

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2023/0002

BETWEEN:

VINCENT CASSELL

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Eddy Ventose

Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton KC for the Appellant.

Mr. Oris Sullivan, Director of Public Prosecutions, for the Respondent.

2023: September 19;
December 8.

Refusal of application to discharge a restraint order – Appellate interference with trial judge’s discretion – Whether the learned judge erred by refusing the appellant’s application to discharge the restraint order – Procedure for obtaining a restraint order under the Proceeds of Crime Act – Whether an application for a restraint order must be made by fixed date claim form and comply with the provisions of Part 8 and 17 of the Civil Procedure Rules 2000 – Joint tenancy – Appellant and wife owning property subject to restraint order jointly – Whether property owned jointly could be the subject of a restraint order – Whether, on an application for a restraint order, the applicant must adduce evidence of the value of the benefit obtained by the defendant on account of his criminal conduct – Risk of dissipation - Whether there was evidence of a risk of dissipation of assets

On 14th December 2022, the Director of Public Prosecutions (the “DPP” or “respondent”) made an *ex parte* application (“the Application”) for a restraint order pursuant to section 41(3) of the Proceeds of Crime Act (“POCA” or the “Act”). The Application was supported by the affidavit of police constable Sean Mason. The basis of the Application was that the appellant was the subject of a criminal investigation and had been charged with a number of offences, including conspiracy to cheat the public revenue between the period

2013-2018 when he was president of the Montserrat Football Association (the “MFA”). The allegation was that in his position as president he was in receipt of “a[n] ‘honoraria’ salary” from the MFA at \$5,000.00 per month during this period. Additionally, on 31st August 2018, the appellant received an honorarium from the Confederation of North, Central America and Caribbean Association Football (“CONCACAF”). It was alleged that he had failed to declare to the Inland Revenue Department (the “IRD”) payments he had received from the MFA in his capacity as president, which were liable to taxation, and that he had also failed to file a personal tax return in 2018 declaring the CONCACAF honorarium. By so doing, he evaded tax liability on the latter amounting to EC\$20,250.00. The investigations eventually culminated in charges being laid against the appellant and an indictment was filed on 24th March 2023.

The evidence before the judge below was that the day to day running of the MFA was conducted by the appellant as the principal officer of the MFA, along with MFA’s secretary, Tandica Hughes. The allegation was that the appellant and Hughes had conspired to cheat the public revenue. The DPP sought to restrain two parcels of land which were registered in the joint names of the appellant and his wife. The couple’s matrimonial home had stood on one of these for some thirty years. On 15th December 2022, the judge granted the DPP’s *ex-parte* application. By application dated 15th February 2023, the appellant sought to set aside the restraint order. By order dated 8th March 2023, the judge dismissed the appellant’s set aside application and continued the restraint order originally granted on 15th December 2022.

Being dissatisfied with this decision, the appellant appealed. Whilst filing several grounds of appeal, five main issues arose for determination at the hearing of the appeal, namely: (1) whether an application for a restraint order under POCA must be commenced by fixed date claim in accordance with the Civil Procedure Rules 2000 (the “CPR”); (2) whether property jointly owned by a defendant may be the subject of a restraint order; (3) whether, on an application for a restraint order, the applicant must adduce evidence of the value of the benefit obtained by the defendant on account of his criminal conduct; (4) whether there was evidence of a risk of dissipation; and (5) whether the restraint order should be discharged for material non-disclosure at the *ex parte* hearing of the application.

Held: allowing the appeal on ground 6 of the appellant’s grounds of appeal, discharging the restraint order granted on 8th March 2023 and making no order as to costs, that:

1. A restraint order under POCA is an order preventing a suspect from disposing of his assets. Its sole purpose is to preserve property to satisfy any confiscation order that might be made in the event of a later conviction. The POCA, in effect, provides a free-standing statutory regime for making an application for a restraint order. It prescribes the way the application should be made and the conditions that must be satisfied. Under the Act, on these facts, the judge needed to be satisfied that (1) a criminal investigation had commenced or that charges had been laid, and (2) that there was reasonable cause to believe that the offender had benefitted from his criminal conduct. This test is different from the test under rule 17.2(3) of the Civil Procedure Rules 2000 (the “CPR”) which stipulates that a court may only grant an interim remedy if (1) the matter is urgent or (2) it is otherwise necessary to do so in the interests of justice. Neither of these conditions are to be satisfied under the POCA. Contrary to counsel for the

appellant's assertions, there is nothing to warrant importing the CPR rules applicable to interim remedies under Part 17 or for invoking the CPR regime for instituting a claim by fixed date claim form under Part 8.

Sections 41 and 43 of the **Proceeds of Crime Act** Chapter 4.04 of the revised laws of Montserrat, 2019 applied.

2. The definition of property under the POCA is wide and includes land. A person holds property under the Act if they have an interest in property, and that interest may be a right (including a right to possession), any legal interest or estate or any equitable interest or power. The appellant, as joint owner, undoubtedly has an interest in the restrained property and it clearly falls within the definition of property under the Act. Further, the restrained property would be realisable property under the Act since the definition of realisable property does not exclude jointly owned property. Whilst the appellant and his wife were joint tenants, the reality is that each joint tenant has an interest in the property as joint owners of the whole property. Counsel's reliance on dicta in *Keithley Lake et al v Richard Vento et al* for the proposition that since joint property could only be severed voluntarily, a court ordered sale could not sever the joint tenancy and so such property could never be the subject of a restraint order, is misplaced. There is no provision under the Registered Land Act ("RLA") that would make the provisions of the POCA relating to restraint orders inapplicable to jointly owned property. Consequently, even though the property was jointly owned, it fell within the definition of realisable property under POCA and was therefore capable of being subject to a restraint order.

Keithley Lake et al v Richard Vento et al AXAHCVP2016/0012 (delivered 20th June 2019, unreported) distinguished; **Blackstone's Criminal Practice 2024** paragraphs E19.49-E19.51 and E19.57 considered.

3. A person benefits from criminal conduct if he obtains property as a result of or in connection with his criminal conduct. The value of the benefit is the value of the property so obtained or where a pecuniary advantage had been obtained, a sum of money equal to that advantage. In making a restraint order, the court's task is not to reach firm conclusions as to the precise extent of a suspect's benefit, rather the court's duty is to decide whether to make the protective order so that in the event of any confiscation order being made, it will be efficacious. On the facts, there was evidence on which the judge could be satisfied that the appellant had benefited from criminal conduct in relation to both the salary and the honorarium. There was also evidence in relation to the value of the benefit in relation to the honorarium. The fact that there was no evidence of the precise value of the benefit obtained by the appellant in relation to the failure to pay tax on his salary afforded no basis for the judge to discharge the restraint order. There is therefore no merit in the appellant's contention that the judge erred in holding that there were reasonable grounds for suspecting that the appellant had benefited from criminal conduct. Additionally, in so far as the appellant contended that the judge also erred in finding that there were reasonable grounds for suspecting that the appellant had committed a criminal offence, the judge was not required to be satisfied of this under the POCA. To the extent

therefore, that the judge appears to have added another condition to be satisfied, this was an error, but it caused no prejudice to the appellant.

Jennings v Crown Prosecution Service [2005] 4 All ER 391 applied.

4. Even where the statutory conditions for the grant of a restraint order are established, the court must not grant the order unless the prosecutor has established that there is a real risk of dissipation of assets. Whilst counsel for the respondent argued that evidence of dishonesty permitted a ready inference of a risk of dissipation, a finding of dishonesty in itself, is insufficient to constitute a real risk of dissipation. If the dishonesty itself is at the heart of the claim against the relevant defendant, the court may be able to draw the inference that the making out of that case against the defendant also establishes sufficiently the risk of dissipation. While the instances of dishonesty on the part of the appellant as referred to in Sean Mason's affidavit showed a pattern of evasive behaviour on the part of the appellant in so far as cooperating with IRD was concerned, there was no actual evidence before the judge of any attempt by the appellant to dissipate his assets. As the judge had provided no written reasons, the only insight into his thought process is from his order dated 8th March 2023. The judge's order failed to address the risk of dissipation at all. Since a restraint order ought not to be granted in the absence of evidence of a risk of dissipation, the judge's failure to deal with this factor was a fatal error of law. The Court of Appeal therefore exercised its discretion afresh and determined that this was not an appropriate case to infer a risk of dissipation merely because dishonesty was charged. The Court therefore allowed ground 6 of the appellant's grounds of appeal and discharged the restraint order.

Mitsuji Konoshita et al v JTrust Asia PTE Ltd BVIHCP2018/0047, BVIHCP2018/0020 (delivered 18th December 2018, unreported) followed; **Jennings v Crown Prosecution Service** [2005] 4 All ER 391 considered.

JUDGMENT

- [1] **WARD JA:** This is an appeal against the decision of the judge below, refusing to discharge a restraint order freezing the appellant's property which he granted on an *ex parte* basis to the respondent on 15th December 2022, pursuant to section 42(1) of the **Proceeds of Crime Act**¹ ("**POCA**" or the "**Act**").
- [2] The appellant advances the following grounds of appeal:
 - (1) The learned judge erred in law in failing to hold that an application for a restraint order could only be commenced by filing a fixed date claim

¹ Chapter 4.04 of the revised laws of Montserrat, 2019.

form in accordance with Part 8 and that a Part 11 application, refers to an application for an interlocutory order within a subsisting claim.

- (2) The learned judge erred in law in holding that joint property held by the respondent was realisable property within the meaning of the **Proceeds of Crime Act**.
- (3) The learned judge erred in law in holding that there were reasonable grounds for holding that the property would be the subject of a confiscation order.
- (4) The learned judge erred in law in determining that there were reasonable grounds for suspecting that the appellant had committed a criminal offence.
- (5) The learned judge erred in law in determining that there were reasonable grounds for suspecting that the appellant had benefited from criminal conduct.
- (6) The learned judge erred in law in holding that there was a reasonable risk of dissipation on the facts of this case, as there were no facts placed before the learned judge by the respondent to that issue beyond the bare allegation contained in the affidavit of Sean Mason.
- (7) The learned judge erred in law in not finding that there was material non-disclosure by the respondent as to the probable extent of the benefit as alleged.

[3] These several grounds of appeal give rise to 5 main issues on this appeal: (1) whether an application for a restraint order under **POCA** must be commenced by fixed date claim in accordance with the **Civil Procedure Rules 2000** (the “CPR”); (2) whether property jointly owned by a defendant may be the subject of a restraint order; (3) whether, on an application for a restraint order, the applicant must adduce evidence of the value of the benefit obtained by the defendant on account of his criminal conduct; (4) whether there was evidence

of a risk of dissipation; and (5) whether the restraint order should be discharged for material non-disclosure at the *ex parte* hearing of the application.

Background

- [4] To set these grounds of appeal in context, a brief background is necessary. On 14th December 2022, by notice of application, the Director of Public Prosecutions made an *ex parte* application (“the Application”) for a restraint order pursuant to section 41(3) of the **POCA**. The Application was supported by an affidavit sworn by police constable Sean Mason. The basis of the Application was that the appellant was the subject of a criminal investigation and had been charged with a number of offences, including conspiracy to cheat the public revenue between the period 2013-2018 when he was president of the Montserrat Football Association (the “MFA”). The allegation was that in his position as president he was in receipt of “a[n] ‘honoraria’ salary” from the MFA at \$5,000.00 per month during this period. Additionally, on 31st August 2018, the appellant received an honorarium from the Confederation of North, Central America and Caribbean Association Football (“CONCACAF”). It was alleged that he had failed to declare to the Inland Revenue Department (the “IRD”) payments he had received from the MFA in his capacity as president, which were liable to taxation, and that he had also failed to file a personal tax return in 2018 declaring the CONCACAF honorarium. By so doing, he evaded tax liability on the latter amounting to EC\$20,250.00. The evidence before the judge below was that the day to day running of the MFA was conducted by the appellant as the principal officer of the MFA, along with MFA’s secretary, Tandica Hughes. They were the only full-time employees of the MFA during the period under investigation. They were both responsible for the payment of taxes due to the IRD by the MFA and were obligated to provide employees of the MFA with a certificate by 31st January each year detailing amounts paid and deducted from the employee’s emoluments. They were also obligated to furnish the comptroller of the IRD with 2 copies of each employee’s certificate. The allegation was that the appellant and Hughes had conspired to cheat the public revenue. The Director of Public Prosecutions sought to restrain two parcels of land which were registered in the joint names of the appellant and his wife; on one of which the couple’s matrimonial home had stood for some thirty years.

- [5] The investigations eventually culminated in charges being laid against the appellant and an indictment was filed on 24th March 2023.
- [6] Before addressing the grounds of appeal and the issues to which they give rise, it is important to note that whether to grant, vary or discharge a restraint order is a matter of judicial discretion. To the extent that this Court is being asked to interfere with the exercise of the judge's discretion, I remind myself of the need for appellate restraint when reviewing the exercise of judicial discretion. The principles that inform an appellate court's interference with the exercise of a judge's discretion were articulated by the learned Chief Justice Sir Vincent Floissac, as he then was, in **Dufour and Others v Helenair Corporation Ltd and Others**:² In summary, an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.
- [7] An appellate court is therefore required to exercise some restraint and must not interfere with the judge's order simply because it disagrees with the weighting which the judge has ascribed to any particular factor or because it would have exercised its discretion differently.

Discussion

Issue 1: Whether an application for a restraint order under POCA must be commenced by fixed date claim form pursuant to CPR Part 8

- [8] On behalf of the appellant, Mr. Dane Hamilton KC submitted that an application for a restraint order is in the nature of civil proceedings. He submitted that a restraint order is analogous to a freezing order under Part 17 of the CPR. As such, rule 8.1 of the CPR requires that such proceedings be commenced by

² (1996) 52 WIR 188.

fixed date claim form in order to properly invoke the court's jurisdiction. Mr. Hamilton referenced Part 17.2(5) to buttress his point by submitting that rule 17.2(5) makes clear that where an interim remedy is sought prior to the commencement of a claim, the applicant must give an undertaking as to the filing of the claim. Mr. Hamilton submitted that the application did not comply with any of these requirements of the CPR, with the result that the court's jurisdiction to hear the application was not properly invoked.

- [9] For the respondent, the Director of Public Prosecutions, Mr. Oris Sullivan, submitted that the procedure to be employed in applying for a restraint order is outlined in the **POCA**. Thus, there is no need to resort to the CPR. Mr. Sullivan submitted that to require that the application be commenced by way of fixed date claim form would defeat the purpose of **POCA** in so far as it provides for the application to be made *ex parte*.

