

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CLAIM NO.407 OF 2016

IN THE MATTER OF THE APPLICATION FOR A RESTRAINT ORDER AGAINST NATIONAL COOPERATIVE CREDIT UNION LIMITED, NATIONAL BANK OF DOMINICA LIMITED, FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED, AND IN RESPECT OF PROPERTY OF ANTHONY EZEKIEL JNO. BAPTISTE AND KRISTA WANDA MAXIME OF SIMON BOULEVARD, STOCKFARM PURSUANT TO SECTION 30 OF THE PROCEEDS OF CRIME ACT No. 4 OF 1993 AS AMENDED BY THE PROCEEDS OF CRIME (AMENDMENT) ACT 7 OF 2013.

BETWEEN: -

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT/RESPONDENT

AND

ANTHONY EZEKIEL JNO. BAPTISTE

1st RESPONDENT/APPLICANT

KRISTA WANDA MAXIME

2ND RESPONDENT/APPLICANT

Appearances:

Gina Dyer Monro of Dyer & Dyer for the Respondent/Applicants
Joyette Morgan & Carlita Benjamin for the Applicant/Respondent

2019: January 29
2020: May 14

On Written Submissions

- [1] **Stephenson J.:** Restraint and freezing orders in Proceeds of Crime proceedings are granted initially on ex parte applications if they are urgent or there is a reasonable ground for believing that if notice is given to the respondents this would cause the dissipation of the realisable property that is the subject of the application. These orders often have a significant impact on the defendants and others who can be affected by it. One must consider the draconian effect of these orders as for the most part the defendants have not been charged with or convicted of any criminal offence. Therefore the counsel involved on both sides of these matters should act expeditiously to ensure that the matters are dealt with without unnecessary delay. (emphasis mine)
- [2] This is a ruling on an application brought by the defendants to discharge a freezing order obtained by the Director of Public Prosecutions (“the DPP”) on behalf of the Financial Intelligence Unit (“the FIU”). It is now trite law that a property freezing order may be varied and discharged at any time by the court.
- [3] In support of her submissions that the freezing order made herein should be discharged counsel on behalf of the applicants made various points:
- a. that there has been material non – disclosure of fundamental facts by the applicants in obtaining the order herein;
 - b. that the order herein is an abuse of the court’s process;
 - c. there is no returnable date in the order;
 - d. the order is contrary to CPR 2000; and
 - e. that in all the circumstances it is fair and just to vary and or discharge the order made.
- [4] It seems to this court that it would be appropriate to deal with the application made on behalf of the applicants in the order as stated in paragraph 2 above.

The Background

- [5] On 2nd January 2016 Anthony Jno Baptiste was charged under the Drugs (Prevention) of Misuse Act¹ with possession of cocaine with intent to supply. On 28th January 2016 Krista Wanda Maxime was

¹ Chapter 40:07 of the Laws of Dominica as amended by Act number 3 of 1993

charged under the said act with drug trafficking. ("the defendants") On 21st April 2016 both of the defendants were charged jointly with drug trafficking under the Drugs (Prevention) Misuse Act.

- [6] On 20th January 2016 in DOMHCV2016/0016 ("16 of 2016") a freezing order was obtained against Jno. Baptiste which order expired on the 21st July 2016. On 3rd June 2016 an application to have the freezing order varied or discharged by the first named defendant. On 4th July 2016 it was ordered by the court that an affidavit in response to the application to vary of discharge was to be filed and served by the Director of Public Prosecutions. ("The DPP"). This affidavit was not filed and the application for extension of time to do so was denied.
- [7] On the 20th December 2016 new proceedings were commenced² and a new application for a property freezing order was made accompanied by an affidavit in support and a certificate of urgency. This was against both defendants. This application was heard and granted on even date. An undertaking was given on that day by counsel appearing before the court that a fixed date claim would be filed within 7 days.
- [8] On the 7th March 2017 the defendants filed an application to discharge/vary this new freezing order with affidavit in support. The DPP responded on the 3rd April 2017 by way of affidavit.
- [9] The new freezing order was continued and there were numerous attempts to convene the hearing of the application to vary and or discharge the freezing order and due to a variety of circumstances and reasons including the passage of Hurricane Maria and the subsequent lack of available court facilities to hear the matter it was finally decided that the matter would be heard by written submissions.
- [10] Consideration has been given to the application to vary and discharge with the supporting affidavit filed by the defendants and to the affidavit in response by the DPP and to the written submissions filed on behalf of both sides.

