balance of probabilities whether it is proved that-

(a) any matters alleged to constitute unlawful conduct have occurred;

[41] In the English case of **The Queen on the Application of the Director of the Assets Recovery Agency and other v Jeffrey David Green and others** [2005] EWHC 3168, the Court had to consider the question of what was meant by "particular unlawful conduct" that was raised in the preliminary issue. The preliminary issue was whether the Director could have sustained or succeeded in a case for civil recovery solely on the basis that the Respondent had no identifiable lawful income to warrant his lifestyle. Based on the ruling on the preliminary issue by McCombe J., two relevant principles arose from this case, and which are helpful to the interpretation of whether the Applicant has proven unlawful conduct in the instant case. They are:

- i) It is not enough that a Respondent does not have an identifiable, lawful income to warrant his lifestyle, as the basis for a claim for civil recovery; and

- ii) The Director must prove on a balance of probabilities that the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct.

[42] In **Delores Elizabeth Miller v The Assets Recovery Agency** [2016] JMCA Civ 25 it was succinctly stated at paragraph 37:

“The effect of section 55 is that the ARA must provide evidence before the Supreme Court that the property is recoverable property by demonstrating that such property was obtained directly or indirectly by unlawful conduct. However, it is not essential for the ARA to establish the precise particulars of the unlawful conduct (see also Director of Assets Recovery Agency and Others v Jeffrey David Green and Others). Further, section 57 empowers the ARA to take civil proceedings if it believes that property constitutes recoverable property.

Learned counsel for the ARA submitted, relying on The Director of Assets Recovery Agency and in the matter of Cecil Walsh, and I accept, that “the court may be asked to draw appropriate inferences from the unlawful conduct established by the Agency combined with the absence of legitimate capital and income”.

[43] Taking the relevant provisions of the POCA into account along with the authorities mentioned above, the test is whether the ARA has satisfied me that the properties were acquired through unlawful conduct and provided evidence to substantiate this. The Court is therefore obliged to assess the evidence presented to determine whether there is some unlawful conduct which has a sufficient relationship to the properties in question and whether there is sufficient admissible evidence to find on a balance of probabilities that the properties were obtained by unlawful conduct and thus recoverable.

[44] In attempting to prove their case the ARA has relied on the affidavits of Selvin Hay, Ronald Rose, E. Ryan Dorsey and Dharwin Diaz.

[45] Selvin Hay is the Chief Technical Director of the FID. He deponed to the fact that the Respondents were served with the Amended Claim Form and Amended Particulars of Claim between June 25 and June 26, 2013 and that after many years there has been no Defence to the Claim.

- [46]** Ronald Rose in his affidavit deponed to the fact that in October 2012, Andrew Hamilton pleaded guilty to Conspiracy to Distribute Marijuana and Conspiracy to launder money in state of California, United States of America and was slated to be sentenced on or about September 30, 2013. A copy of the indictment is attached to his affidavit. This was the result of investigations carried out by the United States government, over the course of three years. During the period an estimated One Million Five Hundred and Eighty-Two Thousand Eight Hundred and Fifty-Six United States Dollars (US\$1,582,856.00) in addition to 2673 pounds of marijuana was seized. It is believed that the proceeds gained from the 1st Respondent's drug trafficking in the USA have been laundered in Jamaica and used to acquire the properties listed herein. These properties have an estimated accumulated market value of Four Hundred Million Jamaican Dollars (J\$400,000,000.00).
- [47]** Enquiries conducted at the National Land Agency and the Stamp duty and Transfer Tax Department of Tax Administration Jamaica revealed that the properties in question are registered to or effectively owned by one or more of the Respondents to include Andrew Hamilton, Dorothy Hamilton, Paulette Higgins, Annmarie Cleary (now deceased), Devon Cleary, Andre Hamilton, Janet Ramsay as well as the companies Andrew Hamilton Construction Company and Andrehan Seafoods Company Limited.
- [48]** On the part of Andrew Hamilton, the ARA has asserted that there is no proof of any legitimate income or any other means to support his lifestyle and considering that his last known employment was in 1991 where he earned a minimal salary, it is believed that the money used to acquire these properties, are the proceeds of his unlawful 'criminal' conduct.
- [49]** Further searches and checks also revealed that none of the other Respondents had the means or income to justify any legitimate account of them acquiring said assets. Local investigations at the National Land Agency and Stamp Duty and Transfer Tax Department of Tax Administration Jamaica revealed that the

estimated value of the real property in Jamaica are Three Hundred and Nineteen Million Seven Hundred Thousand Jamaican Dollars (J\$319,700,000.00) and Three Hundred Thousand United States Dollars (US\$300,000.00). In February to December 2010, the 1st Respondent began disposing of some of these real estate assets after DEA agents seized some of his United States currency and marijuana in the United States and local law enforcement officers searched two of his Kingston 6 properties in Jamaica. Further investigations revealed that the properties were sold to overseas persons who had been visiting Jamaica at the time they purchased the properties. It is suspected that these properties were disposed of to avoid satisfying any judgment, whether forfeiture or civil recovery orders that may be made against the assets consequent to said judgment. Considering Andrew Hamilton's work history, it is believed that a presumption has been raised that he would not have been able to generate an income that would justify him acquiring and sustaining these properties at such values. When the two Respondent companies were examined based on their modus operandi it is believed that they were used as a front or shell company to launder proceeds of Andrew Hamilton's criminality.

