[2017] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

SUPREME COURT CIVIL APPEAL NO 80/2013

BETWEEN	**ANDREW HAMILTON**	**1st APPELLANT**
	DOROTHY HAMILTON	**2nd APPELLANT**
	ANDRE HAMILTON	**3rd APPELLANT**
	ANDREW HAMILTON CONSTRUCTION LIMITED	**4th APPELLANT**
	JANET RAMSAY	**5th APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 61/2014

BETWEEN	**ANDREW HAMILTON CONSTRUCTION LIMITED**	**APPELLANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Ian Wilkinson QC, Mrs Shawn Wilkinson and Miss Akuna Noble instructed by Wilkinson & Co for the appellants

Mrs Caroline Hay, Mrs Symone Mayhew and Miss Alethia Whyte for the respondent

25, 26 February, 5 March 2015 and 20 December 2017

MORRISON JA

Introduction

[1] These are consolidated appeals[1], both of which arise out of proceedings which are still ongoing in the Supreme Court. These proceedings were brought by the Assets Recovery Agency ('ARA') against all the appellants named above (and others), pursuant to the provisions of the Proceeds of Crimes Act ('POCA').

[2] In SCCA No 61/2014 ('the legal status appeal'), the appellant, Andrew Hamilton Construction Limited ('AHCL'), appeals (pursuant to leave granted by this court on 27 June 2014[2]) from a judgment given by Sykes J ('the judge') on 31 July 2013[3] ('the first judgment'). In that judgment, the judge dismissed a preliminary point taken by AHCL in the proceedings referred to above. The preliminary point challenged ARA's legal status to commence the proceedings.

[3] In SCCA No 80/2013 ('the abuse of process appeal'), the appellants appeal (with the leave of the judge) from the subsequent judgment given by the judge in the same proceedings on 30 September 2013[4] ('the second judgment'). By that judgment, the judge dismissed the appellants' application to strike out ARA's claim and to discharge certain orders made against them as an abuse of the process of the court.

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[1] SCCA No 80/2013 and SCCA No 61/2014, consolidated by order of Lawrence-Beswick JA (Ag) on 15 July 2014. Although second in time, the latter appeal relates to a judgment given before the judgment challenged in the former appeal.
[2] **Andrew Hamilton Construction Limited v The Assets Recovery Agency** [2014] JMCA App 20
[3] [2013] JMSC Civ 113
[4] [2013] JMSC Civ 136

[4] Save where it is necessary to refer to any of them specifically by name, I will describe the appellants in both appeals collectively as 'the appellants'.

The background

[5] Section 33(1) of POCA empowers a judge of the Supreme Court to make a without notice restraint order on the application of either the Director of Public Prosecutions ('the DPP') or the ARA. Section 32(1) sets out the conditions which must be satisfied before such an order can be made.

[6] Rules 17.1(1)(c)(i) and 17.1(1)(g)(i) of the Civil Procedure Rules ('the CPR') respectively empower the court to make orders for the detention, custody or preservation of relevant property; and directing a party to provide information about the location of "relevant property or assets".

[7] On 21 August 2012, the ARA filed a without notice application[5] under sections 32 and 33 of POCA, naming 13 respondents ('the original application'). The appellants (excluding Andre Hamilton) were among the respondents and this application sought three principal orders.

[8] First, restraint orders against the appellants (excluding Andre Hamilton) and the other respondents, preventing disposal of and/or dealing with a number of listed assets until the conclusion of all legal proceedings, including appeals. The assets so listed

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[5] Claim No 2012 HCV 04604

comprised 18 pieces of real property registered in the names of the appellants (excluding Andre Hamilton and Janet Ramsay) and others.

[9] Second, an order under sections 32 and 33 of POCA, as well as rule 17.1(1)(c) of the CPR, authorising the ARA to detain and maintain custody of, and to preserve eight items of personal property allegedly owned by one of the appellants, AHCL, and others.

[10] And third, an order under rule 17.1(1)(g) of the CPR that the appellants (excluding Andre Hamilton) forthwith disclose with full particularity the nature and location of all assets owned by them, whether or not identified in the order and whether held in their names or by nominees or otherwise on their behalf.

[11] The grounds of the original application were as follows:

> "(a) A Civil Recovery investigation has been started and is ongoing in Jamaica concerning Andrew Hamilton[6], Rohan Fisher, and Ricardo Fisher and their associates.
>
> (b) On February 10, 2012, Andrew Hamilton, Rohan Fisher, and Ricardo Fisher were indicted in the United States Central District of California for money laundering and violation of United States drug and firearm laws.
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> (c) It is believed that proceeds from the alleged criminal activities of Andrew Hamilton, Rohan Fisher, and Ricardo Fisher and their associates were used to purchase the properties and motor vehicles registered in their names.
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> (d) The Respondents have commenced disposal of the assets.

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[6] The 1st appellant in SCCA No 80/2013

(e) If a restraint order is not made restraining the parties from causing or allowing the disposal of or dealing with the remaining assets, there is a real risk that they will take steps to dissipate these assets and thereby frustrate any judgment which may be obtained against them.

(f) There is reasonable cause to believe that the parties named have benefited from their criminal conduct."

[12] The original application was supported by the affidavit of Mr Ronald Rose ('the first Rose affidavit'), sworn to on 16 August 2012. Mr Rose was at the material time a forensic examiner employed to the Financial Investigations Division ('FID'), and an authorised financial investigator, pursuant to POCA. In this capacity, Mr Rose conducted financial investigations into matters relating to financial crimes, including money laundering, and civil recovery of property.

[13] Mr Rose's evidence was to the following effect. He was a member of a team of financial investigators who conducted investigations into allegations that Mr Andrew Hamilton, Richard Anderson (also known as 'Rohan Fisher') and Ricardo Fisher had been indicted in the United States of America for gun and drug offences and money laundering. It was subsequently confirmed that the three men were in fact indicted on 10 February 2012 in the United States Central District of California for money laundering and violation of United States drug and firearms laws. A resultant civil recovery investigation revealed that various persons, including two of the present appellants, owned real estate and other property jointly with Mr Hamilton. These persons were suspected of being engaged with Mr Hamilton in money laundering and

the properties were believed to be proceeds of his alleged criminal conduct, thereby representing recoverable property.

[14] On 30 December 2010, as part of the investigation, law enforcement authorities carried out a raid at 5 McWhinny Street, Kingston 2, an address which appeared to be the family home in which Mr Hamilton and his siblings had been raised by their parents. There, a significant number of illegal firearms and ammunition was found.

[15] A search was also carried out that same day at 7 Liguanea Avenue, Kingston 6, a property then occupied by Mr Joseph Arnold, Mr Hamilton's brother, and his family. The registered owner of that property was AHCL, the appellant in SCCA 61/2014. The directors and shareholders of AHCL were Mr Hamilton, Ms Janet Ramsay (the 5th appellant in SCCA No 80/2013), and Ms Ann Marie Cleary, the mother of Mr Hamilton's children. Further investigations revealed Mr Hamilton to be a director and shareholder of another company, Andrenhan Seafoods Company Limited ('ASCL'). Along with one other person, Ms Ramsay and Ms Cleary were the other shareholders of ASCL.

[16] AHCL filed nil annual income tax returns for the years 2004-2007 and 2009-2010, while no returns were observed for 2008. ASCL filed no income tax return since its incorporation in 2008. But, during the period April to September 2008, AHCL imported heavy-duty tractors, motor vehicles and parts totalling $42,445,385.76 in value, while ASCL imported a fishing vessel at a total cost of over $19,000,000.00.

[17] Investigations also revealed that, during the years 2002-2009, Mr Hamilton and/or persons connected to him purchased properties of a total value of

$429,500,000.00. These properties were all believed to have been purchased with the proceeds of Mr Hamilton's criminal conduct. As at the date of his affidavit, Mr Rose identified a total of 18 properties as being in the possession of Mr Hamilton and his nominees. But it also appeared that, shortly after the search of premises at 7 Liguanea Avenue, Mr Hamilton had started selling the properties and that 12 of them had already been sold up to the date of Mr Rose's affidavit for a total of over $215,000,000.00.

[18] Mr Hamilton and members of his family were also registered owners of a number of motor vehicles (six in total) acquired during the period 2003-2009. But details of their income declared by Mr Hamilton and four members of his family (including Ms Ramsay, Ms Cleary and Mr Arnold) to the National Insurance Scheme over the period 1982-2010 showed a total income between them of no more than $12,232,839.90 (of which Mr Hamilton's share was $184,817.44).

[19] On this basis, Mr Rose concluded that (a) Mr Hamilton had been indicted for drug, money laundering, and firearm offences; (b) investigations had shown that he had started to dispose of his assets, which therefore needed to be restrained to prevent further dissipation; and (c) to give notice of the application to the parties would enable them to dissipate the assets further and thereby frustrate the proceedings. He accordingly asked for a restraint order to be made without notice.

