

“WHAT DOES IT TAKE TO TAKE THE PROFIT OUT OF CRIME”



DEVELOPMENTS IN JAMAICAN CASE LAW

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INTRODUCTION

LEGAL HISTORY - PROCEEDS OF CRIME ACT, 2007 (POCA)

Per David Green CB, QC – Director, Serious Fraud Office, UK.
May 2013 (10 years after implementation).

"POCA is a vital tool in the fight against economic crime as it strikes at the main motivation for such criminality and diminishes funds available for investment in future criminal conduct. However, POCA goes much further than confiscation. It sets out money-laundering offences that criminalise anyone dealing with criminal proceeds. The introduction of entirely new civil recovery and cash seizure/forfeiture powers has provided a means of pursuing traceable criminal property even in the absence of a conviction ..."

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LEGAL HISTORY - PROCEEDS OF CRIME ACT, 2007 (POCA)

Per David Green CB, QC – Director, Serious Fraud Office, UK. May 2013 (10 years after implementation).

"...Despite the scope of the powers contained in it and its characterisation as 'draconian', the recovery of criminal property under POCA is still patchy. There are a number of challenges which staff in my own organisation and across law enforcement face on a regular basis. These include: extensive and complex third-party litigation; delaying tactics by defendants, including repeated changes in legal representation; the need for better international cooperation; and the risks involved in the vigorous pursuit of civil recovery cases in the High Court."

INTRODUCTION

LEGAL HISTORY - PROCEEDS OF CRIME ACT, 2007 (POCA)

Similarities Between Jamaica and UK

Per: Williams, Hopmeier, Jones (May 2013)

"...As Baroness Scotland QC once suggested, there is a delicious irony in the recovery of the proceeds of crime. Not only does it accord with what most law-abiding individuals want to see, namely the stripping of ill-gotten gains from the criminal classes, but it also means that once recovered those funds can be utilised and invested back into law enforcement, schools, hospitals, and other worthy causes. The important role of the proceeds of crime practitioner is thus ensured, and no doubt will continue..."



INTRODUCTION

LEGAL HISTORY - THE PROCEEDS OF CRIME ACT, 2007 (POCA)

Reasons for the Importation of POCA to Jamaica

*Jamaican Bar Association v Attorney General &
General Legal Council*

[2017] JMFC Full 02; Claim No. 2014 HCV 0772 (par. 2–19)

INTRODUCTION

LEGAL HISTORY - PROCEEDS OF CRIME ACT, 2007 (POCA)

– Its Importation to Jamaica as a response to:

- ✓ Rise in Organized Crime
- ✓ International AML/CTF Obligations
- ✓ International Treaty Obligations
- ✓ Trends in governing Financial Institutions
- ✓ Shortcomings of existing AML legislations



INTRODUCTION

LEGAL HISTORY - PROCEEDS OF CRIME ACT, 2007 (POCA)

Amended in 2013 to close loopholes in existing legal framework

(Attorneys, etc. now required to report Suspicious Transactions)

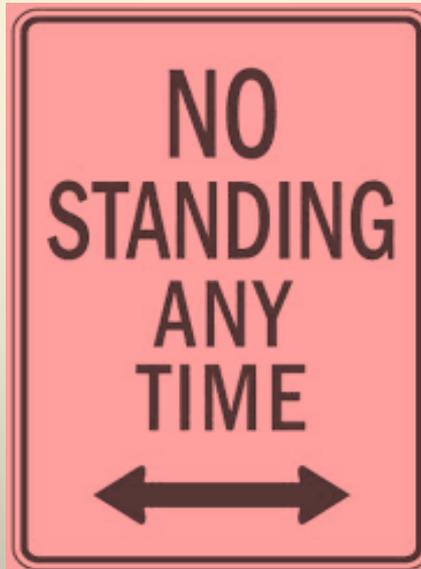
(Many Significant Legal Challenges Resulted)

CHALLENGES TO POCA LOCALLY

ARA's Legal Status

Andrew Hamilton, et al v Asset Recovery Agency

[2017] JMCA Civ 46; SCCA No. 61/2014



CHALLENGES TO POCA LOCALLY

ARA's Legal Status

Andrew Hamilton, et al v Asset Recovery Agency

[2017] JMCA Civ 46; SCCA No. 61/2014

- Counsel argued: ARA is a concept and not a legal person... i.e. POCA did not establish the ARA as a legal entity, corporation sole, or body corporate, capable of suing and being sued in its own name.
- Court disagreed and held (paragraph 55-57) that the statute clearly gave ARA the necessary legal status to commence litigation, etc. in its own name.

