

INVESTIGATIVE AND ASSET RECOVERY TOOLS UNDER THE FINANCIAL INVESTIGATIONS DIVISION ACT AND PROCEEDS OF CRIME ACT



Presented by: Ms. Alethia R. Whyte
Director, Legal Services and Asset Management Unit (Actg.)

A Crusade Against Dirty Money

“The scourge of organized crime and money laundering has become increasingly prevalent in the Jamaican society. It represents a significant security challenge for the State. The response to this has included what Sykes J at the interlocutory stage in this matter aptly referred to as **“a crusade against ‘dirty money’”**.

- ▶ The Jamaican Bar Association v. The Attorney General and The General Legal Council, [2017] JMFC Full 02 , (para 2)

The Financial Investigations Division (FID)

- ▶ Under the Financial Investigations Division Act, the Financial Investigations Division is tasked with the responsibility of eradicating the complex problem of financial crime.
- ▶ The core duties of the FID are to:
 - ❖ Investigate financial crime;
 - ❖ Request, collect and analyze information relating to financial crime;
 - ❖ Request, collect and analyze transaction reports made to it under the FIDA or any other Act including the Proceeds of Crime Act and the Terrorism Prevention Act; and
 - ❖ Promote public awareness and understanding of financial crime

What is a Financial Crime?

- ▶ The FIDA defines a financial crime as “ any offence involving money or other benefits and includes any offence involving fraud, dishonesty, money laundering or the financing of terrorist activities.”
- ▶ The definition is therefore wide and would include offences under the Larceny Act, the Law Reform (Fraudulent Transactions) (Special Provisions) Act, the Proceeds of Crime Act and tax offences.

Investigative Tools



Investigative Tools Under the Financial Investigations Division Act (FIDA)

Production and Inspection Orders:

- ❖ This order may either:
 - ▶ compel a person having possession of any information, book, record or document ,which is relevant to the investigation of a financial crime, to produce the information, book, record or document to an authorized officer; (to be explained later in this presentation).
 - ▶ Compel a person to make such information, book, record or document available to an authorized officer for inspection; or
 - ▶ Require a person to answer questions.

Investigative Tools Under the Financial Investigations Division Act (FIDA)

- ▶ An application for a Production and Inspection Order is made where the Chief Technical Director of the FID has **reasonable grounds for suspecting** that a person has possession or control of any information, book, record or document ,which is relevant to the investigation of a financial crime.
- ▶ The application can be made to a Judge in Chambers at the Supreme Court or a Parish Judge

Investigative Tools Under the Financial Investigations Division Act (FIDA)

Account Monitoring Order:

- ❖ This order compels a financial institution to provide certain account information on a specified person for a period not exceeding One Hundred and Eighty (180) days.

Investigative Tools Under the Financial Investigations Division Act (FIDA)

- ▶ An application for an Account Monitoring Order can only be made to a Judge in Chambers at the Supreme Court. The Judge will only grant the order if he is satisfied that there are reasonable grounds for suspecting that the person specified in the application:
 - (i) Has committed or is about to commit a financial crime; or
 - (ii) Was involved in the commission, or is about to be involved in the commission of, such an offence; and
 - (iii) Has benefitted directly or indirectly, or is about to benefit directly or indirectly, from the commission of that offence.

Investigative Tools Under the Financial Investigations Division Act (FIDA)

- ▶ The Judge must also be satisfied that:
 - The account information sought is likely to be of substantial value, whether or not by itself, to the investigation; and
 - It is in the public interest for the account information to be provided having regard to the likely benefit it will have to the investigation.

Investigative Tools Under the Financial Investigations Division Act (FIDA)

Who can apply for these orders?

- ▶ An application for a Production and Inspection Order or an Account Monitoring Order must be made by an “authorized officer”.
- ▶ An authorized officer is defined in the FIDA to mean:
 - ❖ The Chief Technical Director;
 - ❖ Any officer of the FID authorized as such by the Chief Technical Director; or
 - ❖ Any member of the Jamaica Constabulary Force so designated by the Commissioner of Police.

Investigative Tools Under the Proceeds of Crime Act (POCA)

Customer Information Orders:

- ▶ Compels a financial institution to provide “customer information” concerning an individual against whom an investigation is being conducted.
- ▶ Customer information is defined to mean information as to whether a person holds, or has held any account at or, has during a specified period, conducted any transaction with the financial institution. Details of the accounts and transactions are required if the response is in the affirmative.