The first restraint order and subsequent extensions

[20] On the strength of this evidence, Campbell J granted an interim restraint order in the terms sought on 29 August 2012. Among other things, Campbell J also ordered that

the respondents should "forthwith disclose with full particulars the nature and location of all assets owned by them, whether or not identified in the order and whether they are held in their name or by nominees or otherwise on their behalf ...". For ease of reference, I will describe this order, as the judge did, as the first restraint order.

[21] On 7 November 2012, D McIntosh J extended the first restraint order and fixed 27 May 2013 as the date for the hearing *inter partes* of ARA's application. On 29 January 2013, Marsh J varied the first restraint order, to facilitate the sale of two properties covered by it, and also further extended it to 27 May 2013.

The *inter partes* hearing before Marsh J on 27 May 2013

[22] It is against this background that the *inter partes* application for a restraint order came on for hearing before Marsh J on 27 May 2013. As at that date, ARA had not filed a civil recovery action. As the judge observed (in the second judgment), there was disagreement between the parties as to what exactly transpired before Marsh J on that date. However, the judge found it possible to discern some areas of agreement between them and I gratefully adopt his summary of the position[7]:

> "[30] ...ARA, on May 22, 2013, had filed two applications. The first is an application to extend the life of the restraint order. This application also asked for an order compelling the respondents to make full disclosure of their assets as ordered by Campbell J. The first application had as well an application that the respondents make available for inspection the

[7] [2013] JMSC Civ 136, paras [30]-[31]

> restrained motor vehicles. The second application asked for an order that the estate of one of the respondents (Mr Joseph Arnold) be substituted or since he was deceased.
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> [31] It is common ground that the applications were short served. The respondents objected to both applications being heard. Marsh J upheld the objection and neither application was heard. This left over the question of what to do with the restraint order which would expire on May 27, 2013, the same day of the hearing before Marsh J."

[23] It is at this point that the parties' recollections of what transpired before Marsh J diverge. As the judge recorded the rival contentions[8], the respondents maintained that a full oral application for extension of the interim restraint order (lasting some three hours) was made and refused by Marsh J, while ARA contended that, although Marsh J did spend some time on the matter, neither application was heard on the merits. At all events, Marsh J's order recorded that "[t]he oral application for an extension of restraint order granted on the 29th day of August 2012, extended to the 7th day of November 2012 and further extended on the 29th day of January 2013 is refused". Despite the fact that Marsh J granted leave to appeal from this order, no appeal was filed.

[24] The result of this, as the judge pointed out[9], was that the interim restraint order was not extended beyond 27 May 2013. This paved the way for the proceeds of the

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[8] At para. [32] of the second judgment
[9] At para. [33] of the second judgment

sale of the properties, which had previously been sanctioned by Marsh J's 29 January 2013 order, to be paid out to the attorney-at-law for the respondents.

[25] As regards the controversy as to what had happened before Marsh J, the judge allowed himself the following comment[10]:

> "... it does seem odd to this court that Marsh J having ruled that a written application to extend the restraint order would not be heard would then proceed to hear an oral application for the very same relief. It seems to me that the more likely position was that the time before Marsh J was taken up with whether he had a claim before him and having decided that there was none, then it necessarily followed that the restraint order had to be discharged. If there was no claim then what would be the point of extending the restraint order. It must also be bourne [sic] in mind that Part 17 of the Civil Procedure Rules requires an applicant who receives an interim remedy before claim is filed to file the claim thereafter. This was not done in the matter before Marsh J. The interim remedy was in place from August 2013 [sic] right through to May 2013 without any supporting claim form."

The second application for a restraint order

[26] ARA's next step was to commence an action[11] against the appellants, as well as ASCL, Devon Cleary, Paulette Higgins and Annmarie Cleary on 6 June 2013. The action was commenced by a claim form, supported by particulars of claim bearing the same date. The claim was for (i) a civil recovery order, pursuant to section 57 of POCA, in relation to the several listed assets; and (ii) restraint orders, pursuant to sections 32

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[10] At para. [37] of the second judgment
[11] Claim No 2013 HCV 03440

and 33 of POCA and rule 17.1(f) of the CPR, against each of the appellants and other respondents in relation to stated assets. The assets listed comprised 13 pieces of real property, 15 items of personal property and an amount of $82,659,850.00 held in an escrow account, being the net proceeds of the sale of the two properties sanctioned by the order of Marsh J made on 29 January 2013[12].

[27] Among other things, the particulars of claim stated as follows:

> "3. The 1st Respondent has engaged in unlawful conduct, in that on or about October 22, 2012, Andrew Hamilton pleaded guilty in the State of California, United States of America to Conspiracy to Distribute Marijuana and Conspiracy to Launder Money and is due to be sentenced on September 30, 2013.
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> 4. Hamilton is believed to have purchased property namely parcels of real estate with buildings thereon, motor vehicles and heavy duty equipment from the proceeds of his unlawful conduct registered solely and or jointly with the other Respondents and these properties have an estimated accumulated market value of Jamaican Four Hundred Million Dollars (J$400,000,000.00).
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> 5. The assets described below represent, directly or indirectly, the proceeds of the unlawful conduct of the 1st Respondent in drug trafficking and the unlawful conduct of the other Respondents in laundering the proceeds of the 1st Respondent's unlawful conduct, and as such, they are recoverable property as defined in section 84 of the POCA ('the recoverable property').
>
> 6. The identified legitimate income and resources of the Respondents indicate that it would have been

[12] See para. [21] above

> impossible for them to personally fund the property identified from legitimate income."

[28] A without notice application for court orders ('the renewed application') was also filed on 6 June 2013, supported by affidavits sworn to by Miss Charmaine Newsome and Mr Ronald Rose filed that same day. This application sought restraint orders against the appellants and the other respondents to the action on the grounds set out in the particulars of claim. In addition, the ARA contended that the appellants and the other respondents "have commenced dissipation of the assets".

[29] Miss Newsome's affidavit gave a brief account of the procedural history of the matter, beginning with Campbell J's grant of the first restraint order, and ending with Marsh J's refusal to extend that order on 27 May 2013. With respect to the latter, Miss Newsome stated[13] that, "[t]he Court found that no application was before it and refused Counsel's oral application for an extension of the Restraint Order and did not consider the merits of the case".

[30] In his affidavit ('the second Rose affidavit'), Mr Rose rehearsed much of the ground which he had covered in the first Rose affidavit. But he also stated[14] that –

> "On or about October 22, 2012, Andrew Hamilton pleaded guilty in the State of California, United States of America to Conspiracy to Distribute Marijuana and Conspiracy to Launder Money."

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[13] Para. 7
[14] At para. 6 of the second Rose affidavit

[31] On 7 June 2013, on the strength of this evidence, the judge granted ARA's application for an interim restraint order ('the second restraint order') as prayed, until 3 July 2013. The judge also fixed a date for consideration of the renewed application on an *inter partes* basis.

A challenge to ARA's legal status

[32] When the renewed application came on for hearing *inter partes* on 9 July 2013, counsel for the appellants took the preliminary point that ARA was not a legal entity and therefore could not be a party to the proceedings in its own right. In the submissions which followed, counsel on both sides canvassed in detail the relevant provisions of POCA and the Financial Investigations Division Act (FIDA). Section 3(1) of POCA provides that "the Assets Recovery Agency means – (a) the Financial Investigation Division of the Ministry of Finance and Planning; or (b) any other entity so designated by the Minister by order". Section 4 of FIDA provides for the establishment of a department of Government to be known as the Financial Investigations Division (FID).

The first judgment

[33] In the first judgment, after considering these and other sections of POCA and FIDA, the judge dismissed the preliminary point. Among other things, the judge said this[15]:

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[15] First judgment, paras [19]-[21]

"[19] When acting under POCA, ARA has significant powers. When one looks at the First and Third Schedules to POCA it is obvious that the legislature intended that whichever entity is designated as ARA, then that entity should be able to borrow money, sell property, start, carry and defend legal proceedings in respect of property, enter into a compromise or other legal arrangement in connection with property and manage property generally.

[20] The proposition that ARA is not a legal entity is to misunderstand the statute. The statute was not creating ARA. What it was doing was giving power to any entity that met the label of either being the FID or any other entity designated to use the powers under POCA. Parliament may have chosen an unusual way to go about achieving its purpose. That does not make it bad. What is important is to determine whether what has been enacted can be sensibly interpreted. We are long past the era of the seventeenth to the nineteenth centuries where judges thought that the common law was adequate and only to be tinkered with by the legislature occasionally. This judicial conception of the law and the role of the legislature led to a very restrictive interpretation being given to statutes. Judges saw the legislature as an interloper who should be chased off the legal common law reservation or at least kept within a narrow area of the reservation.