Issues:

² (DOMHCV407 of 2016)

Whether the failure to disclose the circumstances in suit no 12 of 2016 was a material non disclosure which should operate to discharge the current order?

Applicants' submissions

[11] The applicants have applied to have the ex parte freezing order granted herein on the grounds that there was failure on the part of the Director of Public Prosecutions ("the DPP") to make full and frank disclosure to the court when making the ex parte application in the case at bar. The complaint is that the DPP failed to inform the court of the previous order in DOMHCV2016/0012 ("12/2016") which order had expired.

[12] It has been contended that there has been no dissipation of assets of the assets frozen by the said order which expired in July 2016 and that the first named applicant has never dealt with his assets.

[13] It was submitted on behalf of the applicants that this was a material non disclosure which should be met with the discharge of the current order. Learned Counsel Gina Dyer Munro on behalf of the applicants submitted that it is glaring that no mention is made in the ex parte application in the case at bar of the application order which lapsed in DOMHCV2016/0012.

[14] Reference was made to **Bank Mellat –v- Mohammad Ebrahim Nikpour**³ where Denning MR addressed the primary duty to make full and fair disclosure of the material facts in the following terms

"I would like to repeat what has been said on many occasions. When an ex parte application is made for a Mareva injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the court that a Mareva injunction can properly be granted."

[15] Learned Counsel Dyer Munro quoted the learning extracted from Mark S. W. Hoyles book "Freezing and search orders"⁴ which states

³ (1985) FSR 87 @89

⁴ 4th Edition at paragraph 5.12

“There is a powerful argument in the view that if full and frank disclosure has not been made in the without notice application the order will be discharged because of the seriousness of the omissions. This is because it is up to the Judge to consider the importance of the relevant facts so that he can exercise his discretion in the light of as much information as possible. Consequently, a lack of full and frank disclosure need not be deliberate before the injunction is discharged for that reason but merely has to be pertinent to the issues involved, even if it does not affect the merits of the claim”

BY THE DPP

[16] The DPP quoted and relied on oft quoted and relied on statement of Coghlin J in the **Keenan Case (Op Cit)** on the issue of non disclosure to wit

“There is a clear obligation imposed upon those seeking to make ex-parte applications to ensure that a full and fair disclosure of all material facts is made to the court. This duty is not limited to facts known to the applicant but extends to facts that the applicant ought to have known after making proper inquiries”⁵

[17] Counsel also made mention of the Grenada Case of **Director of Public Prosecutions –v- Shankeiel Myland**⁶ and the statement of Justice Taylor-Alexander

“There is always an obligation on Counsel on pain of violation of the practitioner’s oath and of the overriding objective to be full and frank in the disclosure of information relevant to the proceedings without discretion. The importance of Counsel’s obligation is increased where as in this case the application was without notice ...”

[18] Counsel on behalf of the DPP also quoted and relied on the well known opinion of Ralph Gibson LJ in the **Brinks Mat**⁷ case regarding the duty for full and frank disclosure and stated that

⁵ Ibid @ para 13

⁶ (GDAHCV2012/0251)

“It is the prosecution’s submissions that the point of the omission of the information regarding the previous order is trivial and pointed out to the court in their certificate of urgency which was filed as part of the new application that the said application was due to expiration of the previous order. Counsel encouraged the court not to discharge the current order at hand on what they termed such a “slender ground”⁸.

