COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/CLE/gen/00688

IN THE MATTER OF the Mutual Legal Assistance (Criminal Matters) Act, Chapter 98

AND

IN THE MATTER OF the Bank and Trust Companies Regulation Act, Chapter 316

AND

IN THE MATTER OF Order 65 of the Rules of The Supreme Court

AND

IN THE MATTER of the Proceeds of Crime Act, Chapter 93

AND

IN THE MATTER OF a Request for Assistance by the United States of America

AND

IN THE MATTER OF an Application by the Competent Authority of The Bahamas, i.e., The Attorney General

BETWEEN

THE ATTORNEY GENERAL

Applicant

AND

JEFFREY ALLAN PEARSON

Respondent

Before: The Honorable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Kenrah Newry for the Applicant

Gail Lockhart-Charles along with Lisa Esfakis for the Respondent

Hearing Dates: 4 and 22 December 2020

Restraint Order – Proceeds of Crime Act, Chapter 93 – Proceeds of Crime Act 2018 (No. 4 of 2018) – Mutual Legal Assistance (Criminal Matters) Act, Chapter 98 – Application to discharge restraint order after delay in foreign criminal prosecution – Reasonable time for completion of foreign criminal proceedings

RULING

[1] This is an application by Jeffrey Allan Pearson ("**Mr Pearson**"), the Respondent herein, pursuant to section 27 of the Proceeds of Crime Act, 2018 and/or the inherent jurisdiction of the Court for an order to discharge a restraint order granted under the Proceeds of Crime Act, Ch. 93, the predecessor of the Proceeds of Crime Act, 2018.

BACKGROUND

[2] On 20 November 2008, a United States federal grand jury returned a criminal indictment against Mr Pearson, charging him with various offences in connection with a fraudulent telemarketing scheme that he and others operated from Costa Rica (the "**fraudulent scheme**"). Mr Pearson was in Costa Rica at the time of his indictment and pursuant to an extradition request from the United States, he was arrested in Costa Rica in December 2008.

[3] A superseding indictment containing minor changes to the original indictment was subsequently returned against Mr Pearson on 13 January 2009. Thereafter, on 5 March 2010, a United States federal court in Florida granted a Post-Indictment Restraining Order against Mr Pearson to preserve the availability of certain assets, including assets allegedly held at certain banks in The Bahamas, in the event of Mr Pearson's conviction on the indictment and the criminal forfeiture of his property.

[4] By a letter dated 1 April 2010 (the "**Letter of Request**"), the United States Department of Justice made a request for assistance to the Competent Authority of The Bahamas pursuant to the Mutual Legal Assistance (Criminal Matters) Act, Ch. 98. The Letter of Request stated that Mr Pearson kept most of the proceeds of the fraudulent scheme in certain bank accounts located in The Bahamas (collectively, the "**Accounts**") and requested that any funds in the Accounts up to $11.4 million be frozen as a preliminary step to forfeiture under the United States law.

[5] The Letter of Request also stated that, although the United States Department of Justice had sought Mr Pearson's extradition, he remained incarcerated in Costa Rica pursuant to a local investigation regarding his alleged involvement in multiple murders in Costa Rica.

[6] These proceedings were commenced by the Attorney General pursuant to the Letter of Request by an Ex-parte Originating Summons filed on 26 May 2010; and on 28 May 2010, the Court granted, *inter alia*, an order (the "**Restraint Order**") prohibiting Mr Pearson and the banks named in the Restraint Order from disposing of or otherwise dealing with any funds in the Accounts.

[7] It is not clear when but subsequent to the date on which the Restraint Order was granted, Mr Pearson was charged and convicted in Costa Rica for the offences for which he was being investigated at the date of the Restraint Order. He was sentenced to a term of imprisonment of 50 years and is currently serving that sentence.

[8] In the present application, which is brought by a Summons filed on 28 October 2020 (the "**Summons**"), Mr Pearson seeks to have the Restraint Order discharged.

LEGISLATIVE FRAMEWORK

[9] The framework under the Proceeds of Crime Act, Ch. 93 was bifurcated in that domestic proceedings and confiscation orders were deal with under the provisions of that Act, and foreign proceedings and confiscation orders in designated countries were dealt with under the provisions of the Proceeds of Crime Act, Ch. 93 as modified by the Second Schedule of the Proceeds of Crime Act (Designated Countries and Territories) Order (the "**Designated Countries Order**") (the "**Proceeds of Crime Act as Modified**").