[21] In the modern world, judges now recognise and accept that a democratically elected Parliament in a constitutional democracy is empowered to pass laws for good governance and provided that they are compatible with the constitution, then judges should employ a purposive interpretation in order to give effect to the policy reflected in the statute. There are many areas now governed by legislation that were unknown to the common law. The common law was largely predicated on application to matters within the geographical boundaries of the country. The modern world now requires legal powers to deal with matters such as international organised crime and its links with criminals in the geographical boundaries of any particular state. This reality requires the modern nation state to pass laws and introduce concepts unknown to the common law. Judges no longer look for flaws in order to neuter the statute. The purposive interpretation authorises

judges to apply common sense to ensure that the statute works provided of course that the words used are capable of carrying out the objective of the statute. Sometimes the objective is clear but the wrong words were used. That is not the case here."

The legal status appeal

[34] In notice and grounds of appeal filed on 3 July 2014, AHCL appealed against the first judgment on the following grounds:

"a. The learned judge erred in finding or ruling that an entity called *'Assets Recovery Agency'* or *'The Assets Recovery Agency'* had legal personality.

b. The learned judge erred in law stating that the entity described under POCA to recover assets is ARA and that what was done by the legislature under POCA was sufficient to establish ARA.

c. The learned judge erred in failing to appreciate that reference to the ARA in POCA must mean the Financial Investigations Division ('FID') and not an entity called 'The ARA' or 'ARA'.

d. The learned judge erred in law in failing to find that it is the FID that has been given the several powers by POCA, including recovering assets and not another entity called 'ARA'.

e. The learned judge's finding that *'the statute was not creating ARA' (paragraph 20 of the judgment)* is contradictory or inconsistent with his decision to dismiss the preliminary point and the finding that the ARA is the entity described under POCA to recover assets.

f. The learned judge erred in finding that there was no need to make ARA a corporation sole or to establish it in a similar manner to how the FID was established in 2010.

g. The learned judge erred in finding that when acting under POCA the FID is known as 'ARA', particularly as there was no basis for such a finding.

h. The learned judge erred in concluding that what was done by the legislature under POCA was no different from what was done under the Mutual Assistance (Criminal Matters) Act.

i. The learned judge erred in referring to, or relying on, the purposive rule of interpretation to find or rule that an entity called ARA existed.

j. The learned judge erred in law in relying on the establishment of the FID in 2010 to justify the establishment of ARA, having regard to the fact that POCA was enacted in 2007, purported to create ARA and no FID existed at the time.

k. The learned judge erred in law in dismissing the preliminary point raised by the Appellant."

The submissions

[35] In skeleton arguments filed in support of these grounds, Mr Wilkinson QC conveniently treated all the grounds as giving rise to a single argument, that is, that the judge erred in attributing legal personality to the ARA. Mr Wilkinson's basic postulate was that -

> "It is trite law that every litigant must exist and have proper legal status in order to ground his/her/its *locus standi*. In other words, a litigant must have what is regarded as 'legal personality'."[16]

[16] Appellant's Skeleton Submissions filed 25 September 2014, para. 6

[36] After reviewing the relevant provisions of POCA and FIDA, Mr Wilkinson submitted that, at the time when POCA was first enacted in 2007 and, more significantly, when the cases against his client and the other appellants were commenced, there was no legal entity called the ARA. Mr Wilkinson contrasted the provisions of POCA with other legislation, such as the Administrator General's Act, the Children (Adoption of) Act and the Executive Agencies Act, to make the point that, under those statutes, the operational agencies were all given clear legal status. We were also referred to the United Kingdom Proceeds of Crime Act 2002, to demonstrate that, under that statute, the director of the agency known as the Assets Recovery Agency was specifically designated a corporation sole[17]. It was accordingly submitted[18] that the omission to so designate the ARA under POCA reflected a deliberate decision by the Jamaican legislature "not to cloak any such body with legal personality or status".

[37] In all these circumstances, it was submitted, the judge erred in law by applying the purposive rule of statutory interpretation, since, by doing so, he was obviously defeating the intention of the legislature.

[38] In support of these grounds, Mr Wilkinson referred us to various authorities with a view to underscoring the fundamental importance of the requirement of legal personality. I will refer to three of them at this point.

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[17] Proceeds of Crime Act 2002, section 1(3)
[18] Ibid, para. 29

[39] The first in time is the well-known older case of **Lazard Brothers and Company v Midland Bank Limited**[19]. In that case, a writ, judgment and garnishee proceedings issued against a Russian Bank were declared null and void and set aside, it having been established that the bank had ceased to exist as a juristic person before the date of the writ. Delivering the leading judgment in the House of Lords, Lord Wright observed[20] that –

> "... it is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the Court in the exercise of its inherent jurisdiction if and as soon as it appears to the Court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non-existent ..."

[40] A similar result ensued, albeit in different circumstances, in **The Junior Doctor Association and another v The Attorney General for Jamaica**[21]. In that case, the Junior Doctors Association ('JDA') and its central executive were the named respondents to a successful application for an injunction to prevent industrial action on the part of its members. The members of the JDA having disobeyed the injunction, orders for contempt of court were sought against them and granted by the Chief Justice. But the proceedings subsequently collapsed when this court held that, because the respondents had no legal personality, the entire proceedings were a nullity.

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[19] [1933] AC 289
[20] At page 296
[21] (unreported), Court of Appeal, Jamaica, Motion No 21/2000, Suit No E127/2000, judgment delivered 12 July 2000

[41] Lastly, I will mention **Caribbean Development Consultants v Lloyd Gibson**[22]. That was a case in which Sykes J (Ag) (as he then was) refused to permit the substitution of a party for the claimant after the expiration of the relevant limitation period, it having emerged that the claimant was not a legal entity. Taking the view that the entire proceeding was therefore a nullity (after citing the **Lazard Brothers** case), Sykes J (Ag) said this[23]:

> "One of the ways in which a nullity arises is where one party to the suit is not a legal entity. CDC is not a legal entity. The original proceeding was therefore a nullity. If this amendment were allowed it would bring into existence what never existed in law."

[42] In her submissions on behalf of ARA, Mrs Mayhew took no issue with any of these authorities. However, she contended for a distinction between 'corporate personality' and 'legal personality'. On the one hand, she observed, a body established by statute as "a body corporate" will have the full powers vested in it by section 28 of the Interpretation Act (such as, for example, to sue, to enter contracts, or be sued in its corporate name[24]). But, even without this designation, she submitted, a body established under statute and invested with certain powers may nevertheless have legal personality sufficient to enable it to bring legal proceedings for the purposes contemplated by the statute. Because this will only be possible if the body is authorised

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[22] (unreported), Supreme Court, Jamaica, Suit No CL 323/1996, judgment delivered 25 May 2004
[23] At page 11 of the unreported transcript
[24] Section 28(1)(a)(i) and (ii), and section 28(1)(b)

directly or indirectly by the legislature to do so, it is therefore necessary to examine each statute carefully in order to determine the scope of its powers. In this case, Mrs Mayhew submitted, the explicit powers granted to ARA under POCA and FIDA make it clear that Parliament must have intended that it should have legal personality to the extent necessary to give effect to the purposes referred to in the legislation.

[43] I will naturally have to examine in due course the statutory provisions upon which Mrs Mayhew relied. But it may be helpful to first consider briefly a few of the authorities to which she also made reference.

[44] **L C McKenzie Construction Ltd v The Minister of Housing and The Commissioner of Lands**[25], a decision of Duffus CJ, was principally concerned with the question whether the defendants were servants and/or agents of the Crown for the purposes of the Crown Proceedings Act. In considering this issue, one of the points which the Chief Justice had to determine was what was the status of the Minister of Housing, who had been designated a corporation sole with perpetual succession under the provisions of the Housing Act 1968. The legal result of this designation, so the plaintiff's submission went, was that the Minister ceased to be a servant or agent of the Crown and was thus amenable to injunctive relief.

[45] Duffus CJ disagreed, taking the view that the status of corporation sole did not by itself put an end to the relationship of principal and agent between the Minister and

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[25] (unreported), Supreme Court, Jamaica, Suit No E200/1972, judgment delivered 13 November 1972

the Crown. After detailed examination of the provisions of the Housing Act, Duffus CJ concluded that –

> "... the Minister of Housing has no power to sue or liability to be sued and that the provisions of the Crown Proceedings [Act] apply to him; therefore the person to sue or to be sued in respect of all matters arising under the Housing Act of 1968 is the Attorney General."

[46] The Chief Justice's decision in the **L C McKenzie Construction Ltd** case was specifically approved by this court[26] in the consolidated appeals of **Linton Thomas v The Minister of Housing and Ivanhoe Jackson v The Minister of Housing**[27]. In considering the effect of the corporation sole designation by statute, Rowe JA (as he then was) said[28]:

> "Each statute creating a Corporation Sole must be individually examined to discover whether from its terms the Corporation Sole is empowered to sue and is liable to be sued. Accordingly I do not think that an examination of the several statutes referred to by [counsel] in which a person or an official is created a Corporation Sole either with or without power to sue or liability to be sued, can lend assistance to the interpretation of the relevant provisions of the Housing Act."