[19] Counsel rested her submissions in this regard on the decisions of the court in **Satnam Singh [2004] EWHC 2335 (Admin)** where the guidelines as laid down in the **Brinks Matt Ltd Case** was applied and also the principle as laid down in the **Rex –v- Kensington Income Tax Commissioners [1917] 1 KB 486 case**.

[20] Learned counsel pointed out that there was notice was provided to the judge in the certificate of urgency which clearly stated that the previous interim freezing order was expired and therefore failure to state so in the affidavit did not prejudice the defendants in any way. Reference was made to the learning gleaned from Halsbury’s laws of England 2015 Vol. 12 A 712 which states “*Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer*”. Learned Counsel invited the court to find that the reason for the *ex parte* application was in fact disclosed in the certificate of urgency which was filed and which the judge was entitled to take judicial notice of.

[21] Therefore it was submitted by the DPP that in the circumstances there was no material non disclosure sufficient to discharge the order

BY THE COURT:

[22] The law regarding *ex parte* application procedure has been clearly established and stated in a series of cases. A duty is imposed on the DPP in matter such as these to make a balanced application and to inform the courts of all material facts. Any non disclosure on the part of the applicants can be used to challenge the order by the respondent.

⁷ Brinks Mat Ltd –v- Elcombe [1998] 1 WLR 1350

⁸ See Counsel Carlita Benjamin’s submissions dated 12 Jun2 2017 at page 5

[23] The court has a single discretion, which is to be exercised in accordance with all the circumstances of the case, taking account of and giving such weight to the various factors identified in the cases as it considers appropriate.

[24] In **Bank Mellat –v- Nickpour**⁹ as cited and relied on by the applicants herein Donaldson J said¹⁰

“... This principle that no injunction obtained ex parte shall stand if it had been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. But happily we have been referred to a dictum of Warrington LJ in R (on the application of Princess Edmond de Polignac). v Kensington Income Tax Commissioners [1917] 1 KB 486 at 509. He said:

'It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.'”

[25] Lord Slade¹¹ in the same case went on to say

“I think it is of the utmost importance that on any ex parte application for an interim injunction the applicant should recognise his responsibility to present his case fully and fairly to the court and that he should support it by evidence showing the principal material facts upon which he relies. Most particularly, I think that this duty falls on an applicant seeking a Mareva injunction which, if granted, may have drastic consequences for a defendant, by freezing assets in this country which are not necessarily even the subject matter of the action.”

⁹ Op Cit

¹⁰ Op Cit at page 90

¹¹ Ibid at page 92

[26] However it is noted that in the case of **Behbehani v Salem**¹² Lord Wolf stated

“In deciding in a case where there has undoubtedly been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of fresh injunctions, it is most important that the court assesses the degree and extent of the culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court.”

[27] It is therefore clear to this court that Counsel for the Applicant is erroneous in her submission when she states that based on the material non disclosure the freezing order should be discharged. It is clear that there is an objective test which has to be applied before the court can take such action. It is important for the court to consider all the circumstances of the case.

[28] In the **Brinks Matt Case** Balcombe LJ said¹³

“The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 509. But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequence (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained: see in general *Bank Mellat v Nikpour* [1985] FSR 87 at 90 and *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178, [1988] 1 WLR 1337, a recent decision of this court in which the authorities are fully reviewed.”

[29] It is also to be noted that in the case of **Princess Edmond de Polignac**¹⁴ Scrutton LJ. stated that “ *The material facts are those which it is material for the judge to know in dealing with the*

¹² [1989] 2 All ER 143, at page 147

¹³ ([1988] 3 All ER 188 at 193–194,

¹⁴ [1917] 1 KB 486 at 514

application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.”

Abuse of Process

[30] Learned Counsel Gina Dyer Munro on behalf of the applicants submitted that the law provides for application for an extension of the freezing order and failure to do so the order lapses. Counsel pointed the court to the fact that the first freezing order obtained in DOMHCV12/2016 lapsed and expired in July 2016 and a second *ex parte* order was obtained in the case at bar was obtained in December of 2016.