- [50]** The genealogy reports presented are of value in that they show a relationship between the 1st Respondent and the 2nd, 3rd, 7th and 8th Respondents.
- [51]** E. Ryan Dorsey, special agent assigned to the DEA and case officer assigned to the drug investigation of Andrew Hamilton swore to the fact that at the time of swearing to his affidavit on June 6, 2013 Andrew Hamilton was incarcerated in a federal prison. This is after having been indicted for drug offences and thereafter pleading guilty to drug trafficking conspiracy and conspiracy to launder money. He believes that it is reasonable to assume that Andrew Hamilton was generating a million dollars annually as a result of narcotics trafficking. During the course of his investigations, he was never aware of him having any legitimate job or source of income. It is believed that he laundered the proceeds of his criminality in Jamaica and would send monies to Jamaica to purchase assets in his name and the names of family members.

- [52]** Dharwin Diaz, an Intelligence Research Specialist assigned to the DEA was assigned to assist in the verification of persons and addresses of persons who purchased properties from Andrew Hamilton and others located at various locations in Jamaica. He employed the use of database to verify the names of persons and their addresses but all attempts to locate and interview the named purchasers were futile.
- [53]** Counsel for the Respondents has argued that the evidence contained in these affidavits is based on mere belief without the source of the belief being stated and so it renders the evidence unreliable and therefore no weight should be placed on it.
- [54]** It is a fact that both Mr. Rose and Ms. Dorsey spoke to their beliefs however what is to be noted is that in the case of Ms. Dorsey she was the special agent specially assigned to the drug investigation of Andrew Hamilton and so was intimately connected with the investigations. Ms Dorsey also spoke affirmatively to the results of her investigation which included seizure of marijuana from Andrew Hamilton, money taken from him during a vehicle stop, money taken from his apartment in California and from his residence in Georgia. The evidence is supported by documentary evidence such as the indictment which sets out the charges against Andrew Hamilton and so therefore although there is some indication of their beliefs this is not all that is being relied upon.
- [55]** Whereas it is not enough to simply say the Respondents do not have any identifiable lawful income to form the basis for the acquisition of the properties, it is a factor to be considered along with the evidence of the unlawful conduct and the subsequent acquisition of the properties in question. I have taken into account the evidence contained in the supporting affidavits and I am of the view that it presents sufficient evidence for the Court to draw certain inferences. In light of Andrew Hamilton's guilty pleas this is indicative of unlawful conduct. There is the fact of all these properties of immense value registered in his name or in the names of persons connected to him. Similarly, in relation to these persons there is an

absence of any legitimate income to justify the acquisition of properties with the values ascribed to them. Based on that it would be near impossible for them to fund the properties identified from legitimate income. It is therefore reasonable on a balance of probabilities to find that the assets detained were derived through unlawful conduct.

ISSUE TWO

What is the effect of the Respondents' failure to file a Defence?

[56] In this Application for judgment to be entered, the main issue is whether this is an appropriate case for judgment to be entered. The Respondents have contended that their response is such that they have not submitted to the jurisdiction of the Court. I therefore have to firstly consider whether their Response is tantamount to a Defence.

[57] At the time the Amended Claim was filed in 2013 the POCA made no specific provisions for procedures to be followed in civil recovery matters. The normal rules of the CPR would then have been applicable. Rule 12 of the CPR sets out the circumstances under which a claimant may obtain judgment without a trial where the defendant has failed to file a defence in accordance with Part 10. The then applicable Rule 10.2 stipulated that a defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5). Rule 10.5 stipulates what the content of the defence should be. Nothing filed by any of the Respondents herein complied with these provisions.

[58] The POCA Rules having been enacted are said to apply to both old and new proceedings. These Rules make provision for what to do where there is a failure to file a Defence. The specific POCA Rules for consideration are r. 10.8, 10.9 and 10.10. Rule 10.8 addresses considerations that the Court should make where the issue of default judgment arises upon the Respondent's failure to file either an Acknowledgement of Service or a Defence. Rule 10.9 stipulates that the Court may

proceed in considering an application for default judgment against more than one Respondent.

[59] According to Rule 10.8 (2), the Court shall not enter judgment to the Claimant and against the Respondent for failure to file a Defence unless service of the Claim Form and supporting documents is proved. Further, judgment may be entered where the Respondent has filed an Acknowledgement of Service but not a Defence within the requisite time and there is no application pending for an extension of time to file said Defence.

[60] Whether under the CPR or under the POCA Rules a party who intends to defend a matter is required to file firstly an Acknowledgement of Service and thereafter a Defence and so the Respondents would have been required to comply with these provisions if they intended to defend the matter.