[47] Then there is the decision at first instance of F Williams J (as he then was) in **Nichola Bryan and Others v St Mary Parish Council, National Works Agency**

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[26] Zacca P, Rowe JA and Campbell JA (Ag)
[27] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 60 & 61/1983, judgment delivered 22 June 1984
[28] At page 11

and The Attorney General[29]. One of the issues in that case was whether injunctive relief could be granted against the National Works Agency, a body created pursuant to the provisions of the Executive Agencies Act 2002. After examining various statutory provisions under which other public agencies have been established, F Williams J concluded[30] that –

> "... where the legislature intends to accord a body a separate and distinct legal persona, with the power to sue and be sued, it does so in clear terms by using a variety of legislative provisions. That it has not done so in the creation of the NWA as an executive agency, leads to the inference that it was not the intention of the legislature to give such separate legal existence to the NWA: - it remains a part of the Ministry under which it falls, and so also remains a part of the Crown. It has no separate legal existence; but exists as a semi-autonomous body created for administrative expediency."

[48] And finally I will mention **Attorney-General v The Lord Mayor, etc, of the City of Leeds**[31], which Mrs Mayhew cited for the incontrovertible proposition that, as Luxmoore J put it[32], "a statutory corporation ... can only do such acts as are authorized directly or indirectly by the statute creating it".

[49] Mrs Mayhew relied on these cases to make the point that non-designation of ARA as a corporation sole is not decisive of its power to maintain the proceedings against the appellants in this case. Rather, regard must be had to the relevant provisions of

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[29] (unreported), Supreme Court, Jamaica, Claim No 2011HCV06108, judgment delivered 3 February 2012
[30] At para. 41
[31] [1929] 2 Ch 291
[32] At page 295

POCA and FIDA in order to determine the true ambit of the powers given to it by the legislature.

The statutory provisions

[50] First, I will refer to section 3 of FIDA, which states the objects of the Act as being -

> "... to establish a department of Government with sufficient independence and authority to effectively deal with the multidimensional and complex problem of financial crime and confer upon it the responsibility to-
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> (a) investigate all categories of financial crime;
>
> (b) collect information and maintain intelligence databases on financial crimes;
>
> (c) maintain an arm's length relationship with law enforcement agencies and other authorities of Jamaica and of foreign States, and with regional and international associations or organizations, with which it is required to share information;
>
> (d) exercise its functions with due regard for the rights of citizens."

[51] Nothing in these broad, general statements of the objectives of FIDA is of any direct assistance in resolving the issue now under consideration. Indeed, Mrs Mayhew quite properly accepted that neither FIDA nor POCA contains express language designating ARA a body corporate. It was submitted, however, that, in POCA, Parliament has conferred on ARA specific statutory functions and powers which necessarily include the power to bring legal proceedings for certain purposes. In this

regard, Mrs Mayhew placed particular reliance on sections 3, 5, 33, 57, 59 and 71 of POCA.

[52] The starting point is section 3, which I will set out in full:

> "(1) In this Act, the Assets Recovery Agency means -
>
> (a) the Financial Investigations Division of the Ministry of Finance and Planning; or
>
> (b) any other entity so designated by the Minister by order.
>
> (2) The Chief Technical Director of the Financial Investigations Division or, where another entity is designated as the Agency under subsection (1), the person in charge of the operations of that entity, shall be the Director of the Agency.
>
> (3) The provisions of the First Schedule shall have effect as to the conduct of operations of the Agency with respect to the exercise of its functions under this Act.
>
> (4) The Agency shall have such functions as are conferred upon it by this or any other enactment and may do anything (including the carrying out of investigations) that is appropriate for facilitating, or is incidental to, the exercise of its functions.
>
> (5) The Agency shall give the Minister any advice or assistance that the Minister reasonably requires and that -
>
> (a) relates to matters connected with the operation of this Act; and
>
> (b) is designed to help the Minister to exercise his functions so as to reduce crime.
>
> (6) The provisions of paragraphs 12 to 15 of the First Schedule have effect with respect to the disclosure of information to or by the Agency and the use of such information."

[53] Next, there are –

(i) section 5, which empowers the court to make forfeiture orders and other pecuniary penalty orders, upon the application of the ARA or the Director of Public Prosecutions ('DPP');

(ii) section 33 (the section under which ARA's application was originally made in this case), which empowers the court to make a restraint order, upon the application of either the DPP or the ARA;

(iii) section 57, which, under the rubric, "Civil Recovery in the Supreme Court", empowers the "enforcing authority" (defined for the purposes of this section as the ARA or the DPP[33]) to "take proceedings in the Court against any person who [it] believes holds recoverable property":

(iv) section 59(3), which provides that, in relation to any property vested in it by a recovery order, the ARA "has the powers mentioned in the Third Schedule", among which are powers (a) "to start, carry on or defend any legal proceedings in respect of the property"[34]; and (b) in connection with the exercise of any of those powers, of "suing and being sued"[35]; and

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[33] By section 2(1)
[34] Para. 4
[35] Para. 6(2)(c)

(v) section 71, which dis-applies the provisions of the Limitation of Actions Act in relation to any proceedings under that part of POCA which governs civil recovery proceedings in the Supreme Court[36], and prescribes a limitation period in respect of such proceedings of "twelve years from the date on which [ARA's] cause of action accrued"[37].

Conclusion on the issue of legal personality

[54] There can be no question that, in order to institute and maintain legal proceedings, all litigants must have legal status of some kind, some sort of separate legal existence or persona. But it is clear that there is no fixed route to such status. In every case in which it is said to derive from statute, it will be necessary to consider the particular statute relied on in order to discern the intention of Parliament. At one end of the spectrum, there will be clear cases, such as, for instance, a company incorporated under the Companies Act, which "has the capacity ... rights, powers and privileges of an individual"[38]. Equally clear will be the case of a body corporate established by statute to which section 28 of the Interpretation Act applies, which will have the power to, among other things, sue in its corporate name.

[55] However, as the cases show[39], even the designation by statute of a body as a corporation sole does not necessarily vest in that body the right to sue or be sued in its

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[36] Section 71(1)
[37] Section 71(2)
[38] Companies Act, section 4(1)
[39] See paras [44]-[48] above

own name. Every case therefore calls for careful scrutiny of the particular statute in order to determine the legislative intent with regard to the particular body under consideration. In this case, as it seems to me, the various powers conferred on ARA by POCA - to apply or initiate court proceedings for forfeiture orders and other pecuniary penalty orders, restraint orders, civil recovery orders, and to take and defend proceedings in respect of property vested in it as a result of a recovery order – are clear indicators that Parliament must necessarily have intended that it should enjoy legal status for these purposes. Similarly, in my view, the reference in section 71(2) to ARA's "cause of action", in the context of a provision relating to limitation of actions, is only explicable on the basis that Parliament intended that ARA should have the power to file and maintain an action in court.

[56] So whether, as section 3(1) of POCA puts it, "the [ARA] means – (a) the [FID] … or (b) any other entity so designated by the Minister by order", it seems to me that the statute has plainly given the ARA the authority to commence and maintain proceedings in the manner indicated. I accordingly agree with the judge's view[40] that -

> "The proposition that ARA is not a legal entity is to misunderstand the statute. The statute was not creating ARA. What it was doing was giving power to any entity that met the label of either being the FID or any other entity designated to use the powers under POCA."

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[40] See para. [20] of the first judgment

[57] I therefore think that the judge was right to dismiss the preliminary point. It may well be true, as the judge went on to observe, that Parliament chose a somewhat unusual method of investing ARA with the status to initiate legal proceedings. But, as the judge ultimately concluded[41], "[t]he real issue is not whether the legislature could have gone about the matter differently but rather whether what was done is legally sufficient". In this case, I agree with the judge's conclusion that it was and I would therefore dismiss the legal status appeal.

A further challenge to the second restraint order

[58] The first judgment cleared the way for a further attack on the second restraint order by the appellants. At an *inter partes* hearing conducted by the judge on 20 and 21 August 2013, an application was made, pursuant to CPR 26.3(1)(b), to strike out the particulars of claim filed on 6 June 2013 as an abuse of the process of the court[42]. The basis of the challenge was that the nature of the claim and the renewed application was substantially the same as that advanced by ARA in the original application. The appellants pointed out that ARA had not discontinued the original application, which therefore remained extant, and that ARA had in fact sought and obtained leave to appeal against Marsh J's decision. In these circumstances, the appellants contended, Marsh J's decision not to extend the first restraint order made that issue *res judicata* and the ARA was therefore estopped from obtaining any further restraint order over the

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[41] At para [30] of the first judgment

[42] Although strike-out applications were not in fact filed on behalf of all of respondents to the renewed application, the judge effectively treated it as the application of all. And the formal order on the renewed application refers to it as an application made by all, save one, of them – see Restraint Order filed 3 October 2013.

same properties by filing a new claim. The appellants also complained that the second Rose affidavit was "substantially the same as that filed in support of the first restraint order"[43].

