

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE
CASE NO. DOMHCV2014/0387

In the matter of sections 59L and 59M of the **Proceeds of Crime Act**, Chap 12:29, Revised Laws of the Commonwealth of Dominica as amended by the **Proceeds of Crime (Amended) Act No. 7 of 2013**.

AND

In the matter of an application for a Recovery Order in respect of property of **Jhawnie Gage, Arah Paula Cecil Davis and Edgar Augustus Peltier** against **Jhawnie Gage, Arah Paula Cecil Davis and Edgar Augustus Peltier** the National Bank of Dominica Ltd located on 64 Hillsborough Street; and the Royal Bank of Canada located on Dame Eugenia Charles Boulevard

BETWEEN:

**THE ATTORNEY GENERAL OF THE COMMONWEALTH OF
DOMINICA**

Claimant/Applicant/Respondent

AND

**[1] JHAWNIE GAGE
[2] ARAH PAULA CECIL DAVIS
[3] EDGAR AUGUSTUS PELTIER**

Defendants/Respondents/Applicants

Appearances:

Mrs Tameka Hyacinth Burton Solicitor General of the Attorney General's
Chambers for the Claimant/Applicant/Respondent

Mrs Gina Dyer Munro of Dyer and Dyer for the Defendants/Respondents /
Applicants

Mr Justin Simon QC holding a watching brief for the Defendants/Respondents /
Applicants

2019: March 29th

2020: January 5th

**RULING ON APPLICATION TO DISCHARGE POCA FREEZING
ORDER**

[1] **STEPHENSON J.:** On the 23 December 2014, the Attorney General, acting through Corporal Patrick George, Senior Financial Investigator of the Financial Intelligence Unit (the FIU) and represented by Joelle Harris the then Solicitor General, on an application without notice, obtained a restraint order prohibiting the applicants¹ from in anyway disposing of, tampering with, removing from the jurisdiction or in any way diminishing the value of the property and assets set out in the body of the Order including bank accounts held at banks operating in Roseau Dominica and held in the names of the applicants pending the hearing and outcome of an application for a recovery order made by the state pursuant to the **Proceeds of Crime Act**² as amended by the **Proceeds of Crime (Amendment Act)**³.

[2] By way of two notices of application dated the 27th January 2015 the applicants filed applications to discharge the property freezing order made against them.

¹Jhawnie Gage, Arah Paula Cecil Davis and Edgar Augustus Peltier

²Chapter 12:39

³ NO. 7 of 2013

- [3] Affidavits were filed by all the applicants in support of their applications on even date to which were exhibited a number of exhibits.
- [4] On the 28th January 2015 the applicants filed for a stay of proceedings pursuant to Rule 26.1.(2) (q) of CPR 2000 with an affidavit in support of the application.
- [5] On the 30th January 2015 the draft consent order was approved by Thomas J. This order was only ever signed approved and dated by the learned Judge, it was never filed. There was no compliance with Part 42.7 (d) of CPR⁴.
- [6] Be that as it may, subsequent to this draft consent order for a stay of proceedings, there were a number of applications made by the applicants and the respondents. There were also lengthy periods of inactivity in the proceedings between the 26th October 2015 and the 16th February 2017 and from the 20th February 2017 to the 29th June 2018 and again from the 17th December 2018 to March 2019.
- [7] Arguments were heard in Chambers on the application to discharge the freezing order on the 29th March 2019 and written submissions filed by the applicants on the 10th May 2019. There is no record on the court's file of the respondent filing any written submissions, however from the courts record of the hearing it is noted that speaking notes were submitted by the respondents on the morning of the hearing.
- [8] In her amended written submissions Learned Counsel Dyer Munro sought to launch a five pronged attack on the exparte order obtained by the respondents:
- a. That there was no basis for seeking an exparte order;
 - b. That the respondents failed to disclose that the respondents were charged with money laundering offences which were dismissed;

⁴Consent judgments and orders

42.7 (1) Subject to paragraphs (2) to (5), a consent order or judgment must be

- (a) drawn in the terms agreed;
- (b) expressed as being "By Consent";
- (c) signed by the legal practitioner acting for each party to whom the order relates; and
- (d) filed at the court office for sealing.

