

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2012/0251

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Claimant

AND

SHANKIEL MYLAND

Defendant

Appearances:

Ms. Crisan Greenidge of Counsel of the office of the Director of Public Prosecutions for the Respondent/Applicant
Mr. Ruggles Ferguson and Ms. Anyika Johnson of Counsel for Applicant/Respondent

2012: July 24

2012: August 28

DECISION ON INTERIM APPLICATION

THE APPLICATION

- [1] **TAYLOR-ALEXANDER: J. (Ag.):** On the 24th of January 2012, the legislature of Grenada enacted the Proceeds of Crime Act No. of 6 2012 (POCA 2012) with effect from the 27th January 2012. By section 65 of this Act, the former enactment the Proceeds of Crime Act 2003 (POCA 2003) was repealed. This application turns on a question of statutory construction to determine whether elements of POCA 2003 survived the repeal such that it allowed the Respondent/Applicant the Director of Public Prosecutions under its provisions to pursue an order for restraint against the Applicant/Respondent Shankiel Myland.

[2] The Applicant/Respondent (referred to hereafter as the **Respondent**), challenges as null and void an order of the court made on the 12th of July 2012, pursuant to section 28 of the Proceeds of Crime Act (2003 POCA), which purported to (inter alia) restrain the Respondent from dealing with certain properties and accounts belonging to him and compelling him to produce financial documentation in relation to named business enterprises owned and operated by him. The Respondent's simple submission is that the order was made pursuant to a repealed enactment.

BRIEF FACTS

[3] The Respondent was between the 8th February 2012 and the 2nd March 2012 charged together with others with various money laundering and drug offences including conspiracy to commit money laundering and conspiracy to traffic cocaine. These offences it is alleged were committed between the 1st December 2011 and 4th February 2012.

[4] By application filed on the 27th of June 2012, the Respondent /Applicant (**hereinafter referred to as the Applicant**) pursuant to section 28 of POCA 2003, applied to restrain certain property of the Respondent it being realisable property under the Act. The Application was made without notice to the Respondent. The order was granted by the Court, subject to service on the Respondent. (It is noted that nowhere in the application, affidavit in support, or notes of evidence of the proceedings, was it revealed to the judge dealing with the application, that the POCA 2003 under which the application was made had been repealed, whether wholly or in part, and had been replaced by the now POCA 2012. I will return to that later in this judgment.)

[5] The Respondent and other persons affected by the order, including the financial institutions where the Respondent transacts business, were on the 16th of July 2012 served with the directive to freeze all property and named accounts held by the Respondent until further notice.

[6] The Respondent on the 23rd of July 2012 filed a without notice application to set aside that order. On case management held on the 24th of July 2012, the Court directed that the hearing to set aside the order be on notice and directed service on the Applicant. The Court exercised its discretion and abridged the notice period and set the hearing down for the 27th July 2012.

THE EFFECT OF THE NEWLY ENACTED POCA 2012

[7] It is necessary to set out the relevant provisions of POCA 2012. Section 65 provides:-

The following Acts as repealed -

- (a) The Proceeds of Crime Act No. 27 of 1992
- (b) The Proceeds of Crime Act No. 3 of 2003 ; and
- (c) The Money Laundering (Prevention) Act No. 18 of 1999

[8] It is agreed by both parties that the POCA 2012 contains no express transitional or saving provisions.

[9] The Applicant's legal quagmire is compounded by sub section (4) of section 2 of the interpretation provisions of the POCA 2012 which provides:-

"nothing in this act confers any power on any court in connection with offences committed before the coming into force of this Act, or proceedings against a person for an offence instituted before the coming into force of this act."

[10] The inescapable conclusion, to be drawn, the Respondent submits from the conjoint interpretation of section 2 (4) and section 65 is that when POCA 2003 was repealed with no saving or transition provisions, it brought an end to the ability of the Applicant to commence any application that enabled orders to be made for restraint in relation to offences committed before the 27th of January 2012.

[11] Taking the logic of the Respondent's submission to its natural conclusion would mean that immediately upon the promulgation of POCA 2012 on the 27th January

2012, there could be no more applications for restraint and or confiscation in relation to serious crimes committed before the promulgation of the Act.

[12] This I am satisfied would leave a lacuna in the law and I am not convinced that that was the legislative intent.

DOES POCA 2003 HAVE POST REPEAL FORCE?

[13] The common law rule as I understand it is that a repealed enactment is to be treated as if it had never been, except as to matters past and closed.¹

[14] This general principle of the common law is qualified by the statutory provisions contained in the Interpretation and General Provision Act Cap 153. It provides in its relevant parts as follows:-

17 (3) Where a written law repeals wholly or partially any other written law, then, *unless a contrary intention appears*, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;

(c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;**

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed;
or

(e) affect any investigation, legal proceeding or remedy in respect of any **such** right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

¹ See Eton College v Minister of Agriculture [1964] Ch 274.

and any **such** investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made. (my emphasis)