The second judgment

[59] In the second judgment, the judge rejected the applications to strike out the claim form and the particulars of claim on the ground of abuse of the process of the court. He accordingly dismissed the applications to discharge the second restraint order and granted ARA's application to extend the second restraint order until judgment or further order. In making an order for costs against the appellants, the judge also ordered that the costs were to be payable when the claim is concluded.

[60] In dismissing the strike-out application, the judge based himself substantially on the decision of the House of Lords in **Johnson v Gore Wood & Co (a firm)**[44], in particular Lord Bingham's caution[45] that –

> "It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should ... be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by

[43] Para. [42] of the second judgment
[44] [2002] 2 AC 1
[45] At page 31

> seeking to raise before it the issue which could have been raised before."

[61] After a detailed examination of both of the affidavits sworn to by Mr Rose, the judge concluded that, while "on a superficial view they appear to cover the same ground ... they are fundamentally different in several respects". The judge's analysis of the differences between the two affidavits, from which there is no appeal, was as follows[46]:

> "[43] In the first affidavit of Mr Rose placed before Campbell J Mr Rose swore that 'a civil recovery investigation has started and investigations have found ... assets ... believed to be the proceeds of the alleged criminal conduct of Hamilton and represents recoverable property' (para 5 of affidavit dated August 16, 2012). In the second affidavit placed before Sykes J, Mr Rose swore that 'Andrew Hamilton pleaded guilty in the State of California, United States of America to conspiracy to distribute marijuana and conspiracy to launder money' (para. 6 of affidavit dated June 6, 2013). The legal significance is that Mr Andrew Hamilton, on the face of it, has made a judicial confession of guilt before a court of law. At the time of the first affidavit he was a suspect but at the time of the second affidavit what was suspected has now become a fact by virtue of his guilty plea. Mr Hamilton by his plea of guilty took the case from allegations of criminal conduct to proof of criminal conduct. By any measure this must be a significant difference between the two affidavits. It surely must strengthen ARA's case. As to whether that is sufficient to enable a successful application for a recovery order is another matter.

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[46] Second judgment, paras [43]-[48]

[44] The first affidavit did not have any information about the manner in which Mr Hamilton conducted his now admitted drug trafficking and money laundering activity. The second affidavit of Mr Rose states in some detail how it is believed that Mr Hamilton conducted his drug trafficking business (see paras 15 - 16).

[45] The first affidavit did not contain any assertion regarding Mr Hamilton's source of income from any legitimate employment while in the United States of America. In the second affidavit, there is the explicit assertion that investigation done by Drug Enforcement Agency ('DEA') showed that since 1991 Mr Hamilton has not had any legitimate source of income.

[46] The second affidavit reveals more focused and targeted investigations into the means of the named respondents who were also respondents in the first restraint order application. This second affidavit highlights the monthly income and annualised income of some of the respondents in order to suggest that even though some of the properties are in the names of some of respondents, these persons were not able to purchase these properties based on their income. There is no evidence that the named respondents bought these properties with the aid of loans. The evidence strongly suggests that these were cash purchases.

[47] From this it is clear that the differences between the first and second affidavit of Mr Rose are substantial though they may not have taken up a significant number of paragraphs in second affidavit. The second is obviously more detailed than the first. These differences are not surprising given that the first affidavit indicated that it was an ongoing investigation.

[48] The second restraint order was granted in the context of there being a claim form where the ARA has stated that it is seeking a civil recovery order in respect of the restrained properties. Also there were properties

restrained in the second restraint order that were not restrained by the first."

[62] On this basis, after detailed consideration of the facts and the relevant chronology, the judge concluded that there was no abuse of process in this case.

The abuse of process appeal

The grounds of appeal

[63] By notice of appeal filed on 7 October 2013, the appellants appealed against the second judgment on the following grounds:

> "(a) Mr Justice Sykes ('*the learned judge*') erred in law in misapplying the decision or ruling of the House of Lords in ***Johnson v Gore Wood & Co.*** (***A Firm***) [2002] 2 AC 1, to the facts of the instant case. More particularly, the learned judge failed to appreciate and/or apply correctly the germane principles, especially Lord Millett's statement (*Vide* p. 59 in **Johnson** (*supra*).
>
> (b) The learned judge erred in law in failing to appreciate that the principle of ***res judicata*** applied and affected the ARA adversely particularly in light of the ARA's failure or refusal to appeal or challenge Marsh, J's May 27, 2013 ruling.
>
> (c) The learned judge erred in law in failing to appreciate that the second claim, in particular the second application for a Restraint Order, was in substance a collateral attack on the said decision of Marsh J on May 27, 2013 in the first (2012) matter.
>
> (d) The learned judge erred in law in misconstruing or misinterpreting the decision in **Leymon Strachan v The Gleaner Company** [2005] 1 WLR 3204 and in

misapplying the legal principles in the said case to the facts of the instant matter.

(e) The learned judge erred in failing to appreciate or recognize that, in proceeding as he did on the 7th June, 2013 and the 30th September, 2013, respectively, he was essentially acting as a Court of Appeal vis-à-vis the decision of Marsh, J. The effect of this was to defeat, flout, or render nugatory Marsh, J's Orders, particularly the one directing that the proceeds of sale of the two parcels or real estate held in escrow be paid over by the respondent to the appellants' respective Attorneys-at-law.

(f) The learned judge erred when he concluded, in relation to the issue of whether an application to extend the restraint order was considered or heard by Marsh, J, that '... *the more likely position was that the time before Marsh, J was taken up with whether he had a claim before him and having decided that there was no claim then what would be the point of extending the restraint order.'*

(g) The learned judge erred when he said or decided that... '*it is common ground that Marsh, J did not hear the written applications which were in fact supported by affidavits. It is therefore difficult to say that his Lordship addressed his mind to the contents of the affidavit and then made a decision. It will be recalled that the respondents successfully persuaded Marsh J not to entertain the* written *applications*'.

(h) The learned judge erred when he said or decided that '*since Marsh J had held that the written applications were not before him and there was no claim form, then as far as the first restraint order was concerned it was a dead letter.'*

(i) The learned judge erred when he said or decided that '*Also, since it is common ground that his Lordship did not hear the written applications and adjudicate on them it seems fair to say that his Lordship may not have been aware that Mr. Andrew Hamilton had pleaded guilty and was awaiting sentence*.'

(j) The learned trial judge erred in failing to accept the evidence and/or many (`*fourteen*') points listed by the Appellants which clearly established that the Respondent was guilty of abuse of process.

(k) The learned judge erred in failing to address or assess, specifically, the impact of the Respondent's failure to disclose to him: ***(a)*** Marsh J's formal order on May 27, 2013; and ***(b)*** the fact that the Respondent made an oral application for an extension of the restraint order which oral application was made in reliance on, inter alia, written material (application and supporting affidavit) that had been before the court from as far back as August, 2012.

(l) The learned judge erred in failing to consider, or accept, the Appellant's submission that the Respondent's Claim Form and Particulars of Claim, and the evidence adduced in support of them, failed to satisfy the provisions of the Proceeds of Crime Act **(`*POCA*')**, in particular **section 5 (1)** and **section 32 (1)** which deals with the circumstances in which the court will make a restraint order.

(m) The learned judge erred in law in accepting or relying on the Affidavit evidence of Ronald Rose to support his conclusion for granting the (second) Restraint Order when the said affidavit was replete with hearsay evidence and failed to satisfy the requirements of the law, in particular **section 5 (1)** and **section 32 (1)** of POCA.

(n) The learned judge erred in law in dismissing the Appellants' application to strike out the Respondent's Claim Form and particulars of Claim.

(o) The learned judge erred in law in dismissing the Appellant's application to discharge the Restraint Order.

(p) The learned judge erred in law in granting the Respondent's application to extend the Restraint Order.

(q) The learned judge erred in granting Costs to the Respondent."

The appellants' submissions

[64] For the purposes of his argument, Mr Wilkinson very helpfully grouped these grounds into more manageable units, that is, grounds (a), (b), (c) and (j); grounds (d) and (e); grounds (f), (g), (h) and (i); ground (k); grounds (l) and (m); and grounds (n), (o), (p) and (q).

[65] On grounds (a), (b), (c) and (j), Mr Wilkinson submitted that, ARA's application for continuation of the first restraint order, having been refused by Marsh J, ARA was guilty of abuse of process by applying to the judge *de novo* for virtually the identical relief which Marsh J had refused. In circumstances in which there was no appeal against Marsh J's order, despite the fact that leave to appeal was sought and obtained, the proceedings before the judge amounted to no more than a collateral attack on that order. In the alternative, Mr Wilkinson submitted further, the issues between the parties having already been decided by Marsh J's order, the matter was *res judicata* and the judge ought not to have allowed it to be reopened before him.