- c. That most of the items in the order obtained were already in the respondent's custody;
- d. That the order obtained infringes on the principles of self-incrimination; and
- e. That the order is an abuse of process.

[9] Learned Counsel Gina Dyer Munro on behalf of the applicants filed extensive submissions and was also given the opportunity to address the court in support of her application. FIU represented by the Solicitor General filed submissions, presented speaking notes and made oral representations on their behalf.

[10] The court chooses now not to restate these submissions and in so doing the court intends no disrespect to counsel. The submissions both oral and written were useful and helpful and have been fully considered by the Court.

[11] The first substantive ground argued by counsel directed towards the impugned order was that there was **lack of full and frank disclosure on the part of the FIU**.

[12] The ex parte application in the case at bar is an application for a recovery order made pursuant to the provision of the **Proceeds of Crime Act**⁵ ("POCA") Applicants for these kinds of orders like the application for ex parte Mareva and Anton Pillar injunctions are required to make full and frank disclosure to the court. In **Clifford Pitt et al –v- The Director of Public Prosecutions**⁶ Justice Brian G K Alleyne whilst not deciding on the point, made this observation regarding the issues of non-disclosure in applications under the **Proceeds of Crime Act** St Vincent *"that the duty of full and frank disclosure applies equally to applications under this Act as to other applications"*⁷

⁵Op cit

⁶SVGHCV2003/0016

⁷ Ibid paragraph 11

[13] In **Stanford International Bank; Janvey –v- Wastell and another; Serious Fraud Office –v- Wastell and another**⁸ Hughes LJ spoke to the duty of candour required in POCA applications and at paragraph 191 of the judgment he said:

“Whilst I respectfully agree with the view expressed by Slade LJ in **Brink’s Mat Ltd v Elcombe** [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under **POCA** in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge. This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example.”⁹

Sykes J in the Jamaican Case of **The Assets Recovery Agency –v- Upert Smith and others**¹⁰ relied on and agreed with this dicta of Lord Hughes. It is clear that this dicta is relevant to the consideration of the application at bar.

[14] Those being the principles involved it remains only to apply them to the case at bar.

⁸ [2011] Ch 33

⁹ Ibid paragraph 191

¹⁰ [2015] JMSC 168

[15] Has there been non-disclosure of material facts in this case and if so has the non-disclosure been so serious as a matter of public interest and due administration of law that the restraining order granted by Thomas J should be dismissed? This question can be put another way, whether there has been relevant non-disclosure and if so what consequence should attach to any failure to comply with the required duty to make full and frank disclosure?

[16] Learned Counsel Munro Dyer submitted that there has in what seems to be her opinion, been willful and blatant misrepresentation of fundamental facts in this matter by the respondents in that they failed to inform the court that:

- a. there was already a property freezing order in place and that the first and second applicants never breached same and that further, there was never any such order made against the third applicant Peltier. That failure to inform the court of these facts amounted to a material non-disclosure;
- b. the assets which were said to be in the possession of Peltier was at all material times in the custody of the police and that there was never any money laundering charges brought against him therefore there was never any risk of him dissipating any assets and the order was therefore unfair and unjust in the circumstances.

[17] It is the applicants' further contention that the disclosure obligations which the order imposes on the applicants are an "*affront to the principle against self-incrimination*".

[18] It is the applicants' further contention that the disclosure obligations which the order imposes on the applicants are an "*affront to the principle against self-incrimination*".

[19] Learned Counsel Dyer Munro submitted that the order obtained fails to recognise the applicants' privilege against self incrimination and asked this court to find that at this

stage it would be an abuse of process of the court for the respondent to be allowed to vary the order nearly four years after it was granted.