[61] For an application like this the Registry is not empowered to enter the Default Judgment but rather that it should be a judicial decision. This was made clear in the **Norris Nembhard** decision where the Court of Appeal made the following observation at paragraph 54 in respect of the Default Judgment that was granted:

“It was not an order which was made merely by an administrative act of the registry, as in the case of default judgments on a claim for a specified sum of money. There was, therefore, judicial scrutiny and assessment of the claim on which the order was ultimately made”

[62] Taking this into account, it is for me to examine the Amended Claim Form and the Particulars of Claim to determine whether the Respondent is entitled to the Orders being requested. Counsel on behalf of the Respondents has argued that the pleadings are insufficient however, based on my examination of the pleadings I find this argument to be without merit. The pleadings clearly set out what is being contended which included the fact that the identified assets represent directly or indirectly the proceeds of the unlawful conduct of the 1st Respondent. Counsel had also argued that there is no averment of any unlawful conduct on the part of any Respondent other than the 1st Respondent however, I do not find that it is

necessary to establish unlawful conduct on the part of all of the Respondents as it is the properties acquired which should be subject to acquisition by unlawful means and the unlawful conduct does not have to be attributable to the owner of the property.

[63] The Respondents are not exempt from providing an explanation as to how the proceeds were obtained. Some amount of evidential burden of proof is placed on the Respondent. The position was explained by McIntosh J. in **Assets Recovery Agency v Rohan Anthony Fisher, Delores Elizabeth Miller, Ricardo Fisher and Karen Vassell** [2012] JMSC Civ No. 16, a case involving an application for civil recovery of seized property. At paragraph [57] of his judgment, McIntosh J. stated:

“[17] Even though these proceedings are quasi criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.”

[64] McIntosh J. further stated that some of the authorities cited before the Court seemed to suggest that one should not look at the lifestyle of a person and conclude merely on that basis that the money in their possession was proceeds of an unlawful act.

[65] The Court must be careful not to draw any inference or conclusion based solely on a Respondent's lifestyle, and any presumption based on one's lifestyle is rebuttable. The Respondents' failure to reply by way of a Defence means they have failed to counter any of the allegations contained in the Amended Claim Form and Particulars of Claim. They have also failed to counter any of the allegations stated in the several affidavits. I therefore find that there is sufficient evidentiary material on a balance of probabilities to support the fact that the properties were obtained through unlawful conduct.

[66] I next have to consider whether there is any basis to prevent the granting of a civil recovery order. Section 58(3) and (4) of the POCA outline the following:

(3) If each of the conditions in subsection (4) is met, the Court shall not make in a recovery order any provision in respect of recoverable property unless it is just and equitable to do so.

(4) The conditions referred to in subsection (3) are that-

- (a) the respondent obtained the recoverable property in good faith;***
- (b) the respondent took steps after obtaining the property, which he would not have taken if he had not obtained it, or he took steps before obtaining the property, which he would not have taken if he had not believed he was going to obtain it;***
- (c) when the respondent took the steps mentioned in paragraph (b), he had no notice that the property was recoverable; and***
- (d) if a recovery order were made in respect of the property, the order would, by reason of the steps mention in paragraph (b), be detrimental to the respondent.”***

[67] Based on what has been presented to me, there is no evidence that any of the conditions under section 58(4) have been satisfied and therefore no basis to prevent the making of a recovery order.

[68] Section 58 (8) provides that once a recovery order which is in place includes real property, the Order vests the real property in the Crown. The section also states that section 9 (3) – (5) of the Act shall apply to the real property, with the necessary modifications. According to section 58 (4), all other recoverable property which is not real property shall vest in the Assets Recovery Agency.

[69] In light of the provision of section 88(5), property is not recoverable while a restraint order applies to the property, the restraint orders in place would first have to be discharged. In addition to that, the order appointing the interim receiver would also have to be discharged.

[70] I am of the view that the ARA has satisfied all the requirements for the grant of the orders sought and I therefore make the following Orders:

1. Civil recovery orders pursuant to section 57 of the Proceeds of Crime Act, 2007 in relation to the assets listed in Table 1.
2. Civil recovery orders pursuant to section 57 of the Proceeds of Crime Act, 2007 in relation to the assets listed in Tables 2 and 3.
3. Any person in possession of the items listed in Table 2 deliver up and over to the Applicant/Claimant the said items within 21 days of the date of service or other publication of this Order as this Honourable Court might allow.
4. That the Order of this Honourable Court appointing Kenneth Dave Tomlinson of Business Recovery Services Limited, 11 Connolly Avenue, Kingston 4 in the parish of Saint Andrew as interim receiver in accordance with the terms and provisions of the Order be discharged.
5. That the Restraint Order of the Honourable Mr Justice Bryan Sykes (as he then was) made on September 30, 2013 be discharged.
6. Costs to the Applicant/Respondent to be agreed or taxed.

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Stephane Jackson-Haisley
Puisne Judge