[2023] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2020PCCV00015

APPLICATION NO COA2022APP00115

IN THE MATTER OF an application by DETECTIVE SERGEANT DWAYNE FALCONER under Section 79 of the Proceeds of Crime Act 2007 for the forfeiture of seized cash being seized from MICHELLE HALL

BETWEEN	**DETECTIVE SERGEANT DWAYNE FALCONER**	**APPELLANT**
AND	**MICHELLE HALL**	**RESPONDENT**

Courtney Smith and Miss Andrea Holness for the appellant

Respondent not appearing or being represented by counsel

8 June 2022 and 21 July 2023

Civil recovery proceedings - application to adduce fresh evidence - forfeiture of cash – whether cash was obtained through unlawful conduct or was intended for unlawful purpose – whether inference can be drawn that cash is recoverable property from the circumstances surrounding the seizure - sections 55, 79 and 84 of the Proceeds of Crime Act 2007

MCDONALD-BISHOP JA

[1] I have read the draft reasons for judgment of G Fraser JA (Ag). Her reasoning and conclusion accord with my own and there is nothing I could usefully add.

D FRASER JA

[2] I, too, have read the draft reasons for judgment of G Fraser JA (Ag) and they accord with my reasons for concurring with the order made by the court.

G FRASER JA (AG)

[3] In these proceedings, we considered an application to adduce fresh evidence and an appeal in relation to an order made by Her Honour Miss Stephany Orr ('the learned Judge of the Parish Court') (as she then was) in the Civil Division of the Corporate Area Parish Court on 18 December 2017.

[4] Upon hearing the submissions of counsel and considering the relevant law concerning both the application and the substantive appeal, we made the following orders:

> "1. The court accepts the affidavit of Pretania Edwards dated and filed 27 May 2022 and the supplemental affidavit of Pretania Edwards dated 3 June 2022 and 6 June 2022 as satisfactory proof of service on the respondent of the notice of appeal filed on 2 January 2018, amended notice of appeal filed 27 May 2022, notice of application for court orders to adduce fresh evidence filed 27 May 2022 and all relevant documents stated in the said affidavits.
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> 2. The appellants' notice of application for court orders to adduce fresh evidence filed 27 May 2022 is granted in terms of paragraph 1 as amended and paragraph 2.
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> 3. The amended notice of appeal filed on 27 May 2022 is permitted to stand.
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> 4. The appeal is allowed.
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> 5. The orders of her Honour Ms Stephany Orr made on 18 December 2017:

(a) refusing the forfeiture of cash seized from the respondent, Michelle Hall, on 16 November 2016 in the sum of US$9,366.00; and

(b) releasing to the respondent, Michelle Hall, the cash seized from her on 16 November 2016 in the sum of US$9,366.00 with all interest accrued thereon,

are set aside.

6. Cash in the sum of US$9,366.00 seized from the respondent, Michelle Hall, on 16 November 2016 with all interest accrued thereon is forfeited to the Crown.

7. No orders as to costs."

[5] We promised to put our reasons in writing, and this is in fulfilment of that promise.

Background

[6] The appellant, Detective Sergeant Dwayne Falconer, an authorised officer of the Counter Terrorism and Organized Crime Investigations Branch/Constabulary Financial Unit of the Jamaica Constabulary Force, was the plaintiff in the court below. On 17 February 2017, he filed an application by way of plaint No PC 2/17 and particulars of claim ('the claim') on behalf of the Assets Recovery Agency in the Corporate Area Parish Court. The claim was brought pursuant to section 79 of the Proceeds of Crime Act 2007 ('POCA') for the forfeiture of United States bank notes in the sum of US$45,366.00 seized from the respondent.

[7] The trial commenced on 20 November 2017, in the absence of the respondent and counsel on her behalf. During the trial, the learned Judge of the Parish Court heard evidence from the appellant and his two witnesses, Sergeant Michael Elliott and Constable Carlington Utter.

[8] It was the appellant's case that, on 16 November 2016, the respondent arrived at the Norman Manley International Airport in Jamaica ('the airport') at about 6:40 pm from

the State of Connecticut in the United States of America ('USA'). Sergeant Elliott of the Transnational Crime and Narcotics Division testified that at the material time, he was conducting security checks at the airport. Acting on information he received, he approached the respondent and inquired, among other things, how many pieces of luggage she was travelling with and whether all the luggage belonged to her. The respondent informed him that she was travelling with two pieces of luggage; however, one of them belonged to her sister's boyfriend, whom she knew only as "Rohan".

[9] Sergeant Elliott instructed the respondent to collect her luggage and report to the counter numbered 17 in the customs hall. There, he asked her if she was travelling with any cash, to which she responded that she had US$9,000.00 in her handbag. Sergeant Elliott then searched her luggage in her presence. In the luggage she identified as belonging to Rohan, Sergeant Elliott discovered four blue bottles (two marked "Recovery Shampoo" and the other two marked "Recovery Conditioner"). He found the bottles to be unusually heavy, and so he scanned them and subsequently opened them in the respondent's presence. Sergeant Elliott poured out the contents of the bottles, and when the liquid ceased flowing out, the bottles were still heavy. He then cut open one of the bottles and found a Ziploc bag that contained a cylindrical plastic parcel wrapped in carbon paper and secured with elastic bands. Concealed in the parcel were several banknotes of United States currency valued at US$100.00 each. Upon opening the other bottles, Sergeant Elliott found identical parcels. In total, US$36,000.00 was recovered from the four bottles.