Discussion and analysis Ground 1

The legal framework under POCA

- [10] For present purposes, the relevant provisions of **POCA** are set out below:

“Conditions for exercise of powers

41. (1) The Court may exercise the powers conferred by section 42 if—

- (a) a criminal investigation has been started in Montserrat with regard to an offence and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct;
- (b) proceedings for an offence have been instituted in Montserrat and not concluded and there is reasonable cause to believe that the defendant has benefited from his criminal conduct;
- (c) an application by the prosecutor has been made under section 27, 28, 35 or 36 and not concluded, or the Court believes that such an application is to be made, and there is reasonable cause to believe that the defendant has benefited from his criminal conduct;
- (d) an application by the prosecutor has been made under section 29 and not concluded, or the Court believes that such an application is to be made, and there is reasonable cause to believe that the Court will decide under that section that the amount determined under the new calculation of the defendant's benefit exceeds the relevant amount, as defined in that section; or

(e) an application by the prosecutor has been made under section 30 and not concluded, or the Court believes that such an application is to be made, and there is reasonable cause to believe that the Court will decide under that section that the amount determined under the new calculation of the amount available to the defendant exceeds the relevant amount (as defined in that section).

(2) Subsection (1)(b) is not satisfied if the Court believes that—

(a) there has been undue delay in continuing the proceedings; or

(b) the prosecutor does not intend to proceed.

(3) If an application mentioned in subsection (1)(c), (d) or (e) has been made, the condition specified in the relevant paragraph is not satisfied if the Court believes that—

(a) there has been undue delay in continuing the application;
or

(b) the prosecutor does not intend to proceed.

(4) If subsection (1)(a) is satisfied—

(a) references in this Part to the defendant are to the alleged offender;

(b) references in this Part to the prosecutor are to the person the Court believes is to have conduct of any proceedings for the offence; and

(c) section 7(2) has effect as if proceedings for the offence had been instituted against the defendant when the investigation as started.

Restraint orders 42.

(1) If any paragraph in section 41(1) is satisfied, the Court may, on the application of the prosecutor, by order, prohibit any person specified in the order from dealing with any realisable property held by him, subject to such conditions and exceptions as may be specified in the order.

(2) Without limiting subsection (1) and subject to subsection (3), a restraint order may make such provision as the Court thinks fit for—

(a) reasonable living expenses and reasonable legal expenses;
or

(b) enabling any person to carry on any trade, business, profession or occupation.

(3) A restraint order may apply—

(a) to all realisable property held by the person specified in the order, whether the property is described in the order or not; and

(b) to realisable property transferred to the person specified in the order after the order is made.

(4) On the application of the prosecutor, whether made as part of the application for the restraint order or subsequent thereto, the Court may make such order as it considers appropriate for ensuring the restraint order is effective.

(5) Where the Court has made a restraint order, a police officer may, for the purpose of preventing any property to which the order applies being removed from Montserrat, seize the property.

(6) Property seized under subsection (5) must be dealt with in accordance with the Court's directions.

Application, discharge and variation

43. (1) A restraint order—

(a) may be made on an *ex parte* application to a judge in chambers; and

(b) must provide for notice to be given to persons affected by the order.

(2) An application to discharge or vary a restraint order or an order made under section 42(5) may be made to the Court by the prosecutor or by any person affected by the order.

(3) On an application under subsection (2), the Court—

(a) may discharge or vary the restraint order;

(b) if the application was made on the basis that proceedings were instituted or an application was made, the Court must discharge the restraint order on the conclusion of the proceedings or the application, as the case may be;

(c) if the application was made on the basis that an investigation was started or an application was to be made, the Court must discharge the restraint order if within a reasonable period proceedings for the offence are not instituted or the application is not made, as the case may be.”

[11] In simple terms, a restraint order under **POCA** is an order preventing a suspect or defendant from disposing of his assets. The sole purpose for obtaining a restraint order is to preserve a property to satisfy any confiscation order that

might be made in the event of a later conviction. The manner in which an application for a restraint order is made is regulated by section 43(1) which provides that it may be made on an *ex parte* application before a judge in chambers. In Montserrat, an application for a restraint order may be made even before a charge is laid provided that a criminal investigation has commenced.

[12] Notwithstanding, Mr. Hamilton invokes CPR 8.1 and 17.2(5) in support of his contention that the court's jurisdiction to hear an application for a restraint order may only be invoked by filing a fixed date claim. The argument proceeds on the premise that an application for a restraint order under **POCA** constitutes civil proceedings and as such is governed by the CPR. Secondly, it posits that a restraint order is analogous to a freezing order under rule 17.1(1)(j), and that where a restraint order is applied for prior to charges being laid rule 17.2(5) requires that an undertaking be given by the applicant to serve the "claim form" by a specified date. In effect, the submissions amount to saying that to apply for a restraint order under **POCA** is to seek an interim remedy under Part 17 of the CPR so that Parts 8 and 17.2(5) apply. These provisions require some examination.

[13] CPR 8.1 provides so far as relevant:

“(1) A claimant starts proceedings by filing in the court office the original and one copy (for sealing) of-

- (a) the claim form; and (subject to rule 8.2);³
- (b) The statement of claim; or
- (c) if any rule or practice direction so requires—an affidavit or other document...”

[14] Rule 8.1(6)(a) provides that a person who seeks a remedy before proceedings have started must seek that remedy by an application under Part 11. Part 11 deals with applications for court orders made before, during or after the course of proceedings.

[15] So far as relevant, rule 17.2 provides:

“17.2 (1) An order for an interim remedy may be made at anytime, including –

³ Rule 8.2 deals with issuance and service of claim with or without statement of claim as applicable.

- (a) after judgment has been given; or
- (b) before a claim has been made.

(2) Paragraph (1) is subject to any rule which provides otherwise;

(3) The court may grant an interim remedy before a claim has been made only if –

- (a) the matter is urgent; or
- (b) it is otherwise necessary in the to do so in the interests of justice.

(4) ...

(5) If the court grants an interim remedy before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date.”

[16] By virtue of rule 2.2, the CPR applies to all ‘civil proceedings’ in the Eastern Caribbean Supreme Court across the member states. The expression “civil proceedings” is defined as including judicial review and applications to the court under the Constitution of any Member State or Territory under Part 56. However, the rules are disapplied in relation to certain types of proceedings, including “any other proceedings in the Supreme Court instituted under any enactment, in so far as Rules made under that enactment regulate those proceedings...” (Rule 2.2(3)).

[17] Bearing in mind that the very limited and only purpose for which a restraint order is applied, is to preserve property to satisfy a confiscation order following a conviction in criminal proceedings, it is difficult to see how the provisions of CPR Parts 8 and 17 can have any application. There is never any intention to issue a claim within the meaning of the CPR, thus rule 17.2(5), which speaks in mandatory terms, would make no sense in the context of an application for a restraint order. There is, and never will be, any substantive claim in respect of which such an undertaking can be given. The only process that may ensue, if any, is a criminal charge against the defendant.

[18] There are further difficulties in accepting the proposition that an application for a restraint order must be instituted by a fixed date claim form. These have been discussed by at least one academic work authored by Nicola Suter, a former

Criminal Justice Advisor to the Organization of Eastern Caribbean States. Suter makes the following observation in her text **Guide to Investigation and Prosecution of Serious Organised Crime**, 5th edn:

“11.2 Some courts in the Eastern Caribbean have been stipulating that applications for restraint orders to be lodged with a fixed date claim form as opposed to an application form. It is suggested that this practice is not one that should be maintained. First and foremost, a fixed date claim form puts the respondent on notice of the hearing which is inconsistent with the intention of the restraint process.

11.3 In addition, the fixed date claim form invites the respondent to avoid a hearing by making payment of the fine in full. Again, this is inconsistent with the rationale of the restraint order, which is an interlocutory measure to preserve assets pending the making of a confiscation order; given that a confiscation order is unlikely to have been made when the restraint order is sought then the respondent could not possibly know how much to pay.