[31] Counsel contended that the filing of a new action with a new *ex parte* application for a freezing order amounts to an abuse of process. It was submitted that the DPP sought to circumvent section 31 of the POCA (1993) act in that they negligently failed to apply to extend the original order and are seeking to remedy their negligence and failure by starting a new action and obtaining an *ex parte* order in the new action (the case at bar). Learned Counsel on behalf of the applicants contended that their action in the circumstances amounts to an abuse of the court’s process.

[32] Counsel Dyer Munro made reference to the case of Henderson –v- Henderson ¹⁵ and relied on the statement made by Lord Wigram VC

“The court requires parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject litigation in respect of matters which might have been brought forward, only as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.”

(It is noted that Counsel failed to quote the relevant statement in its entirety).

[33] Counsel submitted that the court has an inherent power to prevent parties from abusing its process where negligence or omission resulted in failure to litigate and issues which could have been litigated. It was submitted that it is an abuse to bring Anthony Jno. Baptiste on the same issue that was before the court in Suit number 12 of 2016.

¹⁵ (1843) 3 Hare 100

[34] Learned Counsel also drew to the court's attention that when the exparte order was made in the previous suit (12/2016) Anthony Jno Baptiste applied for the said order to be discharged citing certain deficiencies in the exparte order obtained. That application was never heard. That it is to be noted that the new application in the case at bar the DPP addressed the deficiencies which were pointed out in the previous matter.

[35] Learned Counsel also submitted that a close examination of the two orders obtained, that in the second order the DPP omitted the land which Anthony Jean Baptiste said in his response to the first order was not his also bank accounts which were not his, and these items were left out of the second application.

[36] Learned Counsel stated "*it should be clear to the Court that the Director of Public Prosecutions knew of the previous order and choose not to mention it not the suit so as to bring to the fore the Court's mind suit 12 of 2016*¹⁶" (I am not sure I understand what Counsel is saying here)

[37] Learned Counsel Dyer Munro also criticized the applicants for making an urgent without notice application when the previous order had lapsed for some 4 months and nothing was done, there was no allegation of dissipation of assets after the order had lapsed. Therefore, in the circumstances the matter could not have been urgent as claimed when the DPP's office was reticent in making further applications in the previous matter. Counsel also questioned why was it necessary to make the application without notice?

DPP'S RESPONSE

[38] This court was unable to discern any submission by the DPP on this issue. However it was submitted that the courts have stated that public policy must be a fact considered by the court in deciding whether or not to discharge or vary a restraint order. Reliance was placed on **Director of Serious Fraud Office –v- A** ¹⁷ where the court held inter alia that "*...the proper approach is to consider whether the public interest does or does not call for the order to stand...*"

¹⁶ Para 20 of Submissions filed by Dyer & Dyer 4 July 2017

¹⁷ [2007] EWCA Crim 1927

[39] Learned counsel Miss Benjamin encouraged this court to consider that the applicants (Defendants) were charged with a scheduled offence of possession with intent to supply cocaine which by its very nature is of grave public interest.

BY THE COURT

Abuse of Process:

[40] According to Halsbury's Laws of England¹⁸ "it is an abuse of process to misuse the court's processes to achieve something not properly available in the proceedings¹ *Broxton v McClelland* [1995] EMLR 485 at 497–498, CA. . However, there are no fixed categories of abuse². *v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 "

[41] Lord Diplock pointed out in *Hunter v Chief Constable of West Midlands Police*¹⁹

"[This case] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied;"

Principles of abuse of process

[42] The courts have an overriding duty to promote justice and prevent injustice. It is the duty of the court to protect its process from abuse. This duty includes the inherent power to stop the prosecution of matters, if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