[10] Sergeant Elliott took the respondent to the narcotics office at the airport, where he subsequently searched her handbag. He found five parcels of United States banknotes wrapped with paper bands. Four of the parcels had US$2,000.00, and one had US$1,000.00. He also found US$200.00, which the respondent explained was given to her by her husband's friend to give to someone else, and an additional US$166.00. Altogether, Sergeant Elliott found US$9,366.00 in the respondent's handbag.

Cumulatively, the monies recovered from the respondent's luggage and handbag amounted to US$45,366.00, and they were consequently detained.

[11] The respondent gave a statement (that same day), which was admitted into evidence. She stated, among other things, that she was an office attendant and she was not aware of the cash found in the luggage she received from Rohan. She explained that she had received that luggage the day before she travelled and was told that it contained items for Rohan's brother and niece. She was instructed to hand over the luggage to someone by the name of "Tee" who would meet her at the airport.

[12] Accounting for the cash found in her handbag, the respondent, identified two sources. She indicated that she resigned from her part time job as a supervisor at a nursing home in August 2016, and the following month, she received US$6,500.00 as the balance of her retirement account (which she referred to as her 401K retirement fund). This, she said, was transferred to her chequing account at CSC Credit Union in the USA. She obtained an additional US$3,650.00, which represented half of her "partner draw". The respondent explained that it was her intention to "top up" her husband's account and open a United States currency bank account at the Jamaica National Building Society ('JNBS').

[13] The following day (17 November 2016), the appellant, having received information about a cash seizure at the airport, initiated an investigation into money laundering. He obtained documents, such as the respondent's statement, and visited the local address she provided. When he called the contact number noted in her statement, his calls were, at first, unanswered. Subsequently, he received a text message from that same number which prompted him to call again. A female answered and confirmed that she was the respondent. He notified her that he was investigating the seizure of cash from her, and they had further discussions in that regard. It was also his evidence that he sent a text message to that number advising the respondent of the court dates and requesting that she confirm her address.

[14] Having regard to the circumstances under which the respondent sought to transport the cash, the significant sum, her failure to duly declare the sum she was travelling with and the lack of documentary evidence to support her explanations, the appellant believed that the cash "was obtained from unlawful conduct or intended for use in unlawful conduct". At the close of the appellant's case, the learned Judge of the Parish Court reserved her decision.

[15] Approximately one month later, the learned Judge of the Parish Court made the following orders:

> "a. Application for the Forfeiture of Seized Cash pursuant to Section 79 of the Proceeds of Crime Act is granted in relation to cash in the sum of Thirty Six Thousand United States Dollars (USD$36,000.00) seized from [the respondent] on the 16th day of November 2016.
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> b. Cash in the sum of Thirty Six Thousand United States Dollars (USD$36,000.00) with all interest accrued thereon is forfeited to the Crown.
>
> c. Application for the Forfeiture of Seized Cash pursuant to Section 79 of the Proceeds of Crime Act is denied in relation to cash amounting to Nine Thousand Three Hundred and Sixty Six United States Dollars (USD$9,366.00) seized from [the respondent] on the 16th day of November 2016.
>
> d. Cash in the sum of Nine thousand Three hundred and Sixty Six United States Dollars (USD$9,366.00) with all interest accrued thereon is to be released to [the respondent]."

[16] Dissatisfied in part, with the decision of the learned Judge of the Parish Court, the appellant filed a notice of appeal dated 2 January 2018, in which he sought to challenge orders c and d. On 27 May 2022, the appellant filed an application to adduce fresh evidence and an amended notice of appeal.

The application to adduce fresh evidence

[17] Prior to the consideration of the substantive appeal, we addressed the notice of application for court orders to adduce fresh evidence. The fresh evidence he sought to adduce before this court was contained in affidavits deposed by Mrs Charmaine Newsome and Ms Pretania Edwards, which were filed in support of the application. The essence of the eight grounds filed in relation to the application was that the fresh evidence would significantly influence the resolution of the appeal and that the appellant would be prejudiced if the evidence was not allowed.

[18] The principles that govern whether this court will exercise its discretion to adduce fresh evidence are well settled. The starting point for considering such applications in civil matters was established in the oft-cited case of **Ladd v Marshall** [1954] 1 WLR 1489 and has since been endorsed and adopted by this court in numerous cases. In **Harold Brady v General Legal Council** [2021] JMCA App 27, McDonald-Bishop JA summarised the principles as follows:

> "[38] …The principles extrapolated from **Ladd v Marshall** cases ('the **Ladd v Marshall** principles') establish that the court will only exercise its discretion to receive fresh evidence where:
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> 1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;
>
> 2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and
>
> 3. although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible."

[19] Those principles guided this court in determining whether the admission of the fresh evidence would be in the interests of justice, which is the primary consideration

(see **Deborah Chen v The University of the West Indies** [2022] JMCA Civ 19 and **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26).