11.4 There are several possible unhappy consequences of applying for a restraint order using a fixed date claim form, the most serious being that the DPP is pursued for damages in the event that the defendant were to sell all of the assets listed in the draft order and ‘pay the fine in full’ only to be acquitted at trial.”

- [19] There is force in these arguments and I adopt them.
- [20] In my view, the **POCA** provides a free-standing statutory regime for making an application for a restraint order. It prescribes the way the application should be made. It also prescribes the conditions that must be satisfied before a judge may exercise his discretion to grant a restraint order. Under the **Act**, the judge must be satisfied of two things. First, that one of the conditions in section 41(1) is satisfied. Applied to this case, the first condition would be that a criminal investigation had commenced but had not been concluded and that charges had been laid. Secondly, the judge must be satisfied that there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. “Criminal conduct” is conduct which constitutes an offence or would constitute an offence if it had occurred in Montserrat: section 2(1).
- [21] Clearly, the test under **POCA** is a different test to that articulated under rule 17.2(3), which stipulates that the court may grant an interim remedy before a

claim is issued only if (a) the matter is urgent; or (b) it is otherwise necessary to do so in the interests of justice. Neither of these conditions is required to be satisfied under the **POCA**. It is clear, therefore, that **POCA** prescribes its own test for the grant of a restraint order, independent of any prescriptions under CPR. Once the two conditions under **POCA** are met, the judge may by order prohibit any person specified in the order from dealing with any realisable property held by him, subject to such conditions and exceptions as may be specified in the order.

[22] Furthermore, **POCA** also prescribes, without limitation, the kind of provisions that may be contained within the order. It makes provision for the circumstances under which a restraint order may be varied or discharged as described in sections 43(3)(b) and (c), and identifies the persons who have standing to make such applications.

[23] In my view, there is no warrant for invoking the CPR regime for instituting a claim or for importing the CPR rules applicable to applications for freezing orders or interim remedies generally simply because a restraint order may be viewed as akin to a freezing order.

[24] For the reasons discussed at paragraphs 17 - 23 above, I am of the view that the Application for a restraint order was made in accordance with the provisions of the **POCA** and was properly before the judge, who had jurisdiction to entertain it. There is no requirement that the matter be commenced by a fixed date claim form pursuant to Part 8. I would accordingly dismiss ground 1.

[25] If there is currently a practice of commencing such applications by fixed date claim, as Mr. Hamilton asserts, that practice should be discontinued. In my view it suffices if the application is made in writing and is accompanied by an affidavit or a witness statement. The time might be propitious to consider complementing the provisions of **POCA** in relation to applications for restraint orders with detailed provisions made under Criminal Procedure Rules as is the case in England where applications for a restraint order are governed by Part 33 of the

Criminal Procedure Rules. Under that regime, the application for a restraint order must simply be in writing and supported by a witness statement.

Issue 2: Whether property jointly owned by the defendant may be the subject of a restraint order

[26] The grounds giving rise to this issue are grounds 2 and 3. Mr. Hamilton submitted that since the appellant holds the restrained property as a joint tenant with his wife, he has no severable interest on which the restraint order can be fixed. Citing **Eunice Edwards v Keithley Edwards et al**,⁴ Mr. Hamilton submitted that a joint tenant's interest is the right of survivorship since no joint proprietor has a definable share which can be sold or transferred. Mr. Hamilton further submitted that the court has no power to make an order for the sale of one proprietor's interest to the exclusion of the other proprietor's interest where the joint proprietorship exists and has not been severed by the voluntary act of both joint proprietors. For this proposition, he relied on the dicta of Webster JA [Ag.] in **Keithley Lake et al v Richard Vento et al**.⁵ Mr. Hamilton urged caution in applying the wide interpretation of realisable property as defined in **POCA** and submitted that consideration must be given to the fact that the **Act** makes no provision for the severance of a joint tenancy upon the making of a confiscation order. For these reasons, he submitted, the judge erred in law in holding that the joint property held by the appellant was realisable property and that there were reasonable grounds for holding that the property would be the subject of a confiscation order.

[27] In reply, Mr. Sullivan submitted that there is no rule of law that prevents jointly owned property from being restrained. In support of this contention, he invited the Court to consider the definition of "property" as contained in section 3(1) of the **Act**, and section 3(2), which provides that property is held by a person if he holds an interest in it. Mr. Sullivan also relies on the definition of realisable property at section 14, which definition includes "any property held by the defendant". Applying these definitions, he submitted that the property in which

⁴ ANUHCVP2005/0015 (delivered 14th March 2007, unreported).

⁵ AXAHCVP2016/0012 (delivered 20th June 2019, unreported).

the appellant holds an interest in realisable property and can be the subject of a restraint order.

Discussion

- [28] The starting point is to look to the **Act** to identify what property it renders susceptible to a restraint order. First, the **Act** defines property in the following terms:

“Meaning of, and provisions relating to, “property”

3. (1) “Property” means property of every kind, whether situated in Montserrat or elsewhere, and includes—

- (a) money;
- (b) all forms of real or personal property; and
- (c) things in action and other intangible or incorporeal property.

(2) The following provisions apply in relation to property for the purposes of this Act—

- (a) property is held by a person if he holds an interest in it;
- (b) property is obtained by a person if he obtains an interest in it;
- (c) property is transferred by one person to another if the first person transfers or grants to the other person an interest in the property;
- (d) a reference to property held by a person includes a reference to property vested in his trustee in bankruptcy or, in the case of a company, its liquidator; and
- (e) a reference to an interest held by a person beneficially in property includes a reference to an interest that would be held by that person beneficially if the property were not vested in his trustee in bankruptcy or, in the case of a company, its liquidator.

(3) “Interest”, in relation to property includes—

- (a) a right, including a right to possession of the property;
- (b) any legal interest or estate; and
- (c) any equitable interest or power.”

- [29] This definition of property is very wide and clearly includes land. A person holds property if they have an interest in property and that interest may be a right, including a right to possession of the property, any legal interest or estate or any equitable interest or power. Applied to this case, the restrained property is clearly property within the meaning of the **Act** and the appellant, as a joint owner, undoubtedly has an interest in that property.

[30] The next question is whether the property is realisable property within the meaning of the law. The term realisable property is defined at section 14 in the following way:

- “14. (1) Subject to subsection (2), “**realisable property**” means—
 (a) any property held by the defendant; or
 (b) any property held by the recipient of a tainted gift.
(2) Property is not realisable property if an order under any of the following provisions is in force in respect of that property—
 (a) section 28 of the Drugs (Prevention of Misuse) Act (forfeiture order);
 (b) sections 65, 79, 86 or 105 of this Act; or
 (c) Article 15 or 16 of the Anti-terrorist Financing Order.”

[31] Notably, subsection (2) does not exclude jointly owned property from the definition of realisable property, and for present purposes, none of the exceptions created by subsection (2) applies. Having regard to sections 3(2) and (3), the appellant holds the restrained property within the meaning of section 3 and section 14(1)(a) of the **Act**. The appellant holds an interest in that property because as a joint tenant with his wife, in law, he is a joint owner of the property and both he and his wife own the whole property, subject to the equal interest of each other.⁶ While the right of survivorship is an incident of a joint tenancy, it is not correct to describe this as representative of the only interest of a joint tenant in the property. Each joint tenant has an interest in the property, which on death, vests in the surviving joint tenant. The essence of a joint tenancy was succinctly captured by Webster JA [Ag.] in **Keithley Lake** when he stated at paragraph 29:

“...[E]ach proprietor owns everything and yet owns nothing individually, and no proprietor can claim or be entitled to a separate interest in the property.”