[10] According to its long title, the Proceeds of Crime Act, Ch. 93 was brought into force (on 29 December 2000) to "empower the Police, Customs and the Courts in relation to money laundering, search, seizure and confiscation of the proceeds of crime and for connected purposes".

[11] In ***The Attorney-General v Aguilar*** [2003] BHS J. No. 152, Small J considered the provisions of the Proceeds of Crime Act, Ch. 93. He stated:

> "**7** ...The Act establishes the procedures for restraint and confiscation orders to ensure that persons charged and found guilty of drug trafficking and other relevant criminal offences in The Bahamas, and their accomplices, will not benefit from the fruits of their crimes. Restraint and confiscation orders preserve property which is alleged to be used in or the proceeds of money laundering and other criminal offences so that those funds or property acquired with them may be available for forfeiture or confiscation if

the persons charged are convicted. The legislative intent is that persons involved in those offences and those to whom they have made direct or indirect gifts should be deprived of the proceeds of criminal activity, whether those proceeds retain their character or have been changed through banking or other property transfers or arrangements. The scheme of the legislation is that restraint orders are made pending the outcome of the criminal proceedings and confiscation orders are made after the defendant has been convicted. A restraint order is analogous to a Mareva injunction in civil proceedings inasmuch as it preserves assets until the criminal case is concluded."

[12] The Restraint Order was granted under section 26 of the Proceeds of Crime Act as Modified. However, as indicated, the Proceeds of Crime Act, Ch. 93 has been repealed and replaced by the Proceeds of Crime Act, 2018 (the "**2018 Act**").

[13] The 2018 Act applies to both domestic and foreign confiscation orders and, according to its long title, it was brought into force to *"consolidate and strengthen measure to recover the proceeds and instrumentalities of crime and to combat identified risks"*. One notable change to the proceeds of crime regime introduced by the 2018 Act is that the Court may now make non-conviction based civil forfeiture orders in respect of proceeds of crime even if the person has not been charged with a particular criminal offence.

THE APPLICABLE ACT

[14] Both Ms Lockhart Charles and Ms Newry agree that the Restraint Order remains in place notwithstanding that the Proceeds of Crime Act, Chapter 93 has been repealed and replaced by the 2018 Act. However, they disagree on (i) whether the Proceeds of Crime Act as Modified is also repealed and (ii) which Act applies to the current application.

[15] On behalf of the Attorney General, Ms Newry submits that the Designated Countries Order remains in effect because it was not expressly repealed by the 2018 Act. I agree that the Designated Countries Order remains in place but only to the extent that it is not inconsistent with the 2018 Act. Section 98 of the 2018 Act expressly provides this. The result, in my view, is that while the Designated Countries Order remains in place, the Second and Third Schedules thereof have fallen away because they relate to the modification of the Proceeds of Crime Act, Ch. 93, which itself was repealed by the 2018 Act.

[16] In simple terms, if the Proceeds of Crime Act, Ch. 93 as the principal law is repealed, all subsequent laws amending it are automatically repealed. This is made clear by section 22 of the Interpretation and General Clauses Act (the "**IGCA**") which provides:

> "**23.** Where any written law which has been amended by any other written law is repealed, such repeal shall include the repeal of all those provisions of

such other written law by which such first-mentioned written law was amended."

[17] Ms Newry also submits that section 20 of the IGCA is instructive because it provides that where any obligation or legal proceeding has been commenced under a repealed Act the effect of the repealed act prevails. Section 20 states:

> **20.** Where a written law repeals in whole or in part any other written law, the repeal shall not —
> (a) ...
> (b) ...
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;
> (d) ...
> (e) **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed**."
>
> (Ms Newry's emphasis)

[18] Section 20 of the IGCA contains general savings for the previous operation of a repealed enactment. Section 20(c) refers to any right, privilege, obligation or liability "acquired, accrued or incurred" under the repealed enactment. And section 20(e) refers, *inter alia*, to any legal proceeding in respect of any such right, privilege, obligation, liability. The purpose of section 20(c) and (e) of the IGCA is to save rights, privileges, obligations or liabilities which have been acquired, accrued or incurred under an enactment and might be defeated as a result of the repeal of that enactment. The Summons in the present case seeks the discharge of a restraint order and does not relate to any right, privilege, obligation or liability which might be defeated as a result of the repeal of the Proceeds of Crime Act as Modified; therefore, it is not in my view "a legal proceeding" within the contemplation of section 20(e) of the IGCA.