Investigative Tools Under the Proceeds of Crime Act (POCA)

Disclosure Order:

- ▶ This order may either:
 - ▶ compel a person to produce information or material to an appropriate officer for the officer to take away;
 - ▶ Require a person to give an appropriate officer access to information or material; or
 - ▶ Require a person to answer questions.

Investigative Tools Under the Proceeds of Crime Act (POCA)

Account Monitoring Order

- ▶ This order compels a financial institution, for a period which initially does not exceed Ninety (90) days, to provide information on accounts held by a person of interest or transactions conducted by such person to an appropriate officer. This period can be extended by an application to the court for a further Ninety (90) days.

Investigative Tools Under the Proceeds of Crime Act (POCA)

- ▶ Applications for these orders can only be made to a Supreme Court Judge.
- ▶ These orders can be applied for in the following three circumstances:
 - Where you are conducting a forfeiture investigation. In this circumstance, you have to satisfy the Judge that there are **reasonable grounds for believing** that the subject of the application has benefitted from his criminal conduct.

Investigative Tools Under the Proceeds of Crime Act (POCA)

- Where you are conducting a money laundering investigation. In this circumstance, you have to satisfy the Judge that there are **reasonable grounds for believing** that the subject of the investigation has committed a money laundering offence.
- Where you are conducting a civil recovery investigation. In this circumstance, you have to satisfy the Judge that there are **reasonable grounds for believing** that the property to which the application relates is recoverable or associated property.

Investigative Tools Under the Proceeds of Crime Act (POCA)

In the Privy Council decision of *Assets Recovery Agency (Ex-parte) (Jamaica)*, [2015] UKPC 1, the court set out useful guidance on the “reasonable grounds” test. It stated as follows:

“Reasonable grounds for believing a primary fact... do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds...the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. ... employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the arbiter.”

Investigative Tools Under the Proceeds of Crime Act (POCA)

- ▶ In all circumstances, you also have to satisfy the Judge that:
 - The information sought is likely to be of substantial value, whether or not by itself, to the investigation; and
 - It is in the public interest for the information to be provided having regard to the likely benefit it will have to the investigation.

Investigative Tools Under the Proceeds of Crime Act (POCA)

Who can apply for these orders?

- ▶ When the investigation is a forfeiture investigation, the Chief Technical Director of the FID, an authorized financial investigator or an authorized officer (which includes a constable) can apply.
- ▶ When the investigation is a money laundering investigation, an authorized financial investigator or an authorized officer (which includes a constable) can apply.
- ▶ When the investigation is a civil recovery investigation, only the Chief Technical Director of the FID can apply.

Asset Recovery Tools



Asset Recovery Tools

The POCA provides three avenues by which proceeds of crime can be forfeited. These are:

- ❖ Pursuant to forfeiture and pecuniary penalty orders under section 5 of the POCA, made in circumstances where there is a criminal conviction;
- ❖ Pursuant to cash forfeiture orders under section 79 of the POCA which can also be made in the absence of any criminal conviction; and
- ❖ Pursuant to civil recovery orders under section 58 of the POCA which can be made in the absence of a criminal conviction.

For the purposes of this presentation, we will be focusing on the first two.

Forfeiture and Pecuniary Penalty Orders

- ▶ Prosecution does not end with a conviction. After conviction, the Director of Public Prosecutions (DPP) or the Assets Recovery Agency (ARA) can apply for a forfeiture or pecuniary penalty order.
- ▶ A forfeiture or pecuniary penalty order is made after a defendant is convicted in either the Parish Court or the Supreme Court.
- ▶ Even though the conviction can take place in either the Parish Court or Supreme Court; it is only the Supreme Court that has the power to make the order.

Forfeiture and Pecuniary Penalty Orders

- ❑ Before this order is made, the court has to determine whether a defendant has a criminal lifestyle and has benefitted from his general criminal conduct; or, where the defendant does not have a criminal lifestyle, whether the defendant has benefitted from the particular criminal conduct for which he has been convicted.
- ❑ A forfeiture order is made where the court identifies property which represents the defendant's benefit from criminal conduct and makes an order that this property be forfeited to the Crown.
- ❑ A pecuniary penalty order is one in which the defendant is ordered to pay to the Crown an amount equal to the value of the benefit he received from his criminal conduct.