[32] This does not mean, and does not say, as Mr. Hamilton argued, that a joint tenant has no interest in the property except the right to survivorship; each joint tenant owns the whole property subject to the equal interest of the others. The appellant therefore has an interest in the property because he is the joint owner of the whole property with his wife. When the definitions of property and realisable property are applied, it yields the undoubted conclusion that the

⁶ Sampson Owusu, *Commonwealth Caribbean Land Law* at p. 321.

appellant holds the restrained properties because he has an interest in them, and his interest in the property and the property itself are realisable property within the meaning of the **Act**.

[33] Mr. Hamilton made the further submission that on a confiscation hearing, the court would have no power to make an order for the sale of one proprietor's interest to the exclusion of the other proprietor's interest where the joint proprietorship exists and has not been severed by the voluntary act of both joint proprietors. As such, the property cannot be realisable property and therefore cannot be subject to a restraint order. I understand Mr. Hamilton to be saying that since the purpose of a restraint order is to preserve assets to meet any confiscation order that may be made in the event of a conviction, if joint property can only be severed voluntarily, and a court ordered sale does not have the effect of severing a joint tenancy, then jointly owned property cannot be realisable property and cannot therefore be the subject of a restraint order. Mr. Hamilton relies on the dicta of Webster JA [Ag.] in **Keithley Lake** to ground this submission.

[34] One must be careful not to lift Webster JA [Ag.]'s dicta out of context. In summary, in that case, the respondents obtained a final arbitration award against the appellants for US\$7,419,000.00 which was duly registered as a judgment of the High Court of Anguilla. As a means of enforcing the arbitration award, the respondents applied for the sale of four properties in Anguilla (which I will refer to as A, B, C and D) in which Mr. Lake had an interest. Parcel A was owned by Mr. Lake absolutely; parcel B was owned by him but his sister held an unregistered interest in it; parcel C was owned by Mr. Lake and his two sisters, as proprietors in common in one-third shares; parcel D was owned by Mr. Lake and his wife as joint proprietors. The master heard the application for the sale and ordered that the four properties be sold by public auction and directed that the proceeds of sale be divided in accordance with an order of priority set out in the order. Under Anguilla Law, that judgment operated as a charge on the properties.

[35] The issues on appeal were whether the Master was required to and/or did make an order in respect of the sister's unregistered interest in parcel B; whether the Master erred by ordering the sale of the entirety of parcel C in which Mr. Lake owned only a one-third interest as a proprietor in common; whether the Master erred by ordering the sale of the entirety of parcel D in which Mr. Lake owned an interest as a joint proprietor with his wife; and whether the Master erred in his identification and application of the legal principles relating to lands owned by joint proprietors and proprietors in common.

[36] In relation to parcel D, in which Mr. Lake held an interest as a joint tenant, the court identified the sole issue as whether the operation of the judgment as a charge or the learned Master's order for the sale of that parcel had the effect of severing the joint tenancy.

[37] The provisions of the Registered Land Act⁷ ("RLA") and the Judgments Act⁸ of Anguilla were critical in resolving the issues. Section 2 of the RLA provided that:

"Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act..."

Section 107 of the RLA provides so far as relevant:

"(1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently -

(a) dispositions may be made only by all the joint proprietors; and

(b) on the death of joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly..."

[38] Section 2 of the Judgments Act, so far as material provided that:

"[a] judgment already entered up or hereafter to be entered up against any person in the High Court shall operate as a charge upon all lands of such person within Anguilla to the extent of his beneficial interest therein..."

Section 4 materially provides that:

"the court may at any time within 6 months or such further time as it may allow, from the filing of the application for an order of sale, make an order for the sale of the right, title, and interest of the judgment debtor

⁷ Chapter R30 of the laws of Anguilla.

⁸ Chapter J10 of the laws of Anguilla.

in the lands mentioned in the application, and may in connection with such order give such directions and impose such conditions as it may deem just.”

Section 8 provides that:

“after the sale of the interest of any judgment debtor in any lands under this Act, the judgment creditor shall furnish to the purchaser of the interest a transfer by charge in exercise of the power of sale in a form registerable under the Registered Land Act to the effect that the purchaser has purchased the interest of the judgment debtor.”
(Emphasis added)

- [39] The underlining of the words above was added by the Court of Appeal in that judgment. The Court held that on a proper construction of the Judgments Act and the Registered Land Act of Anguilla, the Court does not have the power to order the sale of the jointly owned property towards satisfaction of a judgment debt. The Court found at paragraph 21 that while the Judgments Act gives the court the power to sell the lands of a judgment debtor, the power is limited to selling the judgment debtor's interest in the land and that by inference, such a sale cannot include the interest of any other person in the land being sold, such as a proprietor in common.
- [40] The Court further held that a sale of land was a disposition within the meaning of the RLA, and since there had been no voluntary severance of the joint tenancy, the order for sale was irregular and did not have the effect of severing the joint tenancy in the property. The upshot of this is that property in Anguilla that is owned by joint tenants cannot be sold by a judgment creditor towards the satisfaction of a judgment debt owed by one of the joint owners without the consent of all the joint owners, or without severance of the joint tenancy to create a tenancy in common.
- [41] In my respectful view, this authority, which concerned the sale of the whole property of a judgment debtor, who was a proprietor in common with others, in favour of a judgment creditor has no application to the issue in the case at bar, which is whether jointly owned property is realisable property within the meaning of the **Act** and can therefore be restrained.

[42] Furthermore, the provisions of the **Registered Land Act**⁹ (the “**RLA**”) of Montserrat relating to reconciliation of that Act with other laws contains a proviso that “except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.”

[43] The proviso is contained in section 3 and reads in full:

“Reconciliation with other laws

3. Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:

Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.”

[44] By virtue of **POCA**, realisable property can be made the subject of a restraint order, and where granted, no one can deal with it save with the consent or approval of the court. Indeed, **POCA** works in tandem with the **RLA** of Montserrat by providing at section 45(1) that where the prosecutor applies for a restraint order, he “must be treated as a person having an unregistrable interest in any registered land, lease or charge to which the application relates, or to which a restraint order made on the application relates and he may lodge a caution with the Registrar of Lands under section 127(1) of the **RLA** forbidding the registration of dispositions of, and the making of entries affecting, the land, lease or charge.” Sections 127 - 131 of the **RLA**, with respect to the lodging of cautions, apply in relation to the caution lodged by the prosecutor: section 45(2).

[45] I can therefore discern no contrary intention in the **RLA** of Montserrat that would make the provisions of **POCA** relating to restraint orders inapplicable to jointly owned property in Montserrat. I can see nothing in the language of **POCA** that leads to the conclusion that jointly owned property is intended to be placed outside the reach of a restraint order. If that were the intention, much clearer

⁹ Chapter 8.01 of the revised laws of Montserrat, 2019.

words would be necessary. No such intention appears on the face of the **Act** and Mr. Hamilton has not referred the Court to any authority that says that jointly owned property is not realisable property and cannot be restrained as a matter of law.