CHALLENGES TO POCA LOCALLY

ARA's Applications as Abuse of Process

Andrew Hamilton, et al v Asset Recovery Agency

[2017] JMCA Civ 46; SCCA No. **80/2013**



CHALLENGES TO POCA LOCALLY

ARA's Applications as Abuse of Process

Andrew Hamilton, et al v Asset Recovery Agency

[2017] JMCA Civ 46; SCCA No. **80/2013**

- ARA procured ex-parte restraint order... restraint not extended at inter-partes hearing... ARA gets leave to appeal... no appeal filed... ARA instead files 2nd ex-parte application for restraint...
- Court found that there was “no good reason” for 2nd ex-parte application... **BUT**

CHALLENGES TO POCA LOCALLY

ARA's Applications as Abuse of Process

Andrew Hamilton, et al v Asset Recovery Agency

[2017] JMCA Civ 46; SCCA No. 80/2013

- **...COURT REFUSED** to discharge the Restraint Order based on public interest considerations.
- **Reasoning:** “...the **greater public interest** in trying to undermine criminal organisations by gnawing at their economic capacity to engage in serious crime... militates against... discharging an order if... the court thinks the order is appropriate...” (paragraphs 94- 96)

CHALLENGES TO POCA LOCALLY

Appropriateness of Pre-Conviction Customer Information Orders (CIOs)

Re: Assets Recovery Agency (Jamaica)

[2015] UKPC 1



CHALLENGES TO POCA LOCALLY

Appropriateness of Pre-Conviction CIO's

Re: Assets Recovery Agency (Jamaica) [2015] UKPC 1

- CIO compels a financial institution to divulge information about its customers. Strict supervision is to be given by the court. Orders not to be granted as matter of course but ONLY if the court deems it just.

CHALLENGES TO POCA LOCALLY

Re: Assets Recovery Agency (Jamaica) [2015] UKPC 1

- An application for a CIO in aid of a forfeiture or money laundering investigation can precede the defendant's conviction.
- There must be “reasonable grounds for believing” a person has benefitted from his criminal conduct or holds recoverable/associated property.

CHALLENGES TO POCA LOCALLY

Re: Assets Recovery Agency (Jamaica) [2015] UKPC 1

- No need to prove specific conduct – the circumstances will speak for themselves... (i.e. not proof but mere “reasons for thinking”)



CHALLENGES TO POCA LOCALLY

Civil Recovery Burden of Proof

Delores Miller v Assets Recovery Agency

[2016] JMCA Civ 25; SCCA No. 20/2012

'Cold Hard Cash'

Balance of Probabilities Affirmed



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CHALLENGES TO POCA LOCALLY

Appropriateness of Pre-Conviction CIOs

&

Civil Recovery Burden of Proof:

How do these connect with and/or affect Suspicious Transaction Reports (STRs)?



CHALLENGES TO POCA LOCALLY

Suspicious Transaction Reports (STRs)

Section 94 of the POCA establishes the obligations on all businesses in the regulated sector to make a disclosure if they **Know...** or **believe...** or have **reasonable grounds for knowing or believing** that another person has engaged in a transaction that could constitute or be related to money laundering...

CHALLENGES TO POCA LOCALLY

Suspicious Transaction Reports (STRs)

- Report unexplained ‘deposits’ outside the scope of customer’s known capital and income.
- Unexplained changes in saving/spending/lifestyle patterns can trigger relevant suspicion.
- No need to prove particulars of any specific unlawful conduct – inferences can be drawn based on absent legitimate capital and income, untruthful explanations concerning source or use of funds, etc.

CHALLENGES TO POCA LOCALLY

Constitutionality of Requiring Attorneys to Report Suspicious Transactions

Affirmed in

Jamaican Bar Association v Attorney General & General Legal Council

[2017] JMFC Full 02; Claim No. 2014 HCV 0772

Lessons Learned from Ex-Parte Applications for Restraint Orders

Full and Frank Disclosure

Assets Recovery Agency v Upert Smith et al

[2015] JMSC Civ.168; Claim No. 2014 HCV 04760



Lessons Learned from Ex-Parte Applications for Restraint Orders

Full and Frank Disclosure

Assets Recovery Agency v Upert Smith et al

- Disclosure requirements extend to all material facts which are known or **could have been known** with careful inquiry.
- Compare with 2017 COA decision in the *Andrew Hamilton* case.

Lessons Learned from Ex-Parte Applications for Restraint Orders

Automatic Provisions in Restraint Order for Reasonable Living Expenses and for its Variation

*The Assets Recovery Agency v Michael Brown AKA
Erdley Barnes et al*

[2015]JMSC Civ 163; Claim No. 2015 HCV 03627

- *Banks to ensure written approval given by ARA prior to allowing withdrawals from restrained accounts.*

Possibilities for Overlap of Civil and Criminal Provisions

- *Detective Sergeant Franklyn McLaren v Roshen Daniels et al* Plaint No. PC 5/2014

&

- *R v Jephthah Ford* for 'Attempting to Pervert the Course of Justice' Info: 8029/14 et al

CONCLUSION

- POCA - vital to fight against organized and/or financial crime
- POCA introduced in keeping with international obligations
- Legal Challenges have cemented ARA's status
- Robust Judiciary protects citizens from potential abuse

CONCLUSION

- Despite harsh provisions of POCA, these observations remain true of POCA and are applicable to the Jamaican Experience:

"...As Baroness Scotland QC once suggested, there is a delicious irony in the recovery of the proceeds of crime. Not only does it accord with what most law-abiding individuals want to see, namely the stripping of ill-gotten gains from the criminal classes, but it also means that once recovered those funds can be utilised and invested back into law enforcement, schools, hospitals, and other worthy causes. The important role of the proceeds of crime practitioner is thus ensured, and no doubt will continue..."

Thank You!