[19] In the circumstances, I agree with Ms Lockhart Charles' submission that an application may be made under the 2018 Act for the discharge of a restraint order granted under the repealed Acts.

THE APPLICATION

[20] The Summons is made pursuant to section 27 of the 2018 Act and the inherent jurisdiction of the Court.

[21] The grounds upon which Mr Pearson relies are set forth in the Summons and are as follows:

(i) No criminal forfeiture or confiscation order has been sought or obtained nor have any proceedings been progressed to obtain a criminal forfeiture or confiscation order in the 10 years and 4 months that have elapsed since the date of the Restraint Order;

(ii) No forfeiture or confiscation orders are reasonably contemplated; and/or

(iii) The substratum upon which the Restraint Order was granted, i.e., to secure the availability assets with a view to criminal forfeiture, no longer applies because no criminal forfeiture has been sought or obtained, nor have any proceedings been progressed to obtain a criminal forfeiture order in the 10 years and 5 months that have elapsed since the date of the Restraint Order.

[22] The primary issue for the Court to determine is whether the Restraint Order should be discharged.

EVIDENCE

Evidence on behalf of Mr Pearson

[23] In support of the Summons, Mr Pearson relies on the affidavit of Candice Knowles filed on 28 October 2020 and the affidavit of Eltora Butcher filed on 19 November 2020, which both refer to and exhibit an affidavit sworn by Jeffrey Steinback, a United States attorney who represented Mr Pearson in his criminal case in the United States.

[24] Based on Mr Steinback's account of the status of the United States criminal proceedings, no order has been made for any fine, forfeiture, confiscation or disgorgement of Mr Pearson's property to date; and there has been no progress in the proceedings since the date the Restraint Order was granted.

[25] Mr Steinback further states that Mr Pearson informed him during a telephone call on 21 October 2020 that he [Mr Pearson] had not been served with any documents to indicate that confiscation or forfeiture orders were being sought against him in Costa Rica or the United States ,or that his extradition was being or is to be pursued.

[26] According to Mr Steinback, it is reasonable to assume that the United States Attorney for the Southern District of Florida, United States Department of Justice and the Courts are not pursuing a confiscation or forfeiture order against Mr Pearson as contemplated by the Restraint Order.

[27] Mr Pearson also relies on the affidavit of Candice Knowles filed on 8 December 2020, which refers to and exhibits the Legal Opinion of Jorge Arturo Vallejo Alfaro, an attorney in Costa Rica. Mr Alfaro was proffered to the Court as an expert on Costa Rican law and Ms Newry, on behalf of the Attorney General, did not object.

[28] I set out Mr Alfaro's Legal Opinion verbatim:

"TO WHOM IT MAY CONCERN.

I, the undersigned, JORGE ARTURO VALLEJO ALFARO, Attorney at Law and Notary Public with Professional ID. No. 6482, granted by the Costa Rican Bar Association, do **HEREBY CERTIFY** that Mr. JEFFREY ALLAN PEARSON TOMASZEWSKI, born on December 11, 1967 to Patrick Cari Pearson and Barbara Michaelene Tomaszewski, bearer of ID from the Republic of Costa Rica No. 801140658, is Costa Rican by naturalization.

1- **THEREFORE, MR. JEFFREY ALLAN PEARSON TOMASZEWSKI IS A COSTA RICAN CITIZEN.**

Consequently, according to our legal system and pursuant to the provisions of Article 31 of our Political Constitution, which literally states:

ARTICLE 31:

"...NO COSTA RICAN WILL BE COMPELLED TO LEAVE THE NATIONAL TERRITORY... "

In lieu of which, it is impossible to decree the extradition of any type of Costaricans within the national territory, **INCLUDING MR. JEFFREY PEARSON TOMASZEWSKI.**

2- **THEREFORE, MR. PEARSON TOMASZEWSKI CANNOT BE EXTRADICTED TO THE UNITED STATES ONCE HE HAS SERVED HIS SENTENCE OR IN ANY FUTURE CIRCUMSTANCES DUE TO HIS STATUS AS A CITIZEN.**

3- **THAT IN THE COURTS OF JUSTICE OF COSTA RICA Mr. Pearson Tomaszewski, HAS NO PENDING MATTERS, NOR ANY EXTRADITION or any other type of (pending) matter with in the Costa Rican territory.**

[Signature]."