[20] Learned Counsel sought to rely on a quotation taken from Millington and Sutherland Williams on the Proceeds of Crime 4th Edition¹¹ when the author states

*“The courts have from the outset been vigilant to protect the defendant’s right against self-incrimination by insisting that the prosecutor must not make any use of the disclosure statement during any criminal trial. In **Re: A Defendant**, (The Independent, 2 April 1987, Wester J ruled that the disclosure order was only to take effect upon the prosecutor giving an undertaking*

Not to use any of the information obtained as a result of compliance with the order for any purpose or in connection with any criminal proceedings taken or contemplated against the defendant or for any purpose other than a purpose arising under the Drug Trafficking offences Act 1986”

[21] In purporting to rely on the above principle Learned Counsel Dyer Munro seeks to argued that in the case at bar the order sought by the FIU would require the applicants to disclose their assets and in so doing they would incriminate themselves. This submission is somewhat misplaced in the case at bar as the learned authors quoted by counsel when make the statement as quoted was making reference to and discussing the question of disclosure orders which is not in issue in the case at bar. Further, the learned authors had this to say before making the statement quoted by Counsel Dyer Munro

“There is a real risk that by requiring a defendant to disclose his assets he might incriminate himself both in relation to the offence with which he has been charged and other offences as well. Full compliance with a disclosure order might, for example, result in the defendant admitting to money laundering charges”¹²

¹¹ See Paragraph 3:08 ‘ The Problem of Self Incrimination’.

¹² *ibid*

[22] Taking the entire paragraph into consideration it is clear that the authors are making reference to where there are parallel criminal proceedings which is not at issue in the case at bar. Further in the case of **Re O**¹³ as referred to by the authors it was recognised that under the relevant legislation there was no provisions expressly empowering the High Court to make a disclosure order, however it was inherent in the nature of the Act that the court should have the ancillary power to require a defendant to disclose his assets and income so as to render effective a restraint order made under s 77¹⁴. The judge therefore had power to make the disclosure order under s 77. The court went on to hold that “a disclosure order made under s 77 was subject to the common law rule against self-incrimination and therefore should be made subject to a condition that no disclosure made in compliance with the order should be used as evidence in the prosecution of an offence alleged to have been committed by the person required to make that disclosure or by his or her spouse”¹⁵.

[23] The learned authors went on to mention the case of **Re: T (Restraint Order: Disclosure of Assets)**¹⁶. In that case the defendant contended before the court that this condition restricting use of the disclosed material was insufficient to protect his privilege against self incrimination in a drug trafficking case which had the defendant complied with the disclosure would have exposed him to would enhance penalty by increasing the size of the confiscation order made against him and in consequence would render him liable to serve a longer term of imprisonment in default of payment than otherwise would have been the case. The court of appeal held that the inclusion of a condition that disclosure made in compliance with a restrained order should not be used in evidence in the prosecution of the person making the disclosure and that this condition removed any risk of self – incrimination.

[24] It is noted further that the issue of “disclosure” and “self incrimination” is relevant where there are parallel criminal proceedings and the over the years the conditions for

¹³ [1991] 1 All E R 330

¹⁴ Ibid paragraph 2 of the head note

¹⁵ Ibid at paragraph 3 of the head note

¹⁶ [1992] 1 WLR 949

disclosure have been attended to by the courts. Therefore the attack mounted by Counsel Dyer Munro in this regard fails as a ground to set aside the Freezing order obtained in the case at bar.

[25] The applicants also argue that there is no good arguable claim warranting the property freezing order herein on the grounds that the allegation of unlawful activity leveled against the applicants are without merits and further that there is no evidence relating the 3rd named applicant to illegal activity.