[66] Amplifying these submissions, Mr Wilkinson drew attention to a number of what he described as "clear examples of abuse of process", which he had also brought to the judge's attention. He submitted that these instances demonstrated that ARA "has been guilty of mishandling or misusing this Honourable Court's resources". They may be summarised as follows:

(i) Failing to file a claim form and/or particulars of claim in respect of the first restraint order, despite having obtained that order as far back as August 2012.

(ii) Deliberately filing, and short-serving the applications for extension of the first restraint order when the hearing before Marsh J was set for 27 May 2013.

(iii) Obtaining several interim restraint orders in the first case against a deceased person (Joseph Arnold), although knowing that he had died from January, 2012.

(iv) Filing a claim form and particulars of claim (subsequently amended) in support of the claim for the second restraint order so as to make an argument that doing so made it different from the application for the first restraint order.

(v) Deploying evidence before the judge which was either similar to that which was before Marsh J when he dismissed ARA's application on 27 May 2013, or known to ARA for months in advance of the hearing before Marsh J.

(vi) Failing to give full and frank disclosure to the judge regarding the earlier proceedings, lasting for almost three hours, before Marsh J.

(vii) Failing to exhibit in the proceedings before the judge Marsh J's perfected order in respect of the 27 May 2013 hearing.

(viii) Seeking a stay of Marsh J's 27 May 2013 order until 7 June in order to delay or prevent Marsh J's order taking effect.

(ix) Not proceeding by way of an appeal to the Court of Appeal, despite having sought and obtained leave to appeal from Marsh J.

(x) Failing to go back before Marsh J, who had a good command of the issues in the matter, to hear its application for the second restraint order on 7 June 2013.

(xi) Failing to inform the appellants' respective attorneys-at-law of the 2013 application and the intention to seek the second restraint order.

(xii) Proceeding to obtain the second restraint order without informing the appellants' said attorneys-at-law.

(xiii) Delaying until 6 June 2013, the day before the stay granted by Marsh J on 27 May 2013 was scheduled to expire, to file the application for the second restraint order.

[67] In support of these submissions, Mr Wilkinson relied on a number of authorities, principal among them the decision of the House of Lords in **Johnson v Gore Wood & Co (a firm)**, to which I will come in due course.

[68] Mr Wilkinson's submissions on the remaining grounds may be summarised, hopefully without disserving any of them, as follows:

> (i) On grounds (d) and (e), the judge failed to give effect to the decision of the Privy Council in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**[47] ('**Leymon Strachan**'), which made it clear that a judge had no power to set aside the judgment of another judge of co-ordinate jurisdiction. In proceeding as he did, it was submitted, the judge acted as a Court of Appeal against Marsh J's decision by effectively overruling his orders.
>
> (ii) On grounds (l) and (m), the claim filed by ARA in respect of the second restraint order was defective in its failure to comply with sections 5(1) and 32(1) of POCA, in particular as regards the evidence required to be supplied to the court on such an application.
>
> (iii) On grounds (f), (g), (h) and (i), the judge erred in, in effect, speculating – incorrectly as it turned out – as to what had occurred at the 27 May 2013 hearing before Marsh J. In particular, the judge

[47] [2005] UKPC 33

erred in concluding that ARA's application for an extension of the first restraint order was not heard and determined by Marsh J.

(iv) On ground (k), the second restraint order should not have been issued, as this encouraged and resulted in a multiplicity of proceedings, contrary to the provisions of section 48(g) of the Judicature (Supreme Court) Act and the overriding objective of the CPR.

(v) And, on grounds (n), (o), (p) and (q), for all the reasons already advanced, the judge ought not to have made the orders which he made.

ARA's submissions

[69] At the outset of her submissions on behalf of ARA, Mrs Hay protested what she described as the appellants' improper representations to this court as regards what had taken place before Marsh J at the 27 May 2013 hearing. Mrs Hay also quite properly reminded us of the well-established limits of appellate authority to interfere with a judge's exercise of discretion: those limits require that this court should ordinarily defer to judges in the court below on discretionary matters, save in those cases in which it

concludes that the exercise of the discretion was palpably wrong (**Hadmor Productions Ltd and Others v Hamilton and Another**[48]).

[70] In this case, Mrs Hay submitted, there was a material change in circumstances, brought about by Mr Hamilton's plea of guilty in the interim to drug trafficking and money laundering offences, between Campbell J's grant of the first restraint order in August 2012 and the judge's grant of the second restraint order in June 2013. In addition, by the time the matter came before the judge, ARA filed its civil recovery action to ground the application for the second restraint order. For these and other reasons identified by the judge, it was therefore not correct to say, as the appellants submitted, that the material placed before the court by Mr Ronald Rose in his two affidavits was "essentially similar".

[71] In these circumstances, taking the "broad merits-based approach" sanctioned by the House of Lords in the leading modern case of **Johnson v Gore Wood & Co** (**a firm**), Mrs Hay submitted that there was no basis for the appellants' contention that the application for the second restraint order was an abuse of the process of the court. Accordingly, the judge's exercise of his discretion in granting the order should not be disturbed.

[72] Mrs Hay also submitted that there was a further reason which justified the judge's order, which was the fact of the appellants' non-compliance, up to the time the

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[48] [1983] AC 191

application for the second restraint order came before him, with the disclosure orders which Campbell J had made.

Discussion and analysis

[73] It seems to me that three broad questions emerge from these submissions. First, did Marsh J's order have the result that the issue of whether to grant a further restraint order against the appellants was *res judicata*? Second, if so, was the subsequent application to the judge an abuse of process? And third, was the application to the judge an attempt to appeal from the decision of one judge to another judge of co-ordinate jurisdiction?

Res Judicata and abuse of process

[74] The phrase *res judicata* is apt to denote three distinct, though related, ideas. In its first, narrower, sense, it describes the species of estoppel ('cause of action estoppel') which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. So, if the cause of action was determined by a judgment of the court to exist, or not to exist, the matter is *res judicata* and no action can subsequently be brought by the losing party to assert the opposite[49].

[49] See the influential judgment of Diplock LJ, as he then was, in **Thoday v Thoday** [1964] P 181, 197

[75] In its second, perhaps looser, sense, it speaks to a situation in which a particular issue forming a necessary ingredient in a cause of action has been litigated and decided; but, in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue. In such circumstances, the doctrine of issue estoppel is said to apply to prevent the reopening of the particular issue. However, the principle of issue estoppel is subject to an exception in special circumstances where further material becomes available, whether factual or arising from a subsequent change in the law, which could not by reasonable diligence have been deployed in the previous litigation[50].

[76] Then thirdly, as Lord Kilbrandon pointed out in the judgment of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another**[51], "... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". This is what is sometimes described as **Henderson v Henderson** abuse of process, deriving as it does from the classic statement of Wigram VC in the nineteenth century case of **Henderson v Henderson**[52]:

> "... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction,

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[50] See generally **Arnold v National Westminster Bank plc** [1991] 2 AC 93, per Lord Keith of Kinkel at pages 109-111
[51] [1975] AC 581, 590
[52] (1843) 3 Hare 100, 115

> the Court requires the 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 of litigation in respect of matter which might have been brought forward 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. **The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time**."[53]

[77] However, as well established as this principle may be, it is also the case that, as Lord Kilbrandon went on to observe, the power to shut out "a subject of litigation" is one "... which no court should exercise but after a scrupulous examination of all the circumstances". In similar vein, delivering the judgment of the Privy Council in **Brisbane City Council and another v Attorney General for Queensland**[54], Lord Wilberforce was careful to emphasise that, because abuse of process is the true basis of the doctrine –

> "... it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

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[53] Emphasis supplied
[54] [1978] 3 All ER 30, 36

[78] Finally, there is **Johnson v Gore Wood & Co (a firm)**. As both Mr Wilkinson and Mrs Hay agree, this is now the leading authority on the topic. The plaintiff in that case was a property developer. Both he and a company controlled by him retained the defendants as their solicitors in certain transactions. Problems having arisen, the company filed action against the solicitors for damages for negligence and this action was settled in the company's favour for a substantial sum. The plaintiff then brought proceedings to recover his personal losses, having made a deliberate decision, for financial reasons, to defer his personal claims until the company's claim had been disposed of. The defendants were well aware that a personal action was contemplated by the plaintiff when they settled the company's action. In fact, the possibility of an overall settlement of both the company's and the plaintiff's personal claims had been discussed during the settlement negotiations. However, these discussions were not pursued because of a paucity of information at that time as regards the quantification of the plaintiff's claims.

[79] After the personal action had been pending for over four years, the solicitors applied for an order dismissing it summarily as an abuse of process. They lost at first instance, but succeeded on appeal. The Court of Appeal accordingly ordered summary dismissal of the action on the ground that it was an abuse of process. However, the plaintiff's subsequent appeal to the House of Lords succeeded and the order dismissing the action for abuse of process was reversed.

[80] After a full review of all the relevant authorities, Lord Bingham of Cornhill, who delivered the leading judgment, concluded as follows[55]:

> "… *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier

[55] At page 31

> proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[81] Concurring, Lord Millett added this[56]:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

[82] In the result, the House of Lords held that, taking into account all the circumstances, the plaintiff's action to recover his personal losses was not abusive and should therefore be allowed to proceed.

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[56] At page 59

[83] **Johnson v Gore Wood & Co (a firm)** was subsequently applied by this court in **S & T Distributors Limited and another v CIBC Jamaica Limited and another**[57]; and **Hon Gordon Stewart OJ, Air Jamaica Acquisition Group Limited and another v Independent Radio Company Limited and another**[58]. In the latter case, Harris JA concluded that[59]:

> "The rule in **Henderson v Henderson** is described as an extension of the doctrine of res judicata. In the cases which were considered, and in which the rule was applied, it is to be noted that the second action was commenced after the first was disposed of. The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause, to protect litigants from having to face multiple suits arising from the same cause of action, and to protect the public interest that there should be finality in litigation and that justice be done between the parties. …"

[84] Nothing in this case turns on the second sense in which the maxim *res judicata* is said to apply, that is, to describe an issue estoppel. But Mr Wilkinson strongly contended that the doctrine applies in either the first or the third sense. If *res judicata* applies to the application for the second restraint order in the first sense, arising out of the decision of Marsh J, then it was an absolute bar to re-litigation between ARA and the applicants. If it applies in the third sense, then the doctrine of **Henderson v**

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[57] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007 - see especially pages 46-52
[58] [2012] JMCA Civ 2, see especially paras [24]-[38]
[59] At para. [38]

Henderson abuse of process will potentially have given rise to a discretionary bar to the subsequent proceedings before the judge.

[85] The question whether *res judicata* applies to this case in the first sense turns entirely on the appellants' contention that, after a hearing on the merits on 27 May 2013, Marsh J refused ARA's application to extend the first restraint order[60]. On this point, it would of course have been helpful to know the judge's reasons, even in summary form, for refusing the application. But, in the absence of any such reasons, I find it impossible to second-guess the judge's conclusion[61] that "… there was no final adjudication on the matter before Marsh J ...". It is common ground that, when the parties went before Marsh J on 27 May 2013, ARA's application for extension of the first restraint order was short-served and that, on that basis, the appellants objected to it being heard. It is also common ground that, as at that date, ARA had not yet filed a civil recovery claim to support the grant of the first restraint order, which had by then been in existence for two days short of nine months. In these circumstances, it seems to me to be highly unlikely, as it did to the judge[62], that, having ruled that a written application to extend the first restraint order would not be allowed to proceed on the ground of short-service, Marsh J would then have embarked on the hearing of a definitive oral application for the same relief.

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[60] See paras [22]-[24] above
[61] At para. [56]
[62] See para. [25] above

[86] On this basis, I would therefore rule out the applicability of *res judicata* in the first or strict sense. In any event, although the judge did not say so in as many words, it is clear that he considered the strike-out application principally on the basis of **Henderson v Henderson** abuse of process. In this regard, as I have already indicated, the judge based himself substantially on **Johnson v Gore Wood & Co (a firm)**. In considering what that decision required of a court asked to determine an issue of **Henderson v Henderson** abuse of process, the judge said this[63]:

> "[20] So, what does Lord Bingham mean by *'broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*'? Whatever else it may mean, based on His Lordship's dictum in **Gore Wood**, it means, at least, examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored. Clearly, there is room for disagreement among experienced judges as the case of **Gore Wood** demonstrated.
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> [21] This court's deduction from **Gore Wood** is that the judge is to take account of various factors against the backdrop of fundamental principles. What are these fundamental principles? What are the factors?"

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[63] At paras [20]-[21]

[87] Next, again basing himself on **Johnson v Gore Wood & Co (a firm)**, the judge went on to list[64] certain fundamental principles which should always be borne in mind when considering the question of abuse of process:

> "(a) courts exist for the determination of disputes that the parties cannot resolve and so litigants, without scrupulous care, ought not to be denied the opportunity to have the courts decide their issues ...;
>
> (b) access to the courts is a fundamental right ...;
>
> (c) there should be finality in litigation and a party should not have to answer for the same matter twice ...;
>
> (d) the public interest emphasizes efficiency and economy in the conduct of litigation ....
>
> (e) abuse of process is not limited to cases of dishonesty or collateral attack on a previous decision and it is not necessary to establish any of these factors before conduct is held to be an abuse of process. However, their presence will make it easier to conclude that there is an abuse of process but even then there is no inevitability about this because what is involved is adiscretion ...;
>
> (f) a distinction must be drawn between abuse of process and the doctrine of res judicata or issue or cause of action estoppel ...;
>
> (g) abuse of process is capable of applying to cases where the first matter did not proceed to judgment or may have ended in a settlement ...;
>
> (h) there is no presumption against bringing successive actions ... .

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[64] At para. [22]

(i) the **Henderson v Henderson** rule does not extend to cases where the defendants in the second case is [sic] different from the first ... ."

[88] In addition to these principles, the judge referred[65] to what he described as an "added dimension" of this case:

> "... The instant case is not just a matter between private citizens. It [sic] action being taken to enforce the law which has as its objective the taking of property allegedly derived from criminal activity or unlawful activity. This is an important public policy issue which cannot be lightly swept aside because this objective is seen as vital to undermining the economic capacity of organised criminal enterprises to continue its [sic] criminal activity."

[89] And finally, the judge identified[66] some of the relevant factors which "seem to figure prominently in the assessment process":

> "(a) if the matter was not yet adjudicated upon and/or it is between different parties then that is an important consideration in deciding whether there is an abuse of process ...;
>
> (b) if the second claim is in substance though not in form the same claim dressed up in different garb the second claim may be dismissed ...;
>
> (c) if the first claim proceeds all the way to final judgment (or settlement) and the parties are the same and the second claim raises issues which properly belonged to the first claim and might have been brought forward with reasonable diligence, then

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[65] At para. [23]
[66] At para. [25]

in the absence of special circumstances the plea of abuse of process may succeed ...;

(d) if the second action is in substance a collateral attack on the decision in the first matter, then an abuse of process will be found to exist ...;

(e) if subsequent decisions of higher courts show that a particular legal position was incorrect then it may be possible for the same parties to reopen the matter decided between them. Thus res judicata in its strictest sense would not apply...;

(f) the explanation given by the person accused of abuse of process is taking into consideration ...;"

[90] There is no appeal against the judge's analysis and conclusions, which I fully endorse, on the relevant legal and factual considerations applicable to the assessment of a challenge to proceedings on the ground of **Henderson v Henderson** abuse of process. I have nevertheless considered it helpful to set them out in some detail for two reasons. First, by way of respectful tribute to a penetrating analysis of the legal position in a difficult area of the law. And second, to underscore the point that, in the absence of any error of law on the judge's part, the appellants must perforce invite this court to interfere with the manner in which he exercised his discretion, on the basis that he either took into account irrelevant factors, or omitted to take into account other relevant factors.

[91] Nor is there any appeal from the judge's findings in respect of the differences between Mr Rose's first and second affidavits. I therefore proceed on the basis that the judge was correct to treat the following facts, which emerged from the second, as

relevant fresh material: (i) Mr Hamilton's plea of guilty to money laundering and drug-trafficking offences; (ii) ARA's filing of a civil recovery action; and (iii) evidence based on investigation by the DEA, which showed that Mr Hamilton had had no legitimate source of income since 1991.

[92] This makes it strongly arguable, as it seems to me, that it is wrong to treat the application for the second restraint order as in any sense a re-litigation of the issues which arose on the application for the first, given that it was based in part on significant new material. If this is so, then it clearly begs the question whether any issue of abuse of process can arise in these circumstances at all. But since neither the case below nor the appeal appears to have been conducted on this basis, I will put this thought to one side for the moment.

[93] That having been said, I am inclined to agree with the appellants, as did the judge[67], that there was no good reason for ARA not to have notified the appellants of its intention to apply for the second restraint order, a mere matter of days after the parties had appeared on an *inter partes* hearing before Marsh J. In this regard, it is unquestionably the case that, as Lord Hoffmann observed in **National Commercial Bank (Jamaica) Limited v Olint Corp Limited**[68], "... *audi alteram partem* is a salutary and important principle ...". Ordinarily, therefore, the principle should apply in

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[67] At para [64]
[68] [2009] UKPC 16, para. 13

the absence of some special justification, arising either from the nature of the application before the court or other surrounding circumstances.