Forfeiture and Pecuniary Penalty Orders

- ❑ In order for applications for a forfeiture or pecuniary penalty order to be made, it is important for the investigators to identify appropriate cases from an early stage.
- ❑ It is particularly desirable for the investigator to inform the ARA of appropriate cases from an early stage so that the ARA can begin investigations into the defendant's assets and financial affairs for the purposes of a possible forfeiture or pecuniary penalty order application.

Forfeiture and Pecuniary Penalty Orders

How will an investigator know what is an appropriate case for a possible forfeiture or pecuniary penalty order application?

- ❑ An appropriate case is any case in which the defendant has obtained a benefit from the criminal conduct.
- ❑ Investigators should have pay special attention to what are regarded as “criminal lifestyle” offences as provided for in the Second Schedule of POCA.

Restraint Orders



In order to preserve property of a defendant that may be liable for forfeiture or needed to satisfy a pecuniary penalty order, the ARA or Director of Public Prosecutions may apply to a Judge of the Supreme Court for a restraint order.

Restraint Orders

- ▶ The condition to be satisfied is that there is reasonable cause to believe that an alleged offender has benefitted from his criminal conduct and:
 - ❖ A criminal investigation has been started in Jamaica regarding the offence;
 - ❖ Proceedings for the offence have been commenced in Jamaica but have not been concluded; or
 - ❖ An application has been made for a forfeiture or pecuniary penalty order which has not been determined.

Restraint Orders

- ▶ The majority of restraint orders applied for by the ARA are where proceedings for the offence against the defendant have been commenced but not yet concluded.
- ▶ A restraint order will be discharged if there is undue delay in the prosecution of the criminal proceedings.
- ▶ It is therefore important that the investigators and the ARA communicate on the status of the criminal proceedings as it is the criminal proceedings that are the very basis of the restraint order.

Forfeiture and Pecuniary Penalty Orders

- ▶ ***The Assets Recovery Agency v Wayne McKenzie*** – forfeiture order in the sum of JA\$310,580.12 granted by consent in December 2016.
- ▶ ***The Assets Recovery Agency v Valicia Bartley*** – Forfeiture Order in the sum of US\$46,033.90 granted by consent in July 2017.
- ▶ ***The Assets Recovery Agency v Kemar Lewis*** – Forfeiture Order in the sum of \$JA1,751,556.84 granted by consent in November 2017.
- ▶ The **first Pecuniary Penalty Order** was granted in February 2018 for the sum of JA\$17,567,588.80 in the matter of the ***Assets Recovery Agency v Ralph Gregg***.

Civil Recovery

- ▶ Civil recovery targets specific property and seeks to forfeit that property on the basis that it was obtained through unlawful conduct.
- ▶ Civil recovery may be invoked whether or not criminal proceedings have been brought for a criminal offence in connection with the property and whether or not a defendant has been acquitted for an offence connected with the property.

Cash Forfeiture

- ❑ The cash forfeiture provisions empower an authorized officer to seize cash where he has reasonable grounds for suspecting that the cash was obtained through unlawful conduct or intended for use in unlawful conduct.
- ❑ An authorized officer is only allowed to seize cash that is above the sum of One Hundred Thousand Dollars (JA\$100,000.00).
- ❑ The term “authorized officer” means a constable, a customs officer or any person designated as such by the Minister by order.

Cash Forfeiture

Does it all have to be on one person?

- ▶ Separate sums of cash may be aggregated if they appear to have a common origin or destination.

- ▶ ***Commissioners of Customs and Excise v Duffy and others [2002] EWHC 425 (Admin).***

“**[17]** In my judgment, **the words of the statute are silent as to where the cash is before it is seized**;

- ▶ it may be with one individual,
- ▶ it may be with more than one individual,
- ▶ or it may be with no individual at all, as, for example, when it is in an unattended parcel or perhaps in a postal packet.

What matters is **whether it is identifiably cash** which is being exported **which can be regarded as a single item** in order to, **first of all**,

- ▶ **examine its totality** (see s 42(1)(a)), and,
- ▶ **secondly, consider its origin or purpose** (see s 42(1)(b)).”

Cash Forfeiture

“So if the evidence shows only that there are various sums held by individuals who are apparently unconnected, those sums cannot be aggregated, but if it can be shown that the money comes from a common source or has a common destination, that may readily lead to the conclusion that in reality it is a single exportation of cash. The court asked to exercise its powers under s 42(2) is then entitled, in my judgment, to look to the reality.”