Evidence on behalf of the Attorney General

[29] In opposition to the Summons, the Attorney General relies on the affidavit of David Rahming filed on 19 November 2020.

[30] In his affidavit Mr Rahming states that, as a result of the Summons, the United States Department of Justice, by a letter dated 13 November 2020, made a supplemental request ("**Supplemental Request**") for assistance pursuant to the Mutual Legal Assistance (Criminal Matters) Act, Ch. 98.

[31] The Supplemental request, which is exhibited to affidavit of Mr Rahming, states, *inter alia*, as follows:

> "...The United States' extradition request remains outstanding with Costa Rica such that upon Pearson's completion of his Costa Rica sentence, he can be extradited to stand trial in U.S. court on the above described charges.
>
> On January 26, 2009, Pearson was transferred to "fugitive status" in his U.S. criminal case...Pearson remains on fugitive status, which means he has not yet appeared before the Court in his criminal case. When a defendant is placed on fugitive status, the charges against him remain pending. There is no limit on how long a defendant may be on fugitive status.
>
> The criminal charges against Pearson are still pending. However, because criminal forfeiture in the United States is *in personam*, the United States cannot forfeit the Subject Account without a criminal conviction. In the interim, the United States sought the restraint of the Subject Account pursuant to the original request in this matter. In order to ensure the availability of the funds in the Subject Account for forfeiture, the United States requests the continued restraint of the Subject Account..."

[32] In addition to the affidavit of Mr Rahming, the Attorney General relies on the affidavit of Ronique Carey filed on 14 December 2020

[33] In her affidavit, Ms Carey seeks to explain, *inter alia*, the status of Mr Pearson's extradition to the United States. She states that Mr Pearson is a United States citizen whose extradition from Costa Rica was requested by the Embassy of the United States on 5 December 2008. She also states that, on 9 December 2009, extradition proceedings were commenced against Mr Pearson and his arrest was ordered by a Resolution issued by the Criminal Court of the First Judicial Circuit of San Jose.

[34] Ms Carey also states that the Processing Judge of the Third Judicial Circuit of San Jose found that all the requirements had been fulfilled in compliance with the Extradition

Treaty signed between Costa Rica and the United States and Mr Pearson's extradition was authorised.

[35] Ms Carey refers in her affidavit a number of documents which are exhibited including (i) a document intituled "The Voluntary Extradition Petition Is Deemed Valid" dated 26 June 2009 and signed by a Judge of the Costs Rica Criminal Court, (ii) a letter dated 1 July 2009 issued by the Costa Rican Supreme Court to the Costa Rican Ministry of Foreign Affairs and (iii) a letter dated 2 July 2009 issued by the Costa Rican Ministry of Foreign Affairs to the Embassy of the United States in Costa Rica.

[36] Those documents demonstrate that prior to his naturalization: (1) Mr Pearson appeared before the Costa Rican Criminal Court on 29 April 2009 and expressly stated his desire to undergo a voluntary extradition process; (2) the Costa Rican Criminal Court determined that the petition for extradition presented by the United States against Mr Pearson was "deemed valid" whereupon Mr Pearson was "left at the disposal of the police authorities" so that he could be "delivered to the Government of the United States of America" and (3) that decision of the Costa Rican Criminal Court was duly communicated to the United States Embassy in Costa Rica by the Costa Rican Ministry of Foreign Affairs.

[37] According to Ms Carey, Mr Pearson was charged, convicted and sentenced to a prison term of 50 years while his extradition proceedings were pending. She also states that the United States' extradition request remains outstanding, such that Mr Pearson can still be extradited upon completion of his sentence.