[46] In practice, it is not uncommon that third parties holding a joint interest in property are affected by restraint and confiscation orders. One only has to peruse **Blackstone's Criminal Practice 2024** at paragraphs E19.49 *et seq* for a discussion, inter alia, regarding how the court should go about valuing a defendant's beneficial interest in shared property at the confiscation stage. For example, the learned authors state at E19.50: "[w]here an asset is jointly owned by defendants, the court must determine the extent of each owner's beneficial interest...The value is the normal sale price..." This approach aligns with section 15 of **POCA** which says that in relation to the value of property, where a person (the defendant) holds property and another person holds an interest in the property, the value of the property is the value of the defendant's interest in it, but in any other case, the value is the market value of the property. Further, at para E19.51, the learning in **Blackstone's** states: "When valuing D's beneficial interests in shared property, the fact that D's interest in the property cannot be realized without a court order or the consent of others does not mean that it has a nominal value only."

[47] More tellingly, as it relates specifically, to a shared interest in the family home, and how this is dealt with at the confiscation stage, the following passage at paragraph E19.57 is instructive:

"Frequently, D's shares in the value of the family home will be included in the available amount. At this stage the fact that the home may need to be sold to meet the order, and innocent family members suffer hardship as a result, is irrelevant to 'the arithmetic exercise' of calculating D's worth (Ahmed [2004] EWCA Crim 2599). The provisions are compatible with the ECHR (Danison v UK (1988) Appln. 45042/98, 7 September 1999). Arguments that the property ought not to be sold could, in an appropriate case, be pursued at the enforcement stage, on the basis of either the HRA 1998 or wider equitable principles (Reynolds [2017] EWCA Crim 57. In Re Kone [2017] EWHC 3763 (Admin), the

High Court appointed a receiver¹⁰ over a family home, holding that any interference with the family's property rights was proportionate to the legitimate aim of the confiscation order."

- [48] None of the foregoing is consistent with the appellant's contention that jointly owned property cannot be the subject of a confiscation order and therefore cannot be restrained.
- [49] If Mr. Hamilton's contentions are correct, such an interpretation would create a charter for criminals to place assets which are the benefit of criminal conduct beyond the reach of the court's processes by the easy device of joint ownership. An example of how this might arise is the case where matrimonial assets were derived from criminal conduct engaged in by both spouses; or where engaged in by the husband, the wife was fully aware of and complicit in the conduct of the husband. Surely, it cannot be that a restraint order cannot attach to the matrimonial property simply because it is jointly owned.
- [50] None of this is to say that an innocent third party who is a joint owner of property with a defendant is without recourse. Section 43(2) of the **Act** permits any person affected by a restraint order to apply to the court to have it varied or discharged. The court, met with such an application, will consider all the circumstances of the case, including whether or not the third party was complicit, and determine whether in all the circumstances the fact of joint ownership affords a reason to vary or discharge the restraint order. But that would be a matter of discretion, and not because jointly owned property *ipso facto* cannot be restrained as a matter of law.
- [51] For all of the foregoing reasons, I would dismiss grounds 2 and 3.

¹⁰ Sections 46 and 47 POCA provide for the appointment of a management receiver and enforcement respectively.

Issue 3: Whether, on an application for a restraint order, the applicant must adduce evidence of the value of the benefit obtained by the defendant on account of his criminal conduct

- [52] Although the written grounds of appeal, 4 & 5, contended that the judge erred in law in holding that there were reasonable grounds for suspecting that the appellant had committed a criminal offence; and that there were reasonable grounds for suspecting that the appellant had benefited from criminal conduct, the focus of the oral submissions before this Court was that the prosecutor had failed to establish that the appellant had obtained a benefit within the meaning of the **Act**, which, according to Mr. Hamilton, required there to be evidence before the judge of the value of the benefit allegedly obtained by the appellant from criminal conduct.
- [53] Mr. Hamilton submitted that there must at least be *prima facie* evidence of the value of the alleged benefit but that the affidavit of police constable Sean Mason, which was filed in support of the application, was completely devoid of any such evidence. Accordingly, the judge erred in law in finding that there was reasonable cause to believe that the appellant had benefitted from his criminal conduct.
- [54] For the respondent, Mr. Sullivan submitted that the appellant had advanced no arguments supporting this ground and had not shown the basis on which the contention is made. He invited the Court to find that paragraphs 44, 45 and 46 of Mason's affidavit gave full details of how the appellant had benefitted from criminal conduct.

Discussion

- [55] A person benefits from criminal conduct if he obtains property as a result of or in connection with his criminal conduct. The value of the benefit is the value of the property so obtained, or where a pecuniary advantage has been obtained, a sum of money equal to that advantage. At the stage of making the application for the restraint order, the prosecutor typically may not know the full extent of the defendant's benefit. Consequently, the application is usually to restrain all the defendant's realisable property because the precise value of the benefit is

not then known, especially where investigations are incomplete. Where, however, the prosecutor is aware that the defendant has benefitted by a specific amount, it is usual for them to apply to restrain only the value of that benefit. The case of **Jennings v Crown Prosecution Service**¹¹ which Mr. Sullivan drew to the court's attention is instructive in this regard. Laws LJ stated at paragraph 28:

"I think it very important to have in mind that in deciding whether to make a restraint order...the court's task is not to reach firm conclusions as to the precise extent of a respondent's benefit, or realisable property...though of course if those matters are plain the facts will be put before the judge. Rather...the court's duty is to decide whether to make a protective order so that in the particular case the satisfaction or fulfillment of any confiscation order made, or to be made, will be efficacious."(See also paragraph 44 of the judgment)

- [56] Although Laws LJ's comments were directed at section 77 of the Proceeds of Crime Act, 1988 UK, that admonition applies with equal force to the statutory regime in Montserrat.
- [57] The need to quantify the precise value of the defendant's benefit arises at the confiscation stage when the court must determine the amount of money to be recovered from him, which is referred to as "the recoverable amount" and is defined generally, as an amount equal to the defendant's benefit from the conduct. It is this amount which the defendant is ordered to pay under the confiscation order. If the defendant proves that he cannot meet that amount, then other formulae are applied. See sections 3 and 13 of **POCA**.
- [58] In this case, the criminal conduct alleged against the appellant was, in essence, conspiracy to cheat the public revenue in relation to a monthly salary of \$5,000.00 per month received from the MFA during the period 2013 to 2018; and an honorarium in the sum of \$67,500.00 received from CONCACAF in 2018, both of which the prosecution says were liable to taxation, which the appellant did not pay. The evidence before the judge was that he was the person responsible for making these payments on behalf of the MFA as it relates to his salary and that of the other employee. Indeed, there was evidence before the

¹¹ [2005] 4 All ER 391.

judge that on 1st September 2015, the MFA sent the appellant a letter requesting the immediate payment of overdue PAYE,¹² which tends to confirm that that was his responsibility. In relation to the honorarium, the appellant was personally responsible for declaring the CONCACAF honorarium in his 2018 tax return but failed to do so. Considering the foregoing, there is nothing to the appellant's point that "there are no facts that would permit the court to pierce the veil of the MFA. As such any pecuniary advantage as alleged that could have been received by the MFA cannot be attributed to the Appellant".¹³

[59] In relation to the salary, paragraph 41 of the affidavit of Sean Mason stated that, following seizure and examination of documents from the MFA, it was agreed that the MFA owed taxes amounting to EC\$313,010.03. He did not quantify the value of the benefit obtained by the appellant on account of the failure to pay taxes on his salary. The value of that benefit would be a sum equal to the pecuniary advantage obtained by the appellant. What was before the judge at that stage, however, was a global sum of taxes owed by the MFA, part of which, on the prosecution's case, represented the pecuniary advantage obtained by the appellant in relation to the failure to pay taxes on his salary. In relation to the honorarium, however, that sum was quantified at \$20,250.00. Sean Mason deponed that:

"45. On 31st August 2018 CASSELL also received an honorarium from the Confederation of North, Central American and Caribbean Football Association (CONCACAF) of EC\$67, 500.00. Mr Vincent Cassell did not declare this this income on a Montserrat income tax return, as he did not submit an income tax return for 2018. (Statement of Nicholas Faulkner paragraph 51, and exhibit FUALKNER018) **Appendix 8.**

46. In relation to the CONCACAF honorarium which Mr. Vincent Cassell failed to declare on an income tax return for the 2018 basic year, he has personally evaded EC\$20,250.00 of income tax. (statement of Nicholas Faulkner paragraph 52.)"

[60] To my mind, there was evidence on which the judge could be satisfied that the appellant had benefited from criminal conduct in relation to both the salary and the honorarium, which is one of the conditions to be satisfied under section

¹² Affidavit of Sean Mason at paragraph 28.

¹³ Appellant's written submissions at paragraph 18.4.

41(1)(a). There was also evidence in relation to the value of the benefit in relation to the honorarium. The fact that there was no evidence of the precise value of the benefit obtained by the appellant in relation to the failure to pay tax on his salary afforded no basis for the judge to refuse to grant the application or to subsequently discharge it. There is therefore no merit in the appellant's contention that the judge erred in holding that there were reasonable grounds for suspecting that the appellant had benefited from criminal conduct.

[61] In so far as it is said that the judge erred in law in determining that there were reasonable grounds for suspecting that the appellant had committed a criminal offence, there is no such requirement under section 41 of **POCA** and the judge was not required to be satisfied of this. To the extent that he appears to have added another condition to be satisfied, this was an error that caused no prejudice to the appellant.

[62] Accordingly, I would also dismiss grounds 4 and 5.

Issue 4: Whether there was evidence of a risk of dissipation

[63] This issue arises from ground 6 which complains that "the learned judge erred in law in holding that there was a reasonable risk of dissipation on the facts of this case, as there were no facts placed before the learned judge by the Respondent to that issue beyond the bare allegation contained in the affidavit of Sean Mason."

[64] Mr. Hamilton submitted that there was an obligation on the prosecution to establish that there is a real risk of dissipation of the defendant's assets. Mason's affidavit merely stated that he was advised that there is a real risk of dissipation, but the affidavit contained no facts supporting that assertion. The assets in question had been acquired by the appellant jointly, and long before the events in question. He had been under investigation for the present matters since March 2022 but there was no evidence that he had taken any steps to dissipate the assets. It was submitted that the judge wholly failed to treat with this necessary precondition and therefore fell into error.

[65] In response, Mr. Sullivan accepted that an applicant for a restraint order must show a risk of dissipation. He contended that what must be shown “is that there is a reasonable risk/likelihood that a suspect would dissipate his asset if it is known that a criminal investigation is ongoing.”

[66] Mr. Sullivan referred the court to paragraphs 13, 22, 33 -37 and 39-40 in Mason’s affidavit, which he submitted established a course of dishonesty embarked upon by the appellant and Ms. Hughes. He contended that this course of dishonest conduct formed the basis of the judge’s finding that there was a likelihood of dissipation. Mr. Sullivan submitted that where dishonesty is charged one can readily infer a real risk of dissipation. For this proposition he cited **Jennings v CPS**.¹⁴

Discussion

[67] It is by now uncontroversial that even where the statutory conditions for the grant of a restraint order are established the court must not grant it unless the prosecutor has established that there is real risk that the defendant would dissipate his assets. This is because, as previously stated, the sole purpose of applying for a restraint order is to preserve the defendant’s assets so that they are available to satisfy any confiscation order that may be made in the event of a conviction. If there is no risk of dissipation, then no application should be made for a restraint order. The learned authors of **Blackstone’s 2024** at paragraph D8.63, explain the rationale for the requirement to establish a risk of dissipation in the following way:

“As a basic principle, ‘if there is no [risk that property will be dissipated]... or the risk is merely fanciful, the order ought not to be made since, *ex hypothesi*, it would not be necessary for the achievement of its only proper purpose.’ (Re AJ and DJ (9 December 1992) unreported per Glidewell LJ.)”

[68] It was therefore incumbent on the prosecutor to set out reasons for fearing asset dissipation and incumbent on the judge to examine the material before him to see whether there was evidence to ground a finding that there was a risk of

¹⁴ Supra n. 11.

dissipation. Mr. Sullivan relies on the dicta in **Jennings v CPS** for the proposition that evidence of dishonesty permits a ready inference of a risk of dissipation. He suggested that this was the basis on which the judge found that there was a real risk of dissipation. I will first look at the principles to be derived from the authorities, and then examine whether the judge in fact found there was a risk of dissipation, and, if so, the basis for his finding.

[69] This Court has previously articulated the approach to be taken when considering the inference that may be drawn from dishonesty when determining whether a real risk of dissipation exists. In **Mitsuji Konoshita et al v JTrust Asia PTE Ltd**,¹⁵ Thom JA offered the following at paragraph 30:

“[A] finding of dishonesty in itself is insufficient to constitute a real risk of dissipation of assets. However...[w]here (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets.”

[70] In **Jennings v CPS**, this is what Laws LJ had to say at paragraph 61:

“Fear of dissipation of assets is the reason for seeking a restraint order. Such fear must, in fact, exist before an order should be applied for. But in a case where dishonesty is charged, there will usually be reason to fear that assets will be dissipated. I do not therefore consider it necessary for the prosecutor to state in terms that he fears assets will be dissipated merely because he or she thinks there is a good arguable case of dishonesty. As my Lord has said, the risk of dissipation will generally speak for itself. Nevertheless prosecutors must be alive to the possibility that there may be no risk in fact. If no asset dissipation has occurred over a long period, particularly after a Defendant has been charged, the prosecutor should explain why asset dissipation is now feared at the date of application for the order when it was not feared before.” (Emphasis added)

[71] I do not read this passage as providing *carte blanche* support for the wide terms in which Mr. Sullivan has stated the proposition. While it is true that where dishonesty is charged a risk of dissipation may be reasonably inferred, Laws LJ was careful to enjoin prosecutors to be alive to the fact that this may not necessarily be so and that there may be no risk at all. The particular

¹⁵ BVIHCMAP2018/0047, BVIHCMAP2018/0020 (delivered 18th December 2018, unreported).

circumstances of each case must be examined to determine whether such a risk exists. Material considerations (non exhaustive of course) will include whether any assets have been dissipated or attempts made to dissipate assets since the defendant was charged or since he knew that he was under investigation; and, also, the nature of the assets sought to be restrained, e.g. cash in bank accounts versus land.

[72] The instances of dishonesty referenced in Mason's affidavit may be summarised as comprising failure to produce records, attend meetings and file tax returns over many years (paragraphs 13 and 22); that Ms. Silcott of the IRD had been "duped" into providing a Tax Compliance Certificate to the MFA to ensure its continued funding by FIFA by representations to her that the MFA would provide evidence of income and tax payments by its employees for the period 2009 - 2016 but had failed to honour that promise (paragraphs 32 -34). I pause here to observe that on a proper reading of these paragraphs the appellant was not the person making these representations. It is also said that communication had been sent to the appellant advising him of the date on which the IRD intended to visit the MFA to conduct an audit, but he replied saying that day was inconvenient because he had just returned from overseas, and, further, that requested documents had been destroyed by faulty storage. Those documents that were supplied by the appellant were incomplete. He was also accused of consistently failing to provide the IRD with documents, thwarting searches and cancelling meetings with the IRD. (paragraphs 35 - 37).