- Para 17 Duffy

Cash Forfeiture

- ❑ The authorized officer is allowed time to investigate the source and intended use of the cash. Once the investigation is complete, the authorized officer can either release the cash or apply for it to be forfeited to the Crown.
- ❑ The question for the court to decide is whether the cash was obtained through unlawful conduct or intended for use in unlawful conduct.
- ❑ Like civil recovery proceedings, the court in cash forfeiture proceedings must make its decision on a “*balance of probabilities*.”
- ❑ Like civil recovery proceedings, cash forfeiture proceedings can be invoked whether or not criminal proceedings have been brought for a criminal offence in connection with the property and whether or not a defendant has been acquitted for an offence connected with the property.

Cash Forfeiture

- ❑ The authorities concerning cash forfeiture proceedings have clearly established that in these proceedings, it is not necessary to identify or prove any criminal conduct.
- ❑ Instead of proving criminal conduct, what is important is the circumstances under which the cash was found and the explanation given by the defendant or any other individual which may lead to an inference on a balance of probabilities that the cash was unlawfully obtained or intended for an unlawful purpose.



Cash Forfeiture

Sandra Marie Cavallier v Commissioner of Customs, [2010] JMCA Civ 26

The court found that there were several circumstances to properly find that the money was unlawfully obtained or intended for an unlawful purpose. These circumstances were:

- ▶ The fact that there was an attempt to conceal the money; the money having been hidden in several pockets of jeans within the Respondent's suitcase.
- ▶ The fact that the Respondent knew that the money was in her suitcase and was party to the attempt to conceal it.
- ▶ The fact that the explanation given by the Respondent to the customs officer as to the purpose of the cash was completely different than the explanation given by the third party, a company, which had later come to claim that the cash belonged to it.
- ▶ The fact that the explanation given by the company as to the use of the cash was found not to be true.
- ▶ The fact that the Respondent had claimed some of the money to be hers while the company had claimed that all of the money belonged to it.

Cash Forfeiture

Leroy Smith v Commissioner of Customs, [2014] JMCA Civ 10

- ▶ The fact that the Respondent consistently lied about the amount of money he had. He initially told the customs officer that he did not have over US\$10,000.00, but he was found to have £14,000.00.
- ▶ The fact that the Respondent attempted to bribe the customs officer to prevent her from checking his luggage where some of the cash was found.
- ▶ The fact that the cash was concealed. Some of the cash was concealed in the Respondent's luggage and some in the groin area of the pants that he was wearing.
- ▶ The conflicting explanations given by the Respondent as to the source of the money.
- ▶ The unsatisfactory explanation about the intended use of the money.

Cash Forfeiture

Winston Pusey v Assets Recovery Agency, [2012] JMCA Civ 48

- ▶ The fact that the cash was concealed in clothing in Mrs. Mahabeer-Barrett's suitcase.
- ▶ Mrs. Mahabeer-Barrett's failure to declare the cash and the lies told as to the quantum.
- ▶ The different reasons given for the purpose of the cash.
- ▶ The fact that Mrs. Mahabeer-Barrett claimed that US\$12,000.00 belonged to her yet the entire sum was claimed by the appellant.
- ▶ The appellant's evidence of his preference for cash transactions being a person with so many alleged business interests.
- ▶ The appellant's past criminal drug activities.

Cash Forfeiture

R (on the application of the Director of Assets Recovery and others) v Green and others,

[2005] EWHC 3186

“...The decisions are no more than a reflection of the fact that in today’s “cashless society”, the ordinary law abiding citizen does not normally have any need to keep large numbers of banknotes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest), and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of banknotes. ...

Just as the law-abiding citizen normally has no need to keep large amounts of banknotes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime...The four decisions do no more than recognize that conduct consisting in the mere fact of having a very large sum of cash in the form of banknotes in one’s possession in certain circumstances (eg at an airport) may well provide reasonable grounds for suspicion and demand an answer.” (emphasis supplied)

Cash Forfeiture

▶ 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

Cash Forfeiture



In 2016, there were 14 cash forfeiture orders totalling JA\$76,738,928.61

In 2017, there were 34 cash forfeiture orders totalling JA\$57,183,531.78

THANK YOU!