[20] In reliance on the **Ladd v Marshall** principles, counsel Mr Courtney Smith submitted, on behalf of the appellant, that the fresh evidence contained in the affidavits demonstrate the respondent's conduct after receiving the orders of the learned Judge of the Parish Court. Accordingly, the evidence upon which the appellant was seeking to rely was neither available nor could it have been obtained with reasonable diligence at the trial. Furthermore, counsel contended, the fresh evidence was relevant to the issues on appeal as it would have an important influence on the outcome and was credible, that is, capable of belief. In support of these submissions, counsel relied on several cases, such as **Ladd v Marshall**, **Harold Brady v General Legal Council** and **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6.

[21] The affidavit deposed by Mrs Charmaine Newsome, a legal officer assigned to the Financial Investigations Division ('the FID'), was filed on 27 May 2022. Mrs Newsome averred that on 18 January 2022, while at the FID's office, she received a telephone call from an individual who identified herself as the respondent. The respondent, she said, called in relation to a document she received in the mail titled "Notice of Hearing". She explained that her attorney-at-law informed her some time ago that the matter "was over", and further that she told him that she had no interest in the cash since it did not belong to her. Mrs Newsome advised the respondent to note all she had told her in an email that was to be sent to both her and Ms Pretania Edwards. She received an email that same afternoon from an email address "michelbabes2240@yahoo.com", and in that email, the respondent reiterated that the money did not belong to her, and she had no interest in the matter.

[22] In the affidavit of Ms Pretania Edwards, a legal officer at the FID, also filed on 27 May 2022, she averred that she noticed a letter from Mr Ludlow Black, an attorney-at-law (dated 22 December 2017) on a file. In that letter (which was exhibited to her

affidavit), Mr Black stated that he represented the respondent and was authorised to receive the seized cash that was released further to the order of the learned Judge of the Parish Court on 18 December 2017. He also indicated that he was anticipating the return of that sum. A letter from the respondent purporting to authorise Mr Black to receive the seized cash on her behalf was attached to Mr Black's letter. Ms Edwards averred that on 22 May 2018, Mr Andrew Wildes, who was the previous legal officer with conduct of the matter, wrote to Mr Black to indicate, among other things, that pursuant to section 79(4) of POCA, the sums would not be released unless this appeal is concluded in the respondent's favour.

[23] In the supplemental affidavit of Ms Edwards filed on 6 June 2022, she stated that the letter dated 22 May 2018 was delivered to Mr Black's office on 29 May 2018. The FID had not, however, received a response from the respondent or any document indicating an intention to act from Mr Black until the telephone correspondence received by Mrs Newsome on 18 January 2022. Ms Edwards further averred that upon receiving a date for the hearing of this application, she emailed a copy of the notice to the respondent, along with her affidavit and that of Mrs Newsome to michelbabes2240@yahoo.com. Additionally, on 3 June 2022, Ms Edwards emailed the amended notice of appeal, chronology of events, bundle of authorities, and the appellant's skeletal arguments to the respondent and Mr Black, to which she received no response.

[24] Counsel Mr Smith pointed out that since Mr Black contacted the Assets Recovery Agency, four days after the decision of the learned Judge of the Parish Court, he was clearly aware of the trial. Counsel contended that Mr Black's letter supports the conclusion that, on a balance of probabilities, the respondent knew of the proceedings in the Parish Court and was deliberately absent. Additionally, the evidence from Ms Newsome that the respondent stated that she had no interest in claiming the seized cash because it was not hers provides a reasonable explanation for her absence at the trial.

[25] Bearing in mind the above evidence and the relevant law, we agreed with Mr Smith that the conditions for adducing fresh evidence had been satisfied, and determined that, in the interests of justice, the affidavits of Mrs Newsome and Ms Edwards should be admitted into evidence. Having admitted, the fresh evidence, the substantive appeal was considered.

The appeal

[26] The amended notice of appeal was filed on 27 May 2022. The grounds stated in that notice are:

> "I. The Learned Parish Judge erred when she determined that the totality of the evidence before the Court was insufficient to prove on a balance of probabilities that the cash seized from the Respondent's handbag was not recoverable property.
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> a. The Learned Parish Judge erred in law by giving no or no proper weight to the entirety of the circumstances of the seizure of the cash when determining the issue of the recoverability of the Nine Thousand Three Hundred and Sixty Six United States Dollars (US$9,366.00).
>
> II. The Learned Parish Judge having granted an order for substituted service by registered mail and having made an order to proceed to trial upon proof of compliance with that order being filed on an Affidavit, erred in law by referring to and/or relying on the possibility that the Respondent was not personally served to explain the Respondent's non-attendance at trial." (Underlining as in the original)

[27] On those grounds the appellant sought the following orders:

> "a. The order of Her Honour Ms. Stephanie [sic] Orr in relation to the sum of Nine Thousand Three Hundred and Sixty Six United States Dollars (USD$9,366.00), made on the 18th day of December, 2017 is set aside.
>
> b. Cash in the sum of Nine Thousand Three Hundred and Sixty Six United States Dollars (USD$9,366.00) seized from the Respondent

> on the 16th day of November 2016 with all interest accrued thereon is forfeited to the Crown.
>
> c. Such further and other relief as the Court may deem fit."

Discussion

Ground I

[28] The crux of this ground of appeal is that the learned Judge of the Parish Court erred when she found that the evidence in its totality was insufficient to prove that the cash seized from the respondent's handbag, which amounted to US$9,366.00, was recoverable property.