[73] I have little difficulty in accepting that those complaints that are properly laid at the feet of the appellant, on the face of it, show a pattern of evasive behaviour in so far as cooperating with the IRD was concerned. My difficulty is in understanding why this is said to ground a fear that the appellant would dissipate the assets sought to be restrained. For the reasons that follow, it seems to me that this was not a case where the mere fact that dishonesty was charged provided a basis, without more, for inferring that there was a reasonable risk of dissipation.

[74] In this case, the application for the restraint order was made on 14th December 2022. The evidence before the judge was that the appellant had been under investigation since March 2022 and had already been charged by the time of the application. No evidence was placed before the judge of any attempt by the appellant to dissipate his assets. I agree with Mr. Hamilton that Mason’s affidavit contained only a bare assertion that the assets would be dissipated. Further, these assets were in the form of two parcels of land, and the matrimonial home had stood for thirty years on one of these. In my respectful view, these were relevant matters which the judge was required to take into account in determining whether the prosecutor had established that there was a risk of dissipation. It is to the judge’s order that I now turn to ascertain what weighed on his mind when granting and continuing the restraint order.

[75] The judge did not provide written reasons. The only insight into his thought process is gleaned from his order dated 8th March 2023 refusing the application to discharge the restraint order. That application was filed on 15th February 2023 and advanced 4 grounds in support. These were:

“(i) The Respondent/Applicant (the Director of Public Prosecutions) has failed to initiate these proceedings by way of Fixed Date Claim Form as required by the Civil Procedure Rules;

(ii) That the said Respondent/Applicant (the Director of Public Prosecutions) has failed to establish that there is reasonable cause to believe that the Applicant benefitted from the alleged criminal conduct which is the threshold requirement under Section 41(b) and 4(1) of the Proceeds of Crime Act;

(iii) The Respondent/Applicant (the Director of Public Prosecutions) has failed to establish by way of evidence that there is a serious risk of dissipation by the Applicant of the benefit, namely, assets derived from the alleged criminal conduct;

(iv) The Court has no jurisdiction to make a Restraint Order against the property owned by the Appellant and his wife as Joint Proprietors.”

[76] Ground (iii) is the only relevant one for present purposes. The judge’s order did not address this ground. In these circumstances, I find that I am unable to accept Mr. Sullivan’s submission that the court’s finding of a risk of dissipation was

based on the evidence of dishonesty that was before him.¹⁶ The question of the risk of dissipation was simply not addressed by the judge at all. What was required to be done by the judge, who was faced with an application to discharge the restraint order, on the grounds, inter alia, that there was no risk of dissipation, is captured in the following dicta of Longmore LJ in **Jennings v CPS** at paragraph 62:

“If there is a duty on the prosecutor to inform the court why, on the facts of a particular case, there is fear of dissipation and the prosecutor fails to discharge that duty, it would be a strong thing to discharge the order altogether. If an application is made by a Defendant to discharge or vary the order on the grounds that it is unreasonable to fear that his assets will be dissipated, the court will decide that question on the evidence. If the court considers that the prosecutor failed to consider whether there was a risk of dissipation when he should have done or failed to put relevant documentary material before the court but that the public interest still requires an order, the judge can deprive the prosecution of their costs...[i]f the public interest requires that an order should be made, an order should still be made.”

[77] That task was simply not performed by the judge. Since a restraint order ought not to be applied for, far less granted, in the absence of evidence of risk of dissipation, the judge’s failure to deal with this highly relevant factor is a fatal error of law. Exercising my discretion afresh and having regard to my findings at paragraphs [69] - [74], I would therefore allow ground 6 and discharge the restraint order.

[78] My conclusion on ground 6 would be sufficient to dispose of the appeal but I will nonetheless go on to say something about ground 7.

Issue 5: Whether there was material non-disclosure by the respondent at the *ex parte* hearing

[79] Ground 7 complains that the judge erred in not finding that there was material non-disclosure by the respondent as to the probable extent of the benefit as alleged. Mr. Hamilton submitted that there was evidence before the judge, contained in the appellant’s affidavit in support of the application to discharge the restraint order, detailing payments made by both the MFA and himself in

¹⁶ Respondent’s submissions at paragraph 39.

relation to their respective tax obligations. These payments were made prior to the filing of the restraint order and evidence of this was directly material to the question of the extent of the appellant's benefit. It was submitted that the judge wholly failed to deal with these matters and thereby erred. Mr. Hamilton submitted that this justifies this court exercising its discretion afresh and discharge the restraint order.

- [80] Mr. Sullivan submits that the public interest in restraint and the confiscation of the proceeds of crime dictates that the court should not be too ready to discharge a restraint order where there has been a failure to give full and frank disclosure.

Discussion

- [81] Where a restraint order is sought without notice to the defendant, there is an uncompromising obligation on the prosecutor to make full and frank disclosure to the judge hearing the application of all material matters that might affect the judge's decision. The test of materiality is whether the matter might reasonably be taken into account by the judge in deciding whether to grant the order and is a question for the judge. The duty extends not only to material facts known to the applicant but to facts he would have discovered had he made proper inquiries: **Commercial Bank - Cameroun v Nixon Financial Group Limited**.¹⁷

- [82] The case of **Director of the Serious Fraud Office v A**¹⁸ explains why this duty is cast upon the prosecutor:

"[6] Because the initial application is commonly made without notice, the court will not at that stage hear argument on both sides. For this reason, as with other without notice applications, the court insists on full and complete disclosure by the Applicant of everything which might affect the decision whether or not to grant the order. There is a high obligation upon such an Applicant to put everything relevant before the Judge, whether it may help or hinder his cause."

- [83] The ultimate sanction for a breach of the duty to make full and frank disclosure is that the restraint order will be discharged. But this is not the inevitable

¹⁷ BVIHCVAP2011/0005 (delivered 6th June 2011, unreported).

¹⁸ [2007] EWCA Crim 1927.

consequence. To procure the discharge of the restraint order the first requirement is that the nondisclosure must be material, in the sense that it would have affected the judge's decision on the application. The approach adopted by the court is to consider whether, with knowledge of the full circumstances and taking into account the previous non-disclosure, the public interest requires the order to be maintained, Whether the non-disclosure was deliberate or accidental will be a material factor, although not necessarily determinative.¹⁹ The court may be more minded to exercise its discretion to overlook the non-disclosure where it is innocent and the order would have been made even if the fact had been disclosed: **Sonya Young v Vynette Frederick**.²⁰

[84] All of that said, it is evident from the judge's order refusing to discharge the restraint order that he did not address the issue of material nondisclosure. This is hardly surprising since this was not a ground on which the discharge was sought and formed no part of the written submissions that either side placed before the judge. In those circumstances, it cannot be right for the appellant to complain to this court that the judge erred in not "finding" that there was material non-disclosure by the respondent when he was not invited to make any such finding or to address his mind to that issue. For these reasons, I am of the view that this Court is not in a position to entertain this ground of appeal, and I would therefore dismiss ground 7.

¹⁹ Supra n. 18 at paragraph 18.

²⁰ SVGHCVP2011/0022 (delivered 31st May 2012, unreported).

Disposition

[85] I would dismiss grounds 1, 2, 3, 4, 5 and 7 and allow the appeal on ground 6.
Accordingly, I would discharge the restraint order granted on 8th March 2023.

I concur.

Dame Janice M. Pereira
Chief Justice

I concur.

Eddy Ventose
Justice of Appeal [Ag.]

By the Court

Chief Registrar