[26] The thrust of the applicants' argument in this regard is that the applicants have failed to satisfy the requirement to show criminal activity which is necessary to enable an applicant to obtain a freezing order and relied on the principle as stated in **Director of Assets Recovery –v- Jeffery Davit Green**¹⁷

[27] Learned Counsel further submitted that the parts of the Order granted on the 23 December 2014 under the hand of Thomas J is unlawful as it seeks to enforce an extra territorial jurisdiction which is invalid. The applicants further complain that the order is an abuse of the process on the ground that *“the procedure employed herein to obtain the recovery order and obtain a property freezing order prior to the same is an abuse of process of the court”*¹⁸. Further, that *“An application for a freezing order is a prelude to an application for an interim recovery order. Moreover once the court makes an interim recovery order it must set aside any freezing order which applied to the property or any part of it covered by the interim recovery order”*¹⁹.

[28] Counsel further contended that the applicants utilised the wrong procedure and mechanism for obtaining the recovery order.

¹⁷ [2005] EWHC 3168 as referenced in The Proceeds of Crime by Millington and Sutherland Williams 4th Edition (op cit) at paragraph 13.21

¹⁸ See Paragraph 37 of Dyer Munro *“Amended submissions”* filed on the 30 November 2019

¹⁹ See paragraph 38 *ibid*

[29] Learned Counsel Dyer Munro further submitted that the FIU has “*wholly failed to appreciate the manner in which section 59L and 59M of the **POCA** as amended ... operates. Consequently the order sought, is materially defective and should be set aside*”.²⁰ It is contended that the freezing order was obtained since 2014 and that the FIU has taken no positive step in the proceedings thereby adversely affecting the applicants who have deposed in their affidavits that it is now necessary for them to have a dwelling place and to be able to lead normal lives that the continuation of the freezing order has caused them continuing hardship. That the applicants have been unable to conduct any business with any financial institution since 2010 and in the circumstances of the case it would be unfair and unjust for this Freezing order to remain in effect.

FIU's response

[30] FIU in their written submissions contends that there was no material non- disclosure as alleged by the applicants and that it is in the public interest that the freezing order is continued. The Respondent also submits that the freezing order was applied for and obtained in accordance with the POCA as amended, that it is not an abuse of process and in the circumstances of the case should not be discharged/ set aside or stayed.

[31] The respondent maintains that as was submitted to and accepted by Thomas J there is a good arguable case with a high possibility of success that the property listed in the freezing order is recoverable property as provided for in section 59M of the POCA as amended.

[32] It was submitted on behalf of FIU that at the time of the application for the freezing order there was disclosure of the fact that there was a previous restraint order which was discharged after the criminal charges against the Applicants were dropped. Learned counsel made reference to the Certificate of Urgency filed on behalf of the FIU which spoke to the fact that the assets were subject to a freezing order which was

²⁰ See paragraph 40 *ibid*

discharged as a result of the money laundering charges being dropped against the applicants.

[33] Further, a review of the affidavit and “*amended*” affidavit of Officer George presented to the court this court is satisfied that the material facts pertinent to the application at the time was placed before the learned Judge.

[34] It was submitted on behalf of the FIU that even if there was a material non- disclosure the discharge of the freezing order is not automatic. It was submitted that, the Court retains discretion and the overriding objective is to ensure that the proceeds of crime are recovered.

[35] Learned Counsel Hyacinth Burton on behalf of the FIU cited and relied on **National Crime Agency v Simkus and others; National Crime Agency v Khan and others; National Crime Agency v Jardine others**²¹ in acknowledging that there is a general duty in civil proceedings on a party applying for a without notice order to make full and candid disclosure of all material facts. Learned Counsel did not dispute that this duty applies to without notice applications for freezing orders as in the case at bar, however, she submitted that in an application to discharge on the ground of material non-disclosure, the Court must weigh the public interest in making the freeze order against the need to sanction the applicant for failure to disclose.

[36] Mrs Hyacinth Burton emphasised the opinion of the court in **Malabu Oil and Gas Limited v Director of Public Prosecutions**²² where Longmore LJ stated that “...*the public interest in making a restraint order in appropriate cases is likely to weigh more heavily than the need to enforce high standards in those who make the application*”

²¹[2016] EWHC 255 (Admin)

²²(unreported) 15 December 2015, Crown Ct

[37] Learned Counsel further relied on the decision made in **Director ARA v Kean**²³ in which a property freezing order obtained by the Asset Recovery Agency was not discharged despite it having been obtained by non-disclosure and innocent misrepresentation at a without notice hearing, because the agency's misjudgment had not been serious. In that case Burton J addressed the issue of the consequences of non-disclosure in this category of case:

'The ARA exercised its powers in the public interest. If the Property ... were indeed obtained with the proceeds of crime, it is in the public interest that Mr. Kean should be deprived of them. That possible result should not be put at risk by reason of a lack of care or misjudgment on the part of the ARA which is far from serious...

[38] It was submitted on behalf of the FIU there was no material non-disclosure. Counsel submitted that all facts which were relevant to the case were brought to the attention of the Learned Judge. Counsel submitted that in the alternative that if this court were to find that there was failure to disclose any relevant fact, that it was not material. Mrs Hyacinth Burton submitted that the public interest in this case is in the continuation of the order and not in setting it aside and that Applicants application to discharge should therefore be dismissed.

Court's considerations

Lack of full and frank disclosure and material non-disclosure:

[39] It is well established law that where there is an ex parte application there is a high duty of candour on the part of the applicant. If there is evidence that there was deliberate deception on the part of the applicant a case to discharge and ex parte order would be made.

[40] Further, a person making a without notice application is duty bound to act in good faith by disclosing all material facts to the court. This duty extends to disclosing facts which

²³ [2007] EWHC 112 (Admin)

may be prejudicial to the applicant's own case. The duty to disclose extends also to those facts which the applicant would have known had he made the proper enquiries.

[41] What are material facts? Material facts are those which are material for the court to know when hearing the *ex parte* application. The borderline between material and non-material facts is somewhat uncertain. The decided cases have established that the distinction is one which has to be made by the courts and not the applicants or their legal advisor. Re: **Kensington Tax Commissioners Ex. P. Polignac**²⁴ and **Thermax Ltd –v- Schott Industrial Gases Ltd**²⁵. (Emphasis mine)

[42] This court agrees with the learned Solicitor General that there is a discretion reserved by the Court to make a fresh order notwithstanding the material non-disclosure. Re: **Brink's Mat Ltd –v- Elcombe and others**²⁶ and applied in **Venus Investments Ltd –v- Wayne Ann Holding**²⁷.

[43] In the **Brink's Mat Case** it was held *inter alia* that although non-disclosure is a serious matter, an injunction order should not be discharged if it would work an injustice on the applicant. In **Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc**²⁸ the Court of Appeal confirmed that there is the jurisdiction to make a fresh Mareva injunction at the '*inter partes*' stage where the original order had been discharged for non-disclosure or, put another way that the court has the discretion to continue an *ex parte* order even in the face of non-disclosure.

[44] This court finds it helpful to repeat the dicta of Ralph Gibson LJ in the **Brinks' Mart case** as to the issues to be included in the court's consideration when taking into account whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure;

²⁴ [1971] KB 586

²⁵ [1981] FSR 289

²⁶ [1988] 3 All ER 188

²⁷ [2015] JMCA App 24 at Page 25

²⁸ [1988] 3 All ER 178

“(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts:’ see **Rex v. Kensington Income Tax Commissioners**, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, *per* Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see **Rex v. Kensington Income Tax Commissioners**, *per* Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and *Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see **Bank Mellat v. Nikpour** [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in **Columbia Picture Industries Inc. v. Robinson** [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in **Bank Mellat v. Nikpour** [1985] F.S.R. 87, 92–93.

(5) If material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:” see *per* Donaldson L.J. in **Bank Mellat v. Nikpour**, at p. 91, citing Warrington L.J. in the **Kensington Income Tax Commissioners' case** [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it “is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be

afforded:” per Lord Denning M.R. in **Bank Mellat v. Nikpour**[1985] F.S.R. 87, 90. The court has discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

“when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:” per Glidewell L.J. in *Lloyds BowmakerLtd. v. Britannia Arrow Holdings Plc.*, ante, pp. 1343H–1344A.”²⁹

- [45] It is noted that this discretion is to be used sparingly.
- [46] The duty of disclosure embraces not only matters known to the applicant and his advisors but also to such matters as would be revealed had there been proper and further inquiries. The duty is to make all proper enquiries before making the application. The extent of the requisite inquiries has been held to depend upon the degree of legitimate urgency at the time of making the ex parte application and the time available for making the inquiries. **Re: Bank Mellat –v- Nickpour**³⁰. This duty will not extend to facts which the material is privileged from disclosure.
- [47] In the case of **Jennings v Crown Prosecution Service**³¹It was held that the duty to make full and frank disclosure of material facts applies as much to applicants seeking restraint orders without notice as to claimants seeking freezing orders without notice. The court emphasised that in exercising its jurisdiction the court ought to take into serious consideration its duty to fulfill the public interest in preserving assets to satisfy a possible subsequent confiscation order than to punish the prosecution for non-disclosure. It was noted that the court should be alert to see that its jurisdiction is not being used as a tool or mechanism by the state in any arbitrary or unfair action, and so the court should persevere to ensure that there is

²⁹[1988] 1 WLR 1350 at pages 1356 to 1357

³⁰[1985] FSR 87, [1982] Com LR 158

³¹[2006] 1 WLR 182

compliance with its rules and standards, not least the duty of disclosure. It was stated that the court's approach to non-disclosure of material facts is the same as to the prosecution's failure to inform the court why it fears that assets will be dissipated. The court ought to consider the fact that the prosecution acts in the public interest and this militates against the automatic sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. The court hastened to say however, that that is not to say that there could never be a case where the prosecution's failure might be so appalling that the ultimate sanction of discharge would be justified. (emphasis mine)

- [48] Was there serious non-disclosure by the FIU to the learned Judge, regarding the dismissal of the magisterial money laundering charge? A review of the certificate of urgency which filed along with the *ex parte* application filed on the 19th December 2014 the then Solicitor General Joelle Harris stated "I Joelle Harris, Solicitor General ...hereby certify that the Application (Without Notice) for the grant of Freezing order is for urgent hearing. *I certify that the assets are the subject of a freezing order pursuant to a Money Laundering Act and that the Court has discharged the said freezing order today, the 19th December 2014 in light of the fact that the relevant Money Laundering Charge against the first and third respondents were dropped. However the State is desirous of proceeding with the Civil Recovery proceedings against the Respondents in respect of the property that were the subject of this freezing order. There is a real risk of the said property being disposed of and / tampered with by the Respondents.*³²" This court noted that the certificate of urgency was part of the application made by the Solicitor General before the Learned Judge and would have been taken into consideration by the judge in deciding on the urgency of the application. It is therefore safe to say that the fact that the money laundering charges brought in the Magistrates Court were dropped against the first and third applicants was brought to the attention of the Learned Judge. It is noted that it would have been best for this information to have been included in the affidavit of Officer George sworn in support of the *ex parte* application. This court finds that there was no non-disclosure on the part of the FIU so as to

³²Certificate of Urgency filed by the FIU on the 19th December 2014

discharge the freezing order in this regard. In fact it is the very fact that the charges in the Magistrate's court were dismissed that formed the reason for the matter to be dealt with by the learned judge as a matter of urgency.

CIVIL RECOVERY:

[49] Civil Recovery of the proceeds of crime is provided for by Part IIIA of **POCA** as amended by section 14 of the **Proceeds of Crime Amendment Act 2013**³³. The sections relevant to the case at bar are sections 59L and 59M.

[50] Section 59L makes provision for the application for a recovery order and section 59M speaks to the application which can be made for a freezing order.

[51] These sections confer on the Attorney General the power to bring civil proceedings for a recovery order or a freezing order. In the case at bar the application made by the Attorney General was for a freezing order. A property freezing order is an order that, subject to any exclusions, prohibits any person whose property is specified or described in the order, from in any way dealing with the property. This enables the Attorney General to recover in civil proceedings property that is or represents property obtained through unlawful conduct.

[52] It is possible to commence and utilise the powers in civil recovery even though proceedings have not been brought for a criminal offence in connection with the property. In the event that there are insufficient grounds for prosecution the Attorney General is still empowered to pursue civil recovery;

- (4) The Court may make a property freezing order if it is satisfied that—
 - (a) there is a good arguable case that—
 - (i) the property to which the application for the order relates is or includes recoverable property; and

³³Act number 7 of 2013

(ii) if any of the property is not recoverable property, it is associated property; and

(b) if the property to which the application for the order relates includes property alleged to be associated property, and the Attorney-General has not established the identity of the person who holds it, the Attorney-General has taken all reasonable steps to do so.

[53] In the **Director of the Assets Recovery Agency –v- Taher**³⁴ it was established that if the Agency tasked with the responsibility of seeking civil recovery was able to establish on the balance of probabilities that the assets in the matter were proceeds of crime then they are recoverable even if there has been a prosecution which has not succeeded and even where there has been no prosecution. In **SOCA v Namli**³⁵, Males J stated that 'an acquittal whether here or abroad is not conclusive of the defendant's innocence'.

[54] In the case at bar, the Learned Solicitor General submitted that **POCA** Amendment does not require that there to be risk of dissipation of assets before a freezing order is obtained. **Re: Nuttall and Anor v National Crime Agency**³⁶.

[55] Learned Counsel on behalf of the FIU submitted further, that the evidence which was adduced before Justice Thomas who concerned the property which was the subject of a restraint order which was about to be discharged. It was submitted to the court that given the evidence of the way the house and vehicles had been handled, there was a good arguable case that there is a risk of dissipation and there was a real need to ensure that the assets remain available for recovery. It was emphasised by counsel that the purpose of the freezing order which was obtained was to preserve the assets pending the determination of the claim for civil recovery.

³⁴2006 EWHC 3402

³⁵ [2013] EWHC 1200 (QB)

³⁶[2016] EWHC 1911 (Admin).

[56] Learned Counsel Mrs Dyer Munro in her response to the Solicitor General's submissions disagreed with the reliance placed on the **Nuttall case**. Mrs Munro submitted that *"there has not been a scintilla of evidence presented of a good arguable case of real risk of dissipation of assets. Risk of dissipation of assets was never addressed in the respondent's affidavits in support of the application against the 2nd and 3rd applicants. There has been no evidence of a good arguable case that knowledge of the investigation could lead to a real risk of dissipation of assets"*.³⁷ Respectfully I disagree with learned counsel in this regard.

[57] The proceedings in the case at bar are civil proceedings to invoke civil recovery of property in such circumstances the powers which the Attorney General through the FIU are exercisable whether or not any proceedings have been brought for an offence in connection with that property. The legislation (**POCA**) provides that once the AG is able to establish on the balance of probabilities that the assets are the proceeds of crime, they are recoverable.

"The Court may make a property freezing order if it is satisfied that –
(a) there is a good arguable case that –

(i) the property to which the application for the order relates is or includes recoverable property; and

(ii) if any of the property is not recoverable property, it is associated property; and

(b) if the property to which the application for the order relates includes property alleged to be associated property, and the Attorney General has not established the identity of the person who holds it, the Attorney General has taken all reasonable steps to do so."³⁸

[58] It is well established law that the standard of proof that is required is on the balance of probabilities. A good arguable case is related to a consideration of the merits of the

³⁷ Submissions filed by Counsel Dyer Munro in response to the Solicitor General's submissions contained in her Speaking notes.

³⁸ Section 59 (M) of the **Proceeds of Crime Amendment Act 2013**

substantive case or claim before the court and upon consideration of the entire evidence. **Re: Serious Organised Crime Agency-v- Khan**³⁹in this case the freezing order was granted even though there existed factual disputes between the parties and further investigation was required. It is to be noted that in civil recovery proceedings the focus is not on the individual but on the property.

