[2021] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 37/2017

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPELLANT**
AND	**SANJA RICARDO ELLIOTT**	**1ST RESPONDENT**
AND	**MYRTLE GENTLES ELLIOTT**	**2ND RESPONDENT**
AND	**ELWARDO AUGUSTUS ELLIOTT**	**3RD RESPONDENT**
AND	**TASHA-GAY DEAYNA GOULBOURNE-ELLIOTT**	**4TH RESPONDENT**
AND	**MARY CHAMBERS**	**5TH RESPONDENT**
AND	**ALDANE FERNANDO FOSTER**	**6TH RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**INTERESTED PARTY**

Mrs Alethia Tomlinson (nee Whyte), Ms Shanique Crooks-Alcott and Ms Ann-Monique Bailey for the appellant

Canute Brown and Norman Godfrey instructed by Brown Godfrey & Morgan for the 1st, 2nd, 3rd and 4th respondents

5th and 6th respondents not appearing or represented

Miss Tamara Dickens instructed by the Director of State Proceedings for the interested party

6, 7 February 2018 and 6 September 2021

BROOKS JA

[1] This case has, regrettably, been long in gestation. It was adjourned on 7 February 2018 in order to secure the notes of evidence taken, and the written reasons for judgment given by the judge at first instance (the learned judge). Although those were provided from as long ago as October 2020, the logistics of re-convening this panel prevented an earlier hearing. Indeed, the court was obliged to sit during the vacation in order to prevent further delay. As it turned out, intervening developments simplified the resolution of the case.

[2] The appeal is brought to this court by The Assets Recovery Agency (the Agency), which is the statutory body charged with carrying out various functions assigned to it by the Proceeds of Crime Act (POCA). The Agency is entrusted under the Act, among other thing, to apply for, in certain circumstances, the restraint of the property of various individuals, including people whose property may be subject to forfeiture, on their being convicted of a criminal offence.

[3] The learned judge considered and refused an application by the Agency for an unqualified extension of a restraint order ('the original order') that had previously been made by another judge of the Supreme Court. The original order was made against the property of Mr Sanja Elliott; his mother, Mrs Myrtle Gentles Elliott; his father, Mr Elwardo Augustus Elliott; his wife, Mrs Tasha-Gay Deayna Gouldbourne-Elliott; Ms Mary Chambers and Mr Aldane Fernando Foster (the respondents). The learned judge granted the extension but permitted Mr Sanja Elliott, Mrs Myrtle Gentles Elliott and Mrs Tasha-Gay Deayna Gouldbourne-Elliott to have access to the restrained property for the purposes of paying reasonable legal fees in respect of the restraint proceedings against them and the criminal proceedings against Mr Sanja Elliott.

[4] The Agency contends that the learned judge based his decision on a view that section 33(4) of the POCA was unconstitutional. It asserts that the learned judge erred in so finding and therefore erred in allowing access to the restrained property for the

purposes, which were mentioned before. The Agency asks that the learned judge's order be set aside.

[5] Section 33(1) of POCA permits a judge of the Supreme Court to make a restraint order upon an application by the Agency. Section 33(3) stipulates that the restraint order may provide that it applies to all realizable property held by a specified person or transferred to that person after the order has been made. Section 33(4) allows exceptions to the restraint order. It states:

> "A restraint order may be made subject to exceptions, which may–
>
> (a) provide for reasonable living expenses and reasonable legal expenses, other than any legal expenses that–
>
> (i) relate to an offence which falls within subsection (5); and
>
> (ii) are incurred by the defendant or by a recipient of a tainted gift;
>
> (b) …
>
> (c) …

Subsection (5), which is referred to in subsection (4) states:

> "The offences that fall within this subsection are–
>
> (a) the offence mentioned in section 32(1)(a)(i), if the condition mentioned in that subsection is satisfied.
>
> (b) the offence mentioned in section 32(a)(ii) [sic], if the condition mentioned in that subsection is satisfied;
>
> (c) the offence concerned, if any of the conditions mentioned in section 32(1)(a)(iii), (b) or (c) is satisfied."

There is no dispute that the conditions of section 32(1)(a)(i) had been satisfied in this case. Mr Sanjay Elliott had been already charged with a predicate offence at the time of the learned judge's decision.

[6] The relevant order made by the learned judge is:

> "(12) The 1st, 2nd and 4th Respondents are allowed to withdraw from the restrained assets identified in the Order a sum for reasonable legal expenses in respect of these restraint proceedings, and as it relates to the 1st Respondent, the criminal proceedings, subject to the taxation of the bills of cost [sic] in respect of all such legal expenses."

[7] The learned judge arrived at that position by reasoning, which is contained in paragraph [31] of his reasons for judgment:

> "I accept that there is a presumption of constitutionality as it relates to the provisions of POCA. However, it appears to me that to [sic] although POCA institutes an absolute prohibition on payment of legal expenses in relation to offences in respect of which a restraint order may be made or in restraint proceedings, it does not provide a concomitant mechanism for an affected citizen to seek recourse to public assistance by way of legal services or funding. As a consequence, it is my view, that the provisions of POCA as contained in section 33(4)(a) infringe the charter of rights provisions of the Constitution dealing with the right to due process. Unlike the provisions that were under consideration in the POCA Challenge by the Jamaican Bar Association, in this case the challenged provision is not justified in a free and democratic society. It is for this very reason why in England there is the provision for public assistance. I agree with the comments of their Lordships in **Re S** ((Restraint Order Release of Assets) [2005] 1 WLR 1338) that 'it is plainly desirable that defendants to restraint orders should in the ordinary course of events have legal representation'. In the absence of public assistance it is my respectful view such a blanket prohibition impinges on the individual's constitutional right to due process."