[29] Section 75(1)(a) of POCA provides that an authorised officer may seize any cash if he has reasonable grounds for suspecting that the cash is recoverable property. Subsection (2) further provides that (subject to subsection (3)), where an authorised officer has reasonable grounds for suspecting that **a part** of cash is recoverable property, and it is not reasonably practicable to seize only that part, the whole of the cash may be seized by the officer.

[30] Section 79 of POCA further states:

> "79. – (1) While cash is detained under section 76, the authorized officer may make an application to the [Parish Court] for the forfeiture of the whole or any part of the cash.
>
> (2) On an application under subsection (1), the [Parish Court] may order the forfeiture of the cash or any part of it if satisfied that the cash or part, as the case may be-
>
> (a) is recoverable property; or
>
> (b) is intended by any person for use in unlawful conduct.
>
> …"

[31] At the outset of her assessment, the learned Judge of the Parish Court reminded herself that the appellant had the burden of proving not only that the cash seized was recoverable property but also that at the time of the seizure, he had a reasonable belief to seize, which was supported by his subsequent investigations. She referred to the law as set out in section 79 of POCA as well as the cases of **Asset Recovery Agency v Michael Brown aka Erdley Barnes and Others** [2015] JMSC Civ 163, **Laura Barnes v Commissioner of Customs** [2015] JMCA Civ 55, and **Director of the Asset Recovery Agency v Szepietowski & Others** [2007] EWCA Civ 766. Thereafter, the learned Judge of the Parish Court considered the evidence before her and applied the relevant law to the circumstances under which each sum (US$36,000.00 and US$9,366.00) was seized. In respect of the larger sum found in the respondent's luggage, she agreed with the appellant that, based on the steps taken to conceal that cash in bottles and the absence of an explanation as to its source and use, from either the respondent or a third party, that sum of US$36,000.00 was, undoubtedly, recoverable property.

[32] On the other hand, the recoverability of the seized cash found in the respondent's handbag became a point of further discussion. The learned Judge of the Parish Court determined that unlike the cash found in the luggage, the respondent had claimed the cash in her handbag.

[33] In arguing this appeal, it was the appellant's position that the learned Judge of the Parish Court should have given weight to the whole circumstances surrounding the seizure of the cash as well as the respondent's absence from the trial. Counsel Mr Smith submitted that this was especially so since the learned Judge of the Parish Court did not reject the uncontested evidence of Sergeant Elliot that, in total, US$45,366.00 was found in the respondent's possession and therefore all the cash recovered was to be treated as one. Reliance was placed on the cases of **Metalee Thomas v The Asset Recovery Agency**, **Laura Barnes v Commissioner of Customs**, **Sandra Marie Cavallier v**

Commissioner of Customs [2010] JMCA Civ 26, **R (on the application of the Director of Assets Recovery and others) v Green and others** [2005] EWHC 3168 ('**R v Green**'), in support of his arguments.

[34] This ground raises important issues relating to the treatment and forfeiture of separate sums of cash seized under different circumstances, albeit on the same occasion. As already established, the learned Judge of the Parish Court, following a hearing on the merits, concluded that the sum of US$9,366.00 found in the respondent's handbag was not recoverable property because the appellant failed to investigate and test the truthfulness of the respondent's explanation for its source and intended use to the requisite standard of proof.

[35] There is merit in the appellant's submission that sufficient weight was not given to the whole circumstances surrounding the cash seizure, which led to the questionable conclusion of the learned Judge of the Parish Court that the cash found in the respondent's handbag should be excluded from the sum deemed to be recoverable property.

[36] Firstly, I was hard put to understand the cryptic finding of the learned Judge of the Parish Court that "the respondent's explanation as to the source and intended use of that cash was consistent". My appreciation of the evidence is that the respondent provided only one written statement on 16 November 2016. She did not provide any further statements, nor did she submit any supporting documents or attend the trial to give any evidence. In those circumstances, there was no basis for a comparison, nor, indeed, any basis for determining consistency or otherwise.

[37] The respondent is said to have provided pertinent information such as the name of the bank from which she withdrew her 401K and the first name of the "banker" from whom she received her "partner draw". In my view, the information provided in the respondent's written statement was sparse. Whilst she did supply the Christian name of

her alleged banker regarding the "partner draw", the respondent did not provide a last name, an address or even a telephone number. It would have been extremely difficult and impracticable (if not impossible) for the appellant to have canvassed every person named "Marlene" in the USA or even in the State of Connecticut. His efforts would have been akin to searching for a needle in a haystack. The incomplete and useless information given by the respondent could be viewed as a deliberate attempt on her part to obfuscate the source of, what could safely be considered, her ill-gotten cash.

[38] The learned Judge of the Parish Court also found that there was no indication that the investigators sought to elicit more detailed information, such as the address of the bank or the addresses and/or contact numbers for the respondent's present and former employers, and there was no evidence that the respondent was unable or refused to provide same. In my view, the learned Judge of the Parish Court seemed to have not given any consideration to the fact that the respondent made herself scarce during the investigation. She had arrived on the island on 16 November 2016 shortly after which the cash was detained. Subsequent information was received that the respondent had departed from the jurisdiction on 19 November 2016, a mere three days after her arrival. On 19 November 2016, when Sergeant Elliot obtained authorization from a Justice of the Peace for the further detention of the cash, he was unable to communicate this information to the respondent. Except for one occasion, the appellant and other police officers were unable to contact her by telephone.