ANALYSIS AND DISPOSITION

Jurisdiction of the Court and applicable principles

[38] Section 27 of the 2018 Act enables the Court to make further orders at the time when it makes a restraint order or at any later time. Under section 27(2)(a), the Court **may** make an order revoking a restraint order or varying the property to which it relates on the application of any person affected by it. As is evident from the language of section 27(2)(a), the jurisdiction of the Court is discretionary.

[39] In exercising its discretion, the Court must have regard to section 49(1)(a)(i) of the 2018 Act. Section 49(1)(a)(i) states:

> "(1) The powers contained in this Part –
> (a) shall be exercised –
> (i) with a view to the value for the time being of property being made available (by the property's realization) for satisfying

any final order under this Part that has been or may be made against the relevant person.."

[40] This has been described as the "legislative steer" in accordance with which the discretion must be exercised.

Must proceedings be progressed to obtain a criminal forfeiture or confiscation order within a particular time?

[41] It is undeniable that more than 10 years have elapsed since the granting of the Restraint Order and no criminal forfeiture or confiscation order has been obtained. Is that sufficient to warrant the discharge of the Restraint Order in the exercise of the Court's discretionary powers?

[42] Ms Lockhart Charles refers the Court to section 32 of the 2018 Act which expressly provides for the duration of a restraint order. Section 32 states:

> "Unless the Court otherwise orders in the interests of justice, a Court which makes a restraint order pursuant to this Part upon the basis that a person is the subject of an investigation shall discharge the order upon the application if the person is not charged within three years of the date of the original order or up to the conclusion of any proceedings commenced, whichever is later."

[43] Ms Lockhart Charles contends that section 32 demonstrates that the 2018 Act does not intend to allow a foreign state to have the benefit of a restraint order without the commencement of proceedings; and therefore, a foreign state should not be allowed to retain a restraint order when there is no prospect that the proceedings can be prosecuted.

[44] In my view, section 32 does not help Mr Pearson's case. Firstly, it clearly does not impose a timeframe within which a confiscation order must be obtained. Secondly, while section 32 stipulates that, if a restraint order is made on the basis that an investigation had been started, then the Court *shall* discharge the order if the person is not charged with an offence within three years of the granting of the restraint order or by the conclusion of the investigation, it nevertheless provides the Court with a residual discretion in the Court to order otherwise *"in the interests of justice"*.

[45] Ms Lockhart Charles further contends that restraint orders should not be left open ended and the intended confiscation order should be obtained within a reasonable time. In this regard, Ms Lockhart Charles refers this Court to the decision of Isaacs J in ***The Attorney General v Benton and others*** [2005] 6 BHS J. No. 409, which she submits is instructive. In that case, Isaacs J stated:

"**18** Section 28A [of the POCA as Modified] is clear on what an affidavit supporting an application under section 26(4) must contain. I consider the condition to be mandatory and not merely facultative because the Act seeks to interfere with a person's constitutional right under Article 27 of the Constitution. Insp Moxey's affidavit does not comply with subparagraph (c).

19 The necessity for compliance with subparagraph (c) is to ensure that applications for restraint orders are not left open ended and that the appropriate steps to be taken will be taken timeously and a person is not deprived of his property for an undue period of time. This also enables the Court to determine whether or not a reasonable time has elapsed since the making of the Order."

[46] The facts in ***The Attorney General v Benton*** may be easily distinguished from those in the present case. The application before Isaacs J was brought under section 25(5) of the Proceeds of Crime Act as Modified, which section *required* the Court to discharge a restraint order if proceedings were not *commenced* against the relevant person within a reasonable time after the restraint order was granted. The point Isaacs J was making was that the requirement under section 28A(c) to indicate *when* proceedings would be commenced was to ensure that the relevant person was not deprived of his property for an excessive period without the commencement of proceedings, i.e. by being charged. This issue is now addressed by section 32 of the 2018 Act as the relevant person must be charged within the period stated in that provision.

[47] In the present case, Mr Pearson was duly charged and proceedings were duly commenced prior to the date of the Restraint Order. Therefore, while Isaacs J's comments are informative, they do not have any bearing in the present case.

[48] Ms Lockhart Charles submits that section 68 of the IGCA provides guidance on the approach the Court should take when no time period is prescribed for the doing of a particular thing. Section 68 of that Act states:

"**68.** Where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

[49] I do not disagree with Ms Lockhart Charles' submission. However, I am cautioned by the judicious words of Davis LJ in ***R v S*** [2019] EWCA Crim 1728, that a court should think long and hard before it discharges a restraint order, just as it should think long and hard before it makes one in the first place.

[50] The Court is bound to consider the practical realities in each case and I find useful guidance from the observations of Davis LJ in ***R v S*** although the facts in that case and the statutory provision under consideration are different from that in the present case.

[51] In ***R v S***, the court was concerned with an appeal against a decision of a judge of the English High Court to discharge a restraint order pursuant to section 42(7) of the English Proceeds of Crime Act 2002 which states that *"the court must discharge the order if within a reasonable time proceedings for the alleged offence are not started"*.

[52] Davis LJ stated:

> "38. ...It is then for the court to decide, having regard to all the circumstances of the particular case, whether or not the proceedings have been started within a reasonable time.
>
> 39. Just what those circumstances are, and the weight to be ascribed to them, will necessarily vary from case to case. It is not possible to identify by way of exhaustive list just what the relevant circumstances will be in every case. But in the ordinary way, we suggest, the following, in no particular order, at least will usually be likely to be relevant (there may of course, we stress, be others in any given case) where s.42(7) is under consideration:
>
> (1) The length of time that has elapsed since the Restraint Order was made;
>
> (2) The reasons and explanations advanced for such lapse of time;
>
> (3) The length (and depth) of the investigation before the Restraint Order was made;
>
> (4) The nature and extent of the Restraint Order made;
>
> (5) The nature and complexity of the investigation and of the potential proceedings;
>
> (6) The degree of assistance or of obstruction to the investigation.
>
> 40. It is the obligation of the judge to evaluate all the relevant circumstances of the particular case in reaching his or her judgment as to whether or not proceedings have been started within a reasonable time. If they are adjudged not to have been started within a reasonable time then the Restraint Order must be discharged; and

accordingly the consequences flowing from such discharge are then irrelevant."

[53] In the present case, ten years have elapsed and there is evidence that it may be 40 years before the criminal proceedings against Mr Pearson may be progressed. However, the reasons and explanations advanced do not demonstrate any neglect on the part of the US prosecutor. Further, I think it would be surprising if the Restraint Order could be discharged for reasons of delay where the subject of the proceedings, i.e. Mr Pearson and not the requesting state, may be regarded as responsible for the delay. It does not lie in the mouth of Mr Pearson to complain about the delay in the prosecution of the criminal proceedings against him when the reason for such delay has been wholly attributable to his incarceration for criminal offences committed by him.

Is it correct that no forfeiture or confiscation orders are reasonably contemplated?

[54] The gravamen of Ms Lockhart Charles' submissions is that a criminal forfeiture or confiscation order cannot be reasonably contemplated in circumstances where criminal forfeiture is an *in personam* proceeding and Mr Pearson cannot be extradited to the United States.

[55] In support of her submission, Ms Lockhart Charles relies upon the legal opinion provided by Mr Alfaro, which is not challenged by the evidence presented by the Attorney General. As indicated in paragraph 28 above, Mr Alfaro states, that Mr Pearson cannot be extradited to the United States after the completion of his sentence because he is a naturalized citizen of Costa Rica and Article 31 of the Political Constitution of Costa Rica states that *"no Costa Rican will be compelled to leave the national territory"*.

[56] In my view, little weight can be attributed to Mr Alfaro's legal opinion for the purposes of the present case because I am not satisfied that he was aware of and considered the relevant facts of this case. There is no reference in Mr Alfaro's legal opinion to the fact that Mr Pearson is also a citizen of the United States and was not a citizen of Costa Rica when the offences alleged against him were committed. Additionally, there is no reference to the fact that Mr Pearson had agreed to undergo a voluntary extradition process prior to his naturalization; and that the petition for extradition presented by the United States against Mr Pearson was "deemed valid" by the Costa Rican Criminal Court and Mr Pearson was "left at the disposal of the police authorities" so that he could be "delivered to the Government of the United States of America". These are material facts and there is no evidence before the Court that Mr Alfaro considered them.

[57] In addition to the foregoing, one would think that the extradition laws of Costa Rica would be relevant to the matter; yet Mr Alfaro's legal opinion is bereft of any reference to Costa Rica's extradition laws or any case law concerning extradition and the proper interpretation of Article 31 of Costa Rica's Political Constitution to which Mr Alfaro referred. In all the circumstances, I do not find Mr Alfaro's opinion to be helpful.

[58] Furthermore, it is difficult for the Court to accept that criminal forfeiture or a confiscation order against Mr Pearson is not reasonably contemplated when the Post-Indictment Restraining Order granted by a United States court on 5 March 2010 to preserve the availability of assets in the event of a criminal forfeiture remains in place. *A fortiori* where the United States Central Authority has made a Supplemental Request to continue the Restraint Order. The United States has clearly not waned in its intention to pursue a confiscation order.

Has the substratum upon which the Restraint Order was granted fallen away?

[59] The evidence before this Court demonstrates that the criminal proceedings instituted against Mr Pearson in the United States remain pending and it is the intention of the United States to have Mr Peason extradited upon the completion of his sentence in Costa Rica. I am therefore not persuaded that the substratum of the Restraint order has fallen away for reasons discussed in paragraphs 27 to 38 above.

[60] Ms Lockhart Charles suggested that a restraint order was analogous to a Mareva injunction and that the principles regarding such injunctions may be applied.

[61] However, in ***R v S*** Davis LJ stated (at paragraphs 36 – 37):

> "36. We were also in argument briefly referred to the situation, suggested to be analogous, where the court is considering making or discharging a Mareva injunction or freezing order. Thus in Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc [1988] 1 WLR 1337, Dillon LJ said at p.1349, in the context of an application to discharge a Mareva injunction:
>
> > "...where a party has obtained a Mareva injunction, that party is bound to get on with the trial of the action – not to rest content with the injunction."
>
> 37. No doubt it is easy to agree with that sentiment in general terms. But, for the present purposes of the operation of the 2002 Act, that kind of sentiment is in any event to be taken as subsumed within the language of s.42(7) itself. In fact, we would express very considerable reservations about bringing in at all to this particular statutory jurisdiction relating to the grant, variation or discharge of Restraint Orders the approach and principles which may apply in the civil jurisdiction relating to the grant, discharge or variation of freezing orders. The positions are significantly different. A civil case involves a private lis between the parties: and a freezing order is sought to preserve the benefit of any money judgment that might thereafter be obtained. A criminal prosecution (actual or prospective) raises quite different issues. The public interest issues are different; the need to investigate others

may be different; the disclosure and preparation issues are different; and so on. Moreover, in cases such as the present where confiscation is prospectively in issue the underlying rationale, as reflected in the legislative steer set out in s.69 of the 2002 Act and as confirmed in the Supreme Court decision in Waya [2012] UKSC 51, [2013] 1 AC 294, is that criminals should not profit from their crimes: and a Restraint Order is thus a means of furthering that particular public interest. Accordingly, we suggest that, for the purposes of applications under this part of the 2002 Act, reliance on principles and authorities relating to civil freezing orders is not normally likely to assist."

[62] The purpose of the Restraint Order is to preserve the position while the criminal proceedings against Mr Pearson are decided upon and the current proceedings are ancillary to those criminal proceedings. If the courts in the United States decide that the criminal proceedings against Mr Pearson should be dismissed by reason of delay or otherwise, it could then be said that the substratum of the Restraint Order has fallen away. Accordingly, I agree with Ms Newry's submission that the issues raised by Mr Pearson may be properly ventilated in the courts of the United States. Furthermore, this Court should be slow to make an order which may preempt a decision of the US courts.

[63] When all things are considered, it is the view of this Court that to discharge the Restraint Order in circumstances of this particular case would likely undermine the efficient working of the proceeds of crime regime and be out of step with the legislative steer of the 2018 Act. Furthermore, in light of the purpose to be served by the Restraint Order, it is the view of this Court that Parliament cannot have intended for the Restraint Order to be discharged if the related criminal proceedings are still viable – a question that is here not within the remit of this Court to determine but more one for the courts of the United States to determine.

[64] I am therefore of the view that Mr Pearson's application should be denied and dismiss the Summons filed herein on 28 October 2020 accordingly. Further, I make no order as to costs.

Dated the 29th day of October, 2021

Tara Cooper Burnside
Justice (AG)