[8] The learned judge refrained from declaring "the offending provision of POCA to be invalid" but decided to adopt, what he termed, "a liberal approach…so as to ensure that the constitutional rights of the Respondents are protected" (paragraph [33]). That "liberal approach" allowed him to make the order quoted above. Miss Dickens, for the Attorney General submitted that the two positions taken by the learned judge are inconsistent, in that he found that subsection 33(4)(a)(i) was unconstitutional, although he said that he could not have done so.

[9] The Agency is correct that the learned judge erred on this ruling. If, as he accepted, the circumstances prevented him from declaring section 33(4) of the POCA unconstitutional, he was bound to follow the dictates of the legislature. He had earlier, in his judgment, unconditionally accepted that section 33(4) prevented access to property for the purposes of paying legal expenses for proceedings involving the offence for which Mr Sanja Elliott was charged. He said, in part, at paragraph [26]:

> "…it appears clear that the legislative intent as evidenced in section 33(4)(a), is to prohibit the use of restrained property for legal expenses that relate to the predicate [offences] for which a respondent or another person may have been charged…."

[10] The learned judge then cited, with approval, an extract from **Re S** (Restraint Order Release of Assets) [2005] 1 WLR 1338; [2004] EWCA Crim 2374, which, he said, supported his view about the effect of section 33(4)(a). The WLR reports the extract at paragraph 58 of **Re S**:

> "Contrary to our initial view that section 41 of the 2002 Act permits the release of restrained funds for legal expenses incurred in relation to a restraint order albeit not to the underlying offence that caused it to be made, **we are in the end satisfied that on its true construction section 41 of the 2002 Act does not permit this**. This is not a conclusion we have reached with any enthusiasm. We are driven to it by the underlying scheme and purpose of the Act and in particular: (1) by reason of the inclusion of the recipients of tainted gifts in section 41(4) of the 2002 Act; and (2) the amendment in Schedule 11 to the Access to Justice

> Act 1999 making public funding available. Accordingly the appeal is dismissed." (Emphasis supplied)

[11] As Mrs Tomlinson, for the Agency, correctly submitted, the learned judge was not entitled to take the stance that he did, in that, the constitutionality point was not argued before him, and he did not take any of the steps which would have given him the jurisdiction to declare section 33(4)(a) unconstitutional.

[12] The recently decided consolidated cases of **Dawn Satterswaite v The Assets Recovery Agency; Terrence Allen v The Assets Recovery Agency** [2021] JMCA Civ 28, demonstrate the learned judges' error. In those cases, as in this, the Agency applied for an extension of the restraint orders that previously had been made against the respective applicants. In those cases, as in this, the issue arose of a variation of the restraint order, in order to allow for the payment of legal fees. Unlike in this case, however, the applicants in those cases actually argued that the restraint orders were unconstitutional. The judges at first instance in those cases refused to entertain the arguments in that forum, and the applicants appealed.

[13] On appeal, this court found, as the learned judge in this case did, that section 33(4) was clear in its effect (see paragraph [164]). It ruled, applying the section to those cases, that the applicants in those cases were prevented by the section from having access to the restrained property. It also rejected a submission that section 33(4) be deemed unconstitutional (see paragraph [164]). It found that the constitutional issue could not be properly raised in the manner that it had been in those cases. Additionally, it rejected the very approach that the learned judge later used, in the present case, to come to his view that section 33(4)(a) was unconstitutional. This court ruled that applicants, who are affected by restraint orders, were "entitled to defend themselves in person or through legal representation of their own choosing **or**, if they have not sufficient means to pay for legal representation, to be given such assistance as is required in the interest of justice [which] could be done through the legal aid scheme or otherwise" (order 5 of the judgment – bold and underlined type as in original)

[14] This court set out the procedure by which an application for a declaration of unconstitutionality against a legislative provision may be made. The learned judge, it is noted, on the caution of counsel, did not make such a declaration. He accepted that a particular process was required (see **R v Oakes** [1986] 1 SCR 103), which process had not been pursued before him. As mentioned before, however, he effectively did declare section 33(4)(a)(i) unconstitutional, and by his order, gave effect to his finding. In that way, he contravened the provisions of the section.

Conclusion

[15] The inevitable conclusion is that based on the learned judge's approach being in error, the appeal must be allowed and the impugned order set aside.

Costs

[16] The Agency having prevailed in this appeal, submitted that it is entitled to an order for costs in its favour. It was felt, however, given all the circumstances of the case that no order should be made in respect of costs.

ORDER

1. Appeal allowed.
2. Order 12 of the restraint order made in this case in the Supreme Court on 20 April 2017 is set aside.
3. No order as to costs.