[39] During that initial contact made by the appellant, the respondent confirmed that she had left the jurisdiction on 19 November 2016. She had not responded to any further attempts to contact her. Ultimately, the appellant was constrained to resort to making an application for substituted service by way of registered post to make her aware of the court proceedings and to effect service of the summons, as well as the plaint and particulars of claim. The evidence supported the appellant's assertion that the documents were served by registered post, yet the respondent made no effort to respond or file a

defence within the stipulated period, or, indeed, at all. The respondent's conduct would have made it impracticable for the appellant to obtain further information from her, such as "…more detailed information, such as the address of the bank or the addresses and/or contact numbers for the respondent's present and former employers…" (as noted by the learned Judge of the Parish Court). Contrary to the findings of the learned Judge of the Parish Court, there was every indication that the respondent would have refused to provide the same.

[40] The learned Judge of the Parish Court also observed, among other things, that there was no evidence that the appellant contacted or made efforts to contact JNBS to confirm the existence of an account belonging to the respondent's husband, which she found, would have been relevant to the respondent's alleged use of the seized cash. It was her view that such information was essential to put the appellant in a position to make the necessary inquiries and test the truthfulness or veracity of the source and intended use of the seized cash.

[41] The fallacy in this reasoning is that the respondent had only indicated a future intention to top up her husband's account and open a new account for herself, not that these were deeds she had already executed. I, therefore, failed to see how verifying that her husband had an account at the stated institution would have provided any "veracity of the source" and intended use of the cash she had in her possession.

[42] While the learned Judge of the Parish Court accepted the evidence of the appellant and Sergeant Elliott that they did not receive any documentary evidence from the respondent to support her assertions, she stated that this did not preclude them from investigating the truthfulness of the respondent's explanation in her statement. This was especially so since they had the burden of proving their case, so they could not rely on the respondent to supply them with documentary proof to explain the source and intended use of the seized cash without carrying out their own reasonable investigations.

[43] The learned Judge of the Parish Court was correct in her assessment that, indeed, the onus was on the appellant to prove his case, however, I wish to note that that could have been achieved not only from direct evidence but also by inferences drawn from the respondent's conduct. The learned Judge of the Parish Court found that the appellant had failed to discharge his burden to prove on a balance of probabilities that the cash seized from the respondent's handbag was recoverable property. In her analysis, she did not place any significant weight on the fact that the respondent did not challenge the appellant's application for the forfeiture of the cash, notwithstanding her observation that such a challenge would be expected of someone who laboured legitimately to acquire the cash seized. Nevertheless, the learned Judge of the Parish Court also considered the possibility that the respondent may have been of the belief that she had already provided an explanation for the cash in her statement. I am of the view that the Learned Judge of the Parish Court's findings that the respondent harboured any such belief was unfounded and was at odds with the evidence that she heard and which she did not reject. I say this having regard to the appellant's testimony that when he spoke to the respondent:

> "I informed this lady that I was conducting an investigation into cash seized from her on November 16, 2016 and asked her why she had left the island.
>
> She related she had left in order to sort out documentation relating to US$9000.00 seized from her.
>
> I asked her about the documents relating to the balance she says she knows nothing about that money as a result she can't account for it".

The respondent did not indicate the nature of the documentation she was sorting out or when they would be forthcoming. In fact, the appellant received no such documentation, and the respondent spurned all further attempts to communicate with her.

[44] The learned Judge of the Parish Court was also of the view that, notwithstanding the possibility that the respondent could have very well been aware of the cash concealed

in her luggage and had intended to distract the authorities with the cash in her handbag, it was the appellant's obligation to carry out the necessary investigations to satisfy himself and the court that there was no truth to her explanation. She found that the appellant would have had to show that the respondent lied or made an inconsistent statement before the seized cash in the sum of US$9,366.00 found in the respondent's handbag could become recoverable property. For those reasons, she ordered that that the sum of US$9,366.00 was not recoverable property. She further found that the explanation for the source and intended use of the cash was sufficient, especially considering the appellant's failure to challenge its veracity.

[45] It is my view that the above findings of the learned Judge of the Parish Court do not conform with the evidence and, as such, there was merit in the complaint of the appellant that she erred in law by giving no or no proper weight to the entirety of the circumstances of the case. In my judgment, the overall conduct exhibited by the respondent gave rise to the inference that, on a balance of probabilities, she was not being truthful about the source and intended use of the seized cash.

[46] Notwithstanding the strong arguments presented by the appellant regarding the challenged findings of fact, the appellant has also sought to buttress his case by way of a successful application to adduce fresh evidence.

[47] The significance of fresh evidence on an appeal was considered by McDonald-Bishop JA in **Harold Brady v General Legal Council**, where she had this to say (paras. [39] and [40]):

> "[39] **Ladd v Marshall**, therefore, laid down the rule that where there had been a trial or a hearing on the merits, the decision should only be reversed by reference to new evidence if it can be shown that the conditions it has stipulated are satisfied.
>
> [40] … Therefore, the **Ladd v Marshall** principles are consonant with the interests of justice in considering fresh evidence applications in civil cases. This is so, although civil appeals to this court are by

> way of rehearing. Indeed, the application of the principles of law relevant to the reception of fresh evidence in civil proceedings has been established in this court with no distinction drawn between appeal by way of rehearing or appeal by way of review."