- [15] The Act in my view provides a general savings and where its provisions are applicable, and subject to a contrary intention appearing, it modifies the strict operation of a repealing enactment. Francis Bennion in his treatise Bennion on statutory interpretation stated that the main effect of such general savings is *"to modify the common law doctrine that at repeal the floodlight is switched off, plunging everything illuminated by it into immediate darkness."*
- [16] In my view, to determine whether the Interpretation and General Provisions Act operated to modify the effect of the repeal such that the Applicant was entitled to rely on POCA 2003 to support an application for restraint would depend on whether on the commencement of POCA 2012, the Applicant had acquired, accrued or incurred any right, privilege, obligation or liability such that it would give him the power to apply for restraint.
- [17] It is my respectful view that a legal right is acquired, accrued or incurred when the person seeking to assert it can actually exercise it and that can only happen when all conditions precedent to the exercise of the right has been fulfilled.
- [18] The charges brought against the Respondent were alleged to have been committed between December 2011 and February 4th 2012. Given that the application for restraint could only be applied for under section 28 of POCA 2003 after criminal charges were laid, and given that criminal proceedings were only instituted between the 8th of February and 2nd of March 2012, and the offences with which the Respondent was charged were purportedly committed between 1st December 2011 and 2nd February 2012, I have no difficulty concluding that at the time of repeal and the enactment of POCA 2012, the Applicant had no accrued or acquired right, that would allow him to come within the exceptions . The Interpretation and General Provisions Act therefore offers no reprieve to the

Applicant, and without more I am without alternative but to grant the application of the respondent and to dismiss the order made on the 12th July 2012.

THE PROCEDURE USED TO OBTAIN THE ORDER OF RESTRAINT

- [19] Subsidiary to the substantive proceedings is the question of the procedure governing the application made. The Applicant commenced the proceedings for restraint by application with affidavit in support, which was challenged by the Respondent on the basis that Part 8 of the CPR provides for proceedings to commence by claim form or fixed date form except where an exception applies.
- [20] Counsel for the Applicant submitted that proceedings for restraint are quasi criminal proceedings and the procedure applicable is regulated by the POCA itself which prescribes the manner in which such proceedings are brought before the High Court.
- [21] POCA 2003 provides at paragraph section 26 (4) of the Act for a restraint order to be made on an ex parte application to a judge in Chambers and provides for notice of the order to be given to persons affected.
- [22] Part 2.2 of the CPR is relevant to resolving this issue. It provides:-

APPLICATION OF THESE RULES

- 2.2 (1) Subject to paragraph (3), these Rules apply to all civil proceedings in the Eastern Caribbean Supreme Court in any of the Member States or Territories.
- (2) In these rules "civil proceedings" include Judicial Review and applications to the court under the Constitution of any Member State or Territory under Part 56.
- (3) These Rules do not apply to proceedings of the following kinds -
- (a) Family proceedings;
 - (b) Insolvency (including winding up of companies);

- (c) Non-contentious probate proceedings
- (d) Proceedings when the High Court is acting as a prize court,
and
- (e) *Any other proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.*"(my emphasis)

- [23] I find that an order for restraint of assets is a civil proceeding given that the object of the order is not penal in character, but is to secure the status quo until the determination of an event.
- [24] I also find that on the strict application of Part 2.3 (e) that these would be proceedings to which the Civil Procedure Rules would be applicable as there are no rules made under the POCA that regulate its proceedings.
- [25] Despite this finding I am satisfied that the proceedings under POCA are special proceedings that dictate the application of a procedure quite apart from the CPR. I am satisfied that in this instance the strict application of the CPR would create a situation of absurdity.
- [26] Applying the reasoning of the Court of Appeal in Kent Andrews et al v The Attorney General of Saint Vincent and the Grenadines Civil Appeal No 19 of 2010, I am satisfied that an application pursuant to section 28 of POCA is in the character of an interim application, although there may not be any further proceedings after the initial order. For these reasons, and given the benefit of my research on the procedure often adopted regionally and internationally in such proceedings, I am satisfied with the mode of commencement used for these proceedings.

AUTHORITY OF THE COURT TO DISTURB ITS EARLIER ORDER

- [27] Save to correct typographical errors, the CPR does not empower the court to review its own order. However, and for reasons earlier mentioned, I am satisfied that the CPR 2000 is inapplicable to the current proceedings.
- [28] Section 28 (5) (a) of POCA 2003 allows the court on the application of any person affected by the order to review its earlier order and to discharge or vary it in relation to any property. Section 21 (5) and (6) of the Proceeds of Crime Act 2012 (2012 POCA) is in similar terms. For reasons earlier mentioned neither POCA 2003 nor POCA 2012 are applicable to these proceedings.
- [29] The throw back provision contained in the West Indies Associated Supreme Court (Grenada) Act Cap 336 Sections 11 and 12 is also of little use given the limitations of Part 40.9 of the English Civil Procedure Rules that allows only a person aggrieved who is **not a party** to the proceedings to apply for discharge or variation of any order made thereunder.
- [30] I am satisfied, however, that, as in the present circumstances where an order of the court is irregular it can be set aside *ex debito justitiae* at any time it comes to the court's attention. Isaac v Robertson (1984) 3 All ER 140 and in particular the dicta of Lord Denning is the authority for this proposition.
- [31] I had earlier in this judgment expressed my dissatisfaction with the manner in which Counsel for the Applicant had applied for and conducted the application for restraint. Counsel was possessed of knowledge vital to the Court exercising its decision to grant the order of restraint, which was not disclosed to the court. That information was as to the former enactment POCA 2003 being repealed and replaced by POCA 2012. Counsel's justification (I assume from her submissions) was that POCA 2012 was inapplicable to her application. For reasons enunciated herein, knowledge of the existence of the newly promulgated Act was vital information that would have guided the Court on whether it was judicious to have granted the order for restraint. 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 and its effect in restraining the Respondent's use of his assets has such harsh consequences. The failure of Counsel to bring this fact to the attention of the judge was to my mind reckless and the implications severe.

[32] For all of the reasons I have identified above I am forced to set aside the order of court dated the 12th day of July 2012 purporting to freeze the property and accounts of the Respondent and to order the Applicant to pay the Respondent's cost in the sum of \$ 1,000.00.

V. Georgis Taylor-Alexander
High Court Judge (Ag.)