[43] The stay of a prosecution could arise in a number of circumstances including but not restricted to, where the accused could not receive a fair trial, or where it would be unfair to try the accused

¹⁸ Volume 32 at paragraph 717

¹⁹ [1982] AC 529 at 536:

because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

[44] The objective of this discretionary power is to ensure that there is a fair trial. This means fair to the defence and to the prosecution according to the law. The courts have determined that the power to stay proceedings on the ground of abuse of process should be used sparingly and have gone as far as to suggest that abuse arguments that are advanced without proper justification can distort the trial process. Where there is no fault on the part of the prosecution it will be rare to grant a stay but the courts should not use their inherent power to stay proceedings merely to discipline the prosecution. (emphasis mine)

[45] Where there is delay, even if it is unjustifiable, a stay should be the exception rather than the rule. A stay will only be granted where there is serious prejudice to the defendant that cannot be abrogated by the judicial power to regulate the admissibility of evidence and the trial process. (emphasis mine)

[46] The duty of public authorities to act fairly and the rule of law which allows a person to predict the consequences of their actions with a degree of certainty are fundamental to the working of criminal justice. There can be an abuse of process where the prosecution can be said to have manipulated or misused the rules of procedure or where inordinate delay has prejudiced the defendant to a situation where a fair trial is no longer possible.

[47] I have carefully reviewed the case presented by Mrs Dyer Munro on behalf of the defendants and the response of the DPP who acts on behalf of the FIU. Having carried out my consideration I am satisfied that the failure of the DPP to renew the application for the renewal of the property freezing order coupled with the delay in making the new application in the new matter along with the consideration that the DPP has failed in this court's view, to establish albeit on a balance of probabilities that there is a good arguable case that there was a real risk of the defendants would really dissipate the property as is required in cases such as these, this case must be dismissed

[48] The inference to be drawn by the actions of the DPP in commencing new proceedings which are identical to the proceedings against the defendants in the 12 of 2016 when they failed to renew the

freezing order and in the face of an existing application by the respondents to strike out or vary the initial *ex parte* property freezing order is that there were seemingly insurmountable hurdles which they would have had to cross in the continued litigation of DOMHCV 12 of 2016.

[49] It is noted that DOMHCV 12 of 2016 was just abandoned in that no notice of discontinuance was filed and so the reality of it is that there are two identical actions pending before the court between the same parties on the same issue.

[50] This just cannot be.

[51] The inferences which on the balance of probabilities is to be drawn, is, that the DPP in the case at bar has sought to circumvent the requirement of POCA regarding the renewal of the freezing order by commencing fresh proceedings in the face of an application to vary or discharge brought by the defendants and without discontinuing the first matter. It is clear to this court that the supposed urgency in the case at bar was no urgency at all given the lapse of time between the expiration of the previous freezing order (July 2016) and the commencement of the current proceedings (December 2016). It is noted that the respondents in the interim made no move to dissipate the assets identified as the recoverable property.

[52] There is no doubt in this court's mind that based on the principles to be applied regarding whether or not there has been an abuse of the court's process that this court has a wide and flexible discretion to prevent a party from instituting a second set of proceedings when it was faced with the difficulties as a result of its negligence or failure to comply with legislation in this case the POCA to apply for the continuation of the freezing order in 12 of 2015 in a time manner and to reply to the application brought by the respondents.

[53] I fully embrace and apply the statement of Bowen LJ in the *McHenry –v- Lewis* (1882) 22 CH. D 397 as quoted in the **Lough Neagh Exploration Ltd v MORrice and another**²⁰.

'I agree that it would be most unwise ... to lay down any definition of what is vexatious or oppressive or to draw a circle so to speak, round this court

²⁰ [1999] NI 258

unnecessarily and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end.'²¹

[54] Therefore in the case at bar I will accede to the application brought by the defendants in this matter to strike out this matter as an abuse of process.

[55] There shall be no order as to costs.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the court

Registrar

²¹ Ibid page 278