[48] The fresh evidence in this matter contradicts the respondent's prior explanation for the cash found in her handbag. In the telephone conversation with Mrs Newsome and the email received by Mrs Newsome and Ms Edwards on 18 January 2022, an individual, who is believed to be the respondent, stated that she had no interest in the seized cash and that it did not belong to her. In light of that evidence, this appeal would be by way of a rehearing. The issue for our determination, therefore, is whether the cash in the sum of US$9,366.00 found in the respondent's handbag is recoverable property.

[49] "Recoverable property" is defined in section 84(1) of POCA as property obtained through unlawful conduct. Section 55(1) defines "property obtained through unlawful conduct" as being property that is directly or indirectly obtained by, in return for, or in connection with unlawful conduct. It states further that "it is not necessary to show the particulars of the [unlawful] conduct" (subsection (b)) in order for a decision to be made regarding whether any person obtained property through unlawful conduct.

[50] In the case of **R v Green,** a decision from the administrative court of the Queen's Bench Division in the United Kingdom, Sullivan J affirmed that proceedings for civil recovery in relation to property can be determined based on conduct without having to identify any particular unlawful conduct. Instead, the court can infer that the property was obtained through some unidentified unlawful conduct in the absence of a satisfactory explanation of how it was obtained.

[51] That principle is congruent with the approach the Parish Courts have taken in determining these matters and is supported by this court. For instance, in **Sandra Marie Cavallier v Commissioner of Customs**, the issue before the court was whether there was evidence of unlawful conduct associated with cash seized at the airport from Ms

Cavallier's luggage for it to constitute recoverable property. A total of US$21,046.00 was found in Ms Cavallier's possession. In her luggage, concealed in various amounts in the pockets of several pairs of pants, the sum of US$19,000.00 was found, and she had US$2,046.00 in her handbag. The circumstances of the discovery were that Ms Cavallier stated on her Immigration/Customs Declaration Form that she was not travelling with more than US$10,000.00, which she reiterated even when some of the cash had been discovered. Thereafter, she explained that her cousins had put the money in the pockets of the pairs of pants because they did not want her to carry it in her handbag.

[52] Ms Cavallier explained in her written statement that her cousin gave her US$1,000.00, which she put into the pockets of one pair of pants, however, the other pairs of pants were given to her by the same cousin to bring to Jamaica. She declared that she was not aware that money was concealed in them. She also stated that she ticked "no" on the Immigration/Customs Declaration Form because she was not looking carefully. The customs officer believed her explanations were inconsistent and seized the money pursuant to section 75 of POCA as recoverable property. Ms Cavallier sought to prove the source of the money by producing documents such as a notarized letter from an auto sales company, which essentially stated that they asked Ms Cavallier to bring that money to pay Jamaica Customs for the duties on three motor vehicles. Attached to the letter were documents that sought to demonstrate that it was a legitimate company trading in motor vehicles. This court noted, however, that none of the documents related to the motor vehicles alleged to be cleared and that the letter contradicted Ms Cavallier's statement. Upon further investigation, it was revealed that there were no import entries in the Customs Department's motor vehicle imports database for any of the motor vehicles identified in the letter. The learned Resident Magistrate consequently found that the cash seized was recoverable property.

[53] The court made several findings, amongst which was the finding that Ms Cavallier knew the money was in her luggage and was a party to the attempt to conceal it.

Additionally, there was no clear demarcation between the cash concealed in her luggage and the cash in her handbag since she claimed that some of the money belonged to her while the auto sales company claimed all of it. Having regard to the circumstances of the concealment, divergent explanations, lack of corroboration, and the relevant law (section 55(1) of POCA), the learned Resident Magistrate's decision was affirmed.

[54] Another applicable case is that of **Laura Barnes v Commissioner of Customs**, the facts of which are also similar to the case at bar. Ms Barnes, who was the appellant in that case, was found at the airport with US$69,900.00 hidden in the bottom of one of her bags, of which she denied having knowledge. An additional sum of US$1,200.00 was found in her handbag, resulting in a total of US$71,000.00 being found in her possession. Further to those sums being detained pursuant to section 79 of POCA, the learned Resident Magistrate granted an order for detention. The learned Resident Magistrate found that the appellant, by failing to orally declare and by falsely declaring on the Immigration/Customs Declaration Form that she was not in possession of cash in excess of US$10,000.00, deliberately concealed the money. Further, the learned Resident Magistrate rejected the appellant's numerous explanations for the manner in which she sought to transport the money to Jamaica as well as its source. She ultimately drew the inference that, among other things, the concealment of such a large sum of money was evidence that it was unlawfully obtained and, as such, recoverable.

[55] The court considered that although the Commissioner of Customs was not obligated to particularise the unlawful conduct, there must have been some evidence that the money was obtained unlawfully. Such unlawful conduct could be inferred on account of lies or the absence of reasonable explanation in relation to the cash seized. Two issues were identified as being of importance: the veracity of the source of Ms Barnes' income and the purpose of the money. The court cited with approval the dictum of Moses J in the case of **Bujar Muneka v Commissioner of Customs & Excise** [2005] EWHC 495, in which he said:

> "…[In] the context of a case where it is not necessary to identify any criminal activity such as drug trafficking; all that has to be identified is that the source was criminal activity or the intended destination was use for criminal activity. A lie in that context may well entitle the fact-finding body to infer what the source or intention for which the cash was to be used was in reality on the balance of probabilities."

[56] In the final analysis, the court found that, among other things, there was ample evidence to establish, on a balance of probabilities, that the cash seized from Ms Barnes was recoverable property. Accordingly, the evidential burden rested with her to provide evidence to rebut the presumption that the money was obtained through unlawful conduct. She, however, failed to justify her ability to accumulate the money, which was clearly compounded by the manner in which the cash was transported and concealed. It was also noted that although Ms Barnes explained that a portion of the money belonged to her sister, that sister did not apply for its release. Consequently, it was the court's determination that the learned Resident Magistrate was entitled to reject Ms Barnes' evidence and that there was no basis upon which to disturb her findings.

[57] The fresh evidence in this case posed a formidable challenge to the truth of the respondent's explanations. The evidence that the respondent belatedly informed Mrs Newsome and Ms Edwards that the seized cash was not hers and that she had no interest in it was accepted as well capable of belief. That evidence is supported by the following observations:

(a) The cash in the respondent's handbag was found on the same occasion that a significant amount of cash was discovered concealed in her luggage.

(b) The respondent explained in her written statement that, although she was not aware of the cash concealed in her luggage, the cash in her handbag (save for US$200.00 that was given to her by her

husband's friend to give to someone else) belonged to her as she had earned it from her 401K plan and her "partner draw".

(c) The information provided in the respondent's statement was lacking since she did not state her husband's account details to facilitate the verification of his account at JNBS, the details of her 401K plan in the USA, nor sufficient details about the banker for the partner draw. Such information would have been within her exclusive knowledge.

(d) Instead of challenging the detention of the cash found in her handbag, the respondent left the country shortly after its seizure and did not attend court to regain her alleged hard earned money.

(e) Despite knowing that the cash was released by the learned Judge of the Parish Court, the respondent, upon being notified of this appeal, contacted the legal officers of the Assets Recovery Agency to not only inform them that she had no interest in the seized cash but also to renege on her prior explanation by stating that the cash did not belong to her.

[58] In light of the above, I was satisfied that from the circumstances under which the cash in the respondent's handbag was seized, as well as her apparent lack of interest in its return and the tacit admission that she had previously lied about its source and intended use, it can be inferred that the sum of US$9,366.00 was "obtained directly or indirectly by or in return for or in connection with" some unidentified unlawful conduct. It could, therefore, be properly regarded as recoverable property. For these reasons, this ground succeeded.

Ground II

[59] This ground of appeal concerns the complaint of the appellant that the learned Judge of the Parish Court, having granted an order for substituted service by registered mail and subsequently ordering that the matter proceed to trial upon proof of compliance with that order, erred in law by referring to and/or relying on the possibility that the respondent was not personally served to explain her non-attendance at the trial.

[60] On the first mention date of the matter (22 March 2017), an application for substituted service along with an affidavit in support were filed in the Parish Court. The affidavit in support was deposed by the appellant, who stated, among other things, that the respondent left Jamaica on 19 November 2016, and so he was seeking permission to serve her outside of the jurisdiction at the address she provided in her written statement. That same day, the application came before Her Honour Ms Carole Barnaby (who was then a Judge of the Parish Court). She granted permission for the substituted service of the summons and particulars of claim by registered mail to two addresses (26 Garfield Street, Hartford, Connecticut, 06112, USA and 15 Claremont Street, East Hartford, Connecticut, 06108, USA). She also set a mention date for 26 July 2017.

[61] On 26 July 2017, the appellant filed an affidavit of posting that exhibited a "Certificate of posting of a registered article" numbered RR008844325 and a receipt dated 21 June 2017, from the Central Sorting Office's Post and Telecom Department as proof of substituted service on the respondent at the Garfield Street address (which she provided in her statement). That affidavit was put before the learned Judge of the Parish Court, who, among other things, ordered the appellant to effect substituted service of the summons and particulars of claim by way of registered post at the other address (Claremont Street address, which the respondent wrote on her Immigration/Customs Declaration Form). The matter was then set for mention on 27 September 2017.

[62] On 14 August 2017, the documents that were mailed to the Garfield Street address were returned to the FID (per affidavit dated 26 September 2017 deposed by the appellant). On 26 September 2017, another affidavit of posting deposed by Detective Constable Fabion Parnell was filed. That affidavit outlined, among other things, that on 31 July 2017, Detective Constable Parnell sent a package which contained the relevant documents to the respondent by registered mail to the Claremont Street address (a receipt from the Vineyard Town Post Office with registration number 942638 was exhibited).

[63] The appellant deposed another affidavit dated 3 November 2017 in which he explained that that package (sent on 31 July 2017) was not in fact sent by registered post but simply posted by mail. Therefore, on 27 September 2017, he went to the Central Sorting Office and served the relevant documents by registered post to the Claremont Street address, in compliance with the order of the learned Judge of the Parish Court. He exhibited a receipt evidencing payment and a "Certificate of posting of a registered article" numbered RR008966562JM.

[64] Having been satisfied that the documents were duly served, the learned Judge of the Parish Court proceeded with the trial in the respondent's absence and received sworn evidence from the appellant and his witnesses. Upon considering the evidence, which included the written statement of the respondent, and the submissions of counsel, the learned Judge of the Parish Court stated:

> "I have considered that she was never served with the first order for detention and the relevant notice. She was not served personally with the plaint note and particulars of plaint herein, she was served by registered post several months after the seizure. It cannot be said definitively that [the respondent] received the documents outlining what she needed to do to challenge the application and chose not to attend court."

[65] It was the appellant's contention that the learned Judge of the Parish Court had doubts about whether the respondent was aware of the claim for the forfeiture of the cash seized from her. Those doubts, counsel argued, were enhanced by the lack of documentary evidence to corroborate the appellant's *viva voce* evidence that he contacted the respondent via telephone and text message and notified her of the court date. Consequently, the learned Judge of the Parish Court did not accept that evidence.

[66] It was also submitted that the affidavit of Mrs Newsome referred to a telephone call and email from the respondent during which she confirmed receipt of the notice of hearing and informed them that not only did she believe the matter was completed but she had no interest in the seized cash. Counsel contended that the learned Judge of the Parish Court did not raise any questions or issues in relation to service on the respondent either before, during, or at the close of the appellant's case. Furthermore, the learned Judge of the Parish Court did not consider that service would have to be proven before the matter was placed on the default hearing list, let alone throughout the hearing of the matter. Reliance was placed on the case of **Sandra Durrant v Jacqueline Kemp** [2018] JMCA Civ 36 to make the point that the circumstances of the respondent's absence did not warrant the comment made by the learned Judge of the Parish Court that "it [could not] be said definitively that the [respondent] received the documents … and chose not to attend court".

[67] A Judge of the Parish Court is empowered by section 145 of the Judicature (Parish Courts) Act ('the Act') to order the service of a summons and of any subsequent proceedings in a suit to be made out of Jamaica on the plaintiff's application, where the claim filed in the Parish Court is against a person residing out of Jamaica. That authority is also conferred by Order VII Rule 35 of the Parish Court Rules, which states:

> "35. Where by reason of the absence of any party, or from any other sufficient cause, the service of any summons, (other than a judgment summons, or a summons under Section 151 or Section 229 of the Resident Magistrate's Law), petition, notice, proceeding or

> document, cannot be made, the Court may, upon an affidavit showing grounds, make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may be just."

[68] It is by virtue of those provisions that the learned Judge of the Parish Court permitted service on the respondent by way of registered post to two addresses outside the jurisdiction. Having received satisfactory proof by way of affidavit evidence and the exhibited certificates of posting that the relevant documents were served by registered post in compliance with those orders, as well as the evidence that only one of the packages was returned, the learned Judge of the Parish Court was obliged, as she did, to proceed with the hearing of the plaint. This was in accordance with section 186 of the Act, which states:

> "186. If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Judge of the Parish Court, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended: ..."

[69] I agree with counsel that in circumstances where the appellant had complied with the court's order for substituted service by mailing the relevant documents by way of registered post to the Claremont Street address (which had not been returned), it was deemed to be served. Additionally, in my view, the evidence contained in the affidavit of Ms Edwards, which exhibited a letter from Mr Black (on behalf of the respondent) dated four days after the delivery of the judgment, supported the appellant's contention that the respondent was wilfully absent and unrepresented at the hearing. At the very least, she was aware of the matter considering her letter (dated the same day the judgment was delivered) in which she purported to authorise the disbursement of the seized cash to Mr Black. Accordingly, we found that there was also merit in this ground.

Conclusion

[70] It is a settled principle of law that this court does not lightly disturb a trial judge's findings of fact. In considering this matter, I was mindful of the guidance given in the Privy Council decision of **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited** [2017] UKPC 40 (a case emanating from this court). Lord Hodge, giving the judgment on the Board's behalf, reiterated that an appellate court should be cautious in reviewing the findings of fact of a judge at first instance, who, unlike a judge at the appellate court, had seen and heard the witnesses.

[71] The appellant's complaint in ground I, that the learned Judge of the Parish Court had erred in law by failing to give any or any proper weight to the entirety of the circumstances of the seizure of the cash when determining the issue of the recoverability of the sum of US$9,366.00, had found traction with this court. Although the learned Judge of the Parish Court had appreciated the relevant law as it concerns recoverable property under POCA, in my view she did not give sufficient weight to the fact that the circumstances of the finding of the money required the respondent to provide evidence to support her assertions about the source of the US$9,366.00 and she having failed to do so, the judge should have found that that money was recoverable property. Furthermore, the fresh evidence led before this court strengthened the appellant's position.

[72] In relation to ground II, it cannot be denied that the learned Judge of the Parish Court was plainly wrong to have ignored the evidence led by the appellant of the substituted service of the documents relating to the court proceedings. By proceeding to hear the claim in the absence of the respondent or counsel appearing on her behalf, the learned Judge of the Parish Court tacitly accepted that the respondent was satisfactorily notified of the court proceedings. Her subsequent findings and expressions of doubt as to service were, therefore, irrational. Ultimately, my reasoning is contrary to these findings, which cannot be reconciled with the evidence.

[73] In light of the foregoing, I concurred with the orders stated above at para. [4].