[94] So the question of what weight to give to the failure to notify the appellants in this case, if such it was, was entirely one for the judge in the exercise of his discretion, having taken into account all the circumstances. The judge considered[69] that, given "the greater public interest in trying to undermine criminal organisations by gnawing at their economic capacity to engage in serious crime, this omission is not sufficient to warrant a discharge of the restraint order". In addition, the judge also expressed the view that, because Mr Hamilton was by then awaiting sentence on serious charges, "[t]he possible risk of dissipation is self-evidence [sic]".

[95] Mr Wilkinson characterised ARA's omission to notify the appellants of its intention to apply for a second restraint order as an "unfortunate 'Nicodemus' approach". But beyond this, as ever, colourful turn of phrase, nothing was put forward to suggest that the judge exercised his discretion on any wrong principle by declining, for the reasons he gave, to discharge the second restraint order on this basis.

[96] In any event, in my view, the judge's approach derives clear support – albeit by analogy – from the decision of the Court of Appeal of England and Wales in **Jennings v Crown Prosecution Service (Practice Note)**[70], to which he referred in his

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[69] At para. [64]

[70] [2006] 1 WLR 182; see especially per Laws LJ at paras 52-57 and per Longmore LJ at para. 64. An appeal to the House of Lords from this decision was dismissed, without any specific reference to this point – see **Jennings v Crown Prosecution Service** [2008] UKHL 29

judgment[71]. In that case, in the context of an alleged failure by the Crown to make full disclosure in confiscation proceedings, it was held that the fact that the prosecution acts in the public interest militates against the sanction of discharging an order if, after consideration of all the evidence, the court thinks the order is appropriate. So although the well-known general considerations as to the duty of a party seeking ex parte relief to make full and frank disclosure apply equally to proceedings of this kind, the consequences of non-disclosure may in an appropriate case be mitigated by public interest considerations.

[97] Mr Wilkinson also renewed a complaint which he had made to the judge that it was an abuse of process for ARA, having sought and obtained leave to appeal from Marsh J, to have instead filed the application for the second restraint order. In my view, the judge's answer to this complaint[72], which is based in considerations of obvious good sense from the legal, as well as the practical standpoint, cannot be faulted:

> "… It is well known that counsel who receives an adverse ruling in these kinds of applications usually asks for leave to appeal and sometimes a stay of execution of the order made. This is usually to preserve his or her position while using the time to assess carefully the options. It is also well known that counsel may quite legitimately decide not to pursue the appeal."

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[71] At paras [59]-[60]
[72] Para. [63]

[98] As will be seen from the passage from his judgment set out below[73], the judge also took into account more general matters relating to the conduct of the parties and the policy of the legislative provisions:

> "[65] As noted earlier, it is now well established that making striking out a claim on the ground of abuse of process is a discretionary power. It is the view of this court that one of the material considerations in exercising the discretion is the conduct of the parties in the matter so far. The respondents have highlighted the sins of ARA which have been noted above. There is nothing to suggest ARA has been acting in bad faith. Failure to adhere to the CPR without more is not proof of bad faith.
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> [66] So far as the respondents are concerned, Campbell J, in August 2012, had ordered the respondents do forthwith disclose with full particulars the nature and location of all assets owned by them, whether or not identified in the order and whether they are held in their name or by nominees or otherwise on their behalf, such disclosure to be verified by affidavit and served on the applicants' attorney at law within fourteen (14) days of service of this order' (para 3). There is no evidence that the respondents have compiled with the order. There is no evidence that the respondents applied to be relieved from complying with the order.
>
> [67] The respondents successfully prevented from being heard an application to compel compliance with the order of Campbell J having been in breach from August 2012 until May 2013.
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> [68] Parliament has enacted legislation that has as its primary object crime reduction by means of undermining the economic capability of criminals to wage criminal activity. It has reflected this in POCA.

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[73] Paras [65]-[71]

One of the powers given to ARA is the ability to secure restraint orders against possibly criminally derived property. It is vital that 'bad money' or money derived from unlawful activity be kept out of the financial system because of the severe distorting effects that it can have on both macro and micro economy. It is vital that criminals and their associates be deprived of their property not for the purpose of enriching the State but for crippling their ability to continue as a criminal economic enterprise. In keeping with this policy, the respondents were asked to disclose their assets and their location.

[69] This does not necessarily mean that the respondents are engaged in money laundering or the holding of property derived from criminal activity. The order is designed to assist in the investigative process. The respondents have simply ignored this aspect of Campbell J's order.

[70] At the end of the day what the court has before it is ARA whose handling of the matter has been less than ideal and respondents who complain about abuse of process. On the one hand, the court has ARA that, despite its imperfections and missteps, has sought to use the law to achieve a legitimate purpose. There is no evidence of malafides on the part of the agency. On the other hand, there are the respondents who have sought protection of law by invoking a discretionary power of the court in circumstances when they have failed to comply with a critical paragraph of Campbell J's order made in August 2012. The disclosure of assets is vital to the investigative process.

[71] Looking at matter broadly as directed by Lord Bingham, this court concludes that there is no abuse of process. The application to strike out the claim and particulars of claim and to discharge the restraint order on the ground of abuse of process is dismissed."

[99] There is, as Lord Bingham pointed out in **Johnson v Gore Wood & Co (a firm)**[74], no "hard and fast rule to determine whether, on given facts, abuse is to be found or nor". Rather, it is for the judge hearing the application in each case to determine "whether in all the circumstances a party's conduct is an abuse". In this case, the judge found that the conduct of the ARA was not abusive, after an obviously careful assessment all the matters canvassed before him. In my view, the conclusions to which he came were ones which were clearly open to him on the evidence, both as a matter of law and of discretion, and no basis has been shown for this court to disturb them.

Was this an appeal from the decision of one judge to another judge of co-ordinate jurisdiction?

[100] The appellants submitted that the hearing of the application for the second restraint by the judge amounted – impermissibly – to one judge being asked to exercise an appellate jurisdiction over another of co-ordinate jurisdiction. In support of this submission, the appellants place full reliance on **Leymon Strachan**, which is a decision of the Privy Council on appeal from this court. In that case, an application was made to Smith J to set aside an order made by Walker J in the Supreme Court on the ground that Walker J had no jurisdiction to make it. The issue was therefore whether Smith J had power to do so. Delivering the judgment of the Privy Council, Lord Millett held[75] that he did not:

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[74] At page 31
[75] At para. 33

> "In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata*. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside."

[101] In this case, the judge distinguished **Leymon Strachan**[76] on the basis that the application which Smith J was asked to consider in that case was an application to review Walker J's order. In this case, on the other hand, "[t]he court is being asked to exercise the power to make a restraint order in the context of all that has happened". The judge also went on to say, as has already been seen, that it was clear that there was no final adjudication on the matter before Marsh J.

[102] Again, I agree with the judge. In challenging Walker J's order in **Leymon Strachan**, the appellant was seeking to overturn it on the basis of want of jurisdiction. That, as the Privy Council held, was a result that could only be achieved by an appeal. In this case, on the other hand, the application before the judge was not so much an application to set aside Marsh J's order (especially since, as the judge found, Marsh J made no order on the merits), as it was a fresh application for an interim restraint order based, in part, on new material. Further, as Mrs Hay pointed out, section 34 of POCA provides for applications to the court to vary or discharge restraint orders, thus plainly

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[76] At para. [55]

indicating a legislative intention that such orders might be subject to periodic review by judges of co-ordinate jurisdiction.

Conclusion on the issue of abuse of process

[103] I would therefore dismiss the abuse of process appeal, on the ground that there is no basis upon which this court can properly interfere with the judge's exercise of his discretion, based as it was on an application of the correct principles of law and matters which fell entirely within his purview to decide.

Disposal of the consolidated appeals

[104] I therefore propose that both the legal status and the abuse of process appeals should be dismissed. In the absence of an application for a contrary or different order being made by the appellants within 21 days of the date of the court's judgment in this case, I would order that the appellants should pay ARA's costs, to be agreed or taxed.

An apology

[105] The decision in these appeals has been outstanding for an inordinately long time. On behalf of the court, I wish to apologise undeservedly for this delay. While, as is almost invariably the case, there are reasons which could be advanced for this delay, I cannot possibly proffer them to the parties and their legal advisers, who are fully entitled to expect better.

DUKHARAN JA

[106] I have read in draft the judgment of Morrison JA which is well written and very comprehensive. I agree entirely with his reasoning and conclusion. I agree with the proposition that the legal status and the abuse of process appeals should be dismissed. There is nothing that I can add.

BROOKS JA

[107] I too have read the daft judgment of Morrison JA. I agree with his reasoning and conclusion and have nothing useful to add.

MORRISON JA

ORDER

1) Appeals dismissed.

2) In the absence of an application for a contrary or different order being made by the appellants within 21 days of the date of the court's judgment in this case, costs to the respondent to be agreed or taxed.