[59] It is also noted that the High Court has the power and jurisdiction to vary and discharge freezing orders that have been made. This however does not bring an end to the proceedings as was seen in the **Stanford Case**⁴⁰the freezing order which was discharged as a result of material non-disclosure and misrepresentation on the part of the State Agency, was re-imposed by the Court after extensive and full arguments were heard by the court.

[60] This court does not accept and agree with the arguments raised by Learned Counsel Mrs Dyer Munro regarding the validity of the Freezing order here in and agrees with the learned Solicitor General that the public interest does lie in favour of maintaining the Freezing order until the determination of the civil recovery claim.

[61] The FIU must prove that the property in question is recoverable property. Recoverable property is described as:

- (a) property obtained through unlawful conduct and tainted property;
- (b) property obtained through unlawful conduct that has been disposed of since it was obtained through unlawful conduct or tainted property that has been disposed of since it became tainted property, if it is held by a person into whose hands it may be followed.⁴¹

[62] The court must decide this issue on a balance of probabilities whether the matters alleged by the FIU exist. They must show that there is an arguable case that the

³⁹ [2012] EWHC 3235

⁴⁰ Stanford International Bank (In Receivership) [2010] EWCA Civ. 137

⁴¹ S 59A(1) ins by s 14 of Act 7 of 2013

property subject to the freezing order is recoverable property. The need for a criminal conviction is not necessary in an action for civil recovery under **POCA** as distinct for a criminal conviction being necessary for confiscation⁴². This is also stated in the Court of Appeal Decision in **Ahmed Williams v The Supervisory Authority**⁴³ where Blenman JA having looked at the nature of the freezing order said “...civil asset forfeiture stands apart from any criminal charge or offence and is not based on either”⁴⁴

[63] “The legislation also reflected the recognition by Parliament that existing forfeiture provisions were inadequate for the purpose of depriving the offender of the fruits of his crime.”⁴⁵ The Dominican legislation was drafted after the UK’s Legislation and it can therefore be safe to say that this Parliament’s legislative intent was the same as the UK’s.

[64] The court in Civil Recovery proceedings is concerned with property in the possession of the respondents for which there is a seemingly no legitimate explanation for its origins.⁴⁶ Though this is a matter to be determined at the trial stage, it allows the court to view the power to grant the Property Freezing Order.

[65] Having reviewed the authorities and the affidavits along with the arguments both written and oral presented to the court by counsel on both sides I am satisfied that the Learned Judge who heard the application for the freezing order was presented with and did accept evidence that the property as listed in the application and order is property is either recoverable property or associated property and that there is a real

⁴²S59B (c) inserted by s 14 of Act 7 of 2013.];

⁴³S, ANUHC VAP2015/0035 especially paras 71 and 74

⁴⁴ Ibid at paragraph 74

⁴⁵Millington and Sutherland Williams, The Proceeds of Crime, 4th Ed, Oxford University Press, 2013, at para 1:03

⁴⁶**Serious Organised Crime Agency v Gale and others**, [2009] EWHC 1015 at para.14.

possibility that it would be dissipated and should remain subject of the freezing order already made.

[66] Of concern to this court is the length of time that this matter has been in the system and the seeming delay that has occurred in the prosecution of the application, taking into consideration that there was a stay of proceedings at some stage and the natural disaster which visited Dominica from which the Court system is still yet to fully recover from.

[67] Taking into consideration as to what is at stake for the applicants (respondents to the freezing Order application) it is clear that the time has come for there to be some movement in this case and this court takes this opportunity to encourage Counsel with conduct of the matter to move accordingly.

[68] I wish to thank Counsel for the helpful submissions in this matter and to apologise for the length of time that it took for this decision to be rendered. The conditions at the court and registry and the constraints suffered by the judge are well known to Counsel.

M E Birnie Stephenson
High Court Judge

SEAL

BY THE COURT

REGISTRAR