IN THE SUPREME COURT OF

THE TURKS AND CAICOS ISLANDS

RO 1/2020

IN THE MATTER OF AN APPLICATION FOR A RESTRAINT ORDER BY THE DIRECTOR OF PUBLIC PROSECUTIONS PURSUANT TO SECTIONS 41(1) AND 42 OF THE PROCEEDS OF CRIME ORDINANCE CHAPTER 3:15

AND IN THE MATTER OF AN APPLICATION BY THE APPLICANTS FOR THE DISCHARGE OR VARIATION OF THE RESTRAINT ORDER

BETWEEN

THE DIRECTOR OF PUBLIC

PROSECUTIONS **APPLICANT**

AND

1. CARLINE CHARITE

2. AUDELIN CHARITE

3. PAULENE BOUTIQUE

4. ISLAND BROKERAGE

CONSULTANCY **RESPONDENTS**

CORAM: AGYEMANG CJ

MR. OLIVER SMITH FOR THE 1, 3, AND 4 RESPONDENTS

MR. KEITH JAMES FOR THE 2 RESPONDENT

MS. LATISHA WILLIAMS OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE APPLICANT

DELIVERED ON 4TH SEPTEMBER 2020

RULING

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(1) This is a ruling in respect of an application for an extension of a Restraint Order granted to the applicant against the respondent herein. The application seeks an extension of a Restraint Order granted to the applicant against the assets of the respondents on the 20th of February 2020, which was given a three-month limit of operation on 7th May 2020.

(2) The application has been brought on the following grounds:

"1. The respondents are currently the subjects of the on-going investigation by officers of the Integrity Commission for the offences of Corruption, Money Laundering, offences under Schedule 1 of the Proceeds of Crime Ordinance 2014;

2. Given the current pandemic and travel restrictions, Investigators from the Integrity Commission have not been able to return to the Island but hope to do so over the next few weeks;

3. The Crown intends to apply for a confiscation order against the realisable assets of the Respondents in the event of a conviction following a criminal trial in accordance with S. 15(1)(a) of the Proceeds of Crime Ordinance."

(3) To give a background to this extension application, I must recount matters antecedent to the variation application in which the order which is sought to be extended, was made.

(4) On 20th February 2020, this court coram: Ventour J, granted a Restraint Order against the assets of the four respondents in this application. The order, which was granted upon a hearing based on an affidavit deposed to by one ASP Kenville Charles, was in the following terms:

"1. Pursuant to sections 41 and 42 of the Proceeds of Crime Ordinance…Carline Charite is restrained whether by herself, her servants or agents or however otherwise from disposing of, causing or allowing the disposal of and/or dealing with the assets identified in the order.

2. All persons real or otherwise named in this order are prohibited from dealing with the asset listed in this order.

3. The said first respondent is prohibited from:

a. Removing from the Turks and Caicos Islands assets whether or not they are named in paragraph 6 (a list specifying her assets contained in the order).

b. In any way disposing of, dealing with or diminishing the value of any of the assets whether they are named in paragraph 6 or not.

4. That the order apply to all assets of the (first) Respondent whether or not the assets are described in this Order or are transferred to the alleged

offender after the order is made, is in her own name or whether they are solely or jointly owned.

For the purpose of this Order the (first) Respondent's assets include any asset in which she has a right or over which she has the power, directly or indirectly to dispose of, or deal with as if it was her own. The first respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with her direct or indirect instructions".

The order was said to apply to the following 'assets and institutions':

1. Bank of Nova Scotia account numbered 35417 in the name of Paulene Boutique P.O. Box 959 Carline and Audelin Charite Balance as at 31/10/19: USD19,892.

2. Bank of Nova Scotia account 35319 in the names of Audelin and Carline Charite: Balance as at 31/10/19 USD 47,283.47

3. Hallmark Trust 5189420021055845 Compass Debit card in the name of Carline Charite Balance on 31/10/19: USD 1650.

4. Block and Parcel #60504/134 Shrub Close – Plot with three detached houses (all occupied, split into apartments)

5. Block and Parcel #60504/179 Millennium Highway (0.25 ac) & Plaza Building)

6. Block and Parcel # 60605#190 Slater Drive, off South Dock Road

7. Block and Parcel #60511/50 (0.94 ac) and 60511/53 – (0.94) Plots of land adjacent north of Kew Town, undeveloped raw land,

8. Block and Parcel #60511/53 Transfer document dated 4th March 2014

9. Block and Parcel # 60505/50

10. Block and Parcel # 60505/191 and 60505/192 Land off Millennium Highway, Providenciales."

The Bank of Nova Scotia Account numbered 35319 was a company co-owned by the first and second applicants: JV's Trucking Services.

(5) After an application was brought by the respondents to discharge or vary the order, this court, as at present constituted, on 7th May 2020, granted a variation of the order of 20th February in the following terms: That,

"The monthly living expenses deposed to by the first and second applicants in their affidavits, business expenses of Island Brokerage Consultancy, Paulene Boutique, and JV Trucking Services, as well as the legal expenses of the applicants be allowed out of any and all of the bank accounts of the four applicants for a period of three months.

The restraint order will continue to run for a period of three months from this day.

An order is made accordingly."[1]

(6) Subsequently, it having been brought to the attention of the court by learned counsel Mr. Oliver Smith that the order for payment of legal expenses was made *per incuriam* s. 5 of ***Ordinance 22/2018 Proceeds of Crime Amendment Ordinance*** which amends s. 42 of POCO by the insertion of s. 42 (2A) which restricts provision as to legal expenses, the court amended its order and disallowed legal expenses.

APPLICANT'S CASE:

(7) The instant application for extension of the Restraint Order, is supported by two affidavits: one from the said ASP Kenville Charles, Head of the Financial Crimes Unit of the Police Force, and the other from Richard Mills, Senior Investigating Officer of the Turks and Caicos Islands Integrity Commission.

[1] RO1/2020 DECIDED ON 7TH MAY 2020

(8) To summarize their evidence: the gentlemen allege that the investigation for which the Restraint Order was obtained, has ran into difficulty caused by the enforced absence of investigators in charge of the investigation from this jurisdiction; that the said investigators had left the shores of this country on 22nd March 2020 due to the coronavirus pandemic, and have been unable to return to continue with their investigative work.

(9) ASP Charles has urged the court to consider as realisable assets for a confiscation order in the event of their conviction, the respondents' assets under restraint (including their bank accounts).

(10) These assets, he asserts, are at risk of dissipation, hence the need for a restraint order. He alleges the risk to be: the pattern of disappearing bank deposits in the respondents' accounts. He points to the fact that typically, the accounts have been emptied following the court's order to allow for household and business expenses.

(11) In evidence that is difficult to reconcile with the affidavit of Mr. Mills regarding the matter of the stalled investigations, ASP Kenville Charles continues to assure the court that investigations are continuing, and that the Treasury Department has sent the Integrity Commission (with more to come), voluminous information which is being sifted for information regarding the number of applications made by the fourth respondent in the period under investigation.

He attributes the delay in investigation to the painstaking efforts to sift the said information.

(12) Learned counsel for the applicant Ms. Williams, announces that the applicants are not in this application, seeking an open-ended Restraint Order. She asserts that the applicant will be happy for the court to limit the time of operation as

was done in the order of variation, and to supervise the progress of the work of the investigators so as to put them on their toes in relation to the duration.

(13) In making this submission, learned counsel who avers in her skeleton arguments that *"the COVID-19 situation remains fluid and will not admit of certainty of date for completing the Investigation",* has invited the court to adopt the principles set out in ***R v S [2019] EWCA 1728***, to monitor the progress by extending the Restraint Order, and requiring the Prosecution to report on the investigation's progress in order to determine whether or not to discharge the order.

(14) In the applicant's skeleton arguments as buttressed by oral arguments of counsel, it is submitted that the COVID-19 pandemic has caused delay in the investigation in respect of which the Restraint Order was granted. The delay is attributed to the absence of investigators in charge of the investigation from the jurisdiction.

(15) It is asserted that the said investigators who are based in the United Kingdom and possess special skills for the investigation, came into the jurisdiction to conduct the investigation, but have had to return to the United Kingdom because of the COVID-19 pandemic; they have however, been unable to return to continue with their work.

(16) Learned counsel who informs the court that at the time of the discharge/variation hearing, it was not foreseen that the investigators would not be able to return to proceed with their investigation, has assured the court that once they are able to return to the country, which she suggests may be in September of this year, the investigation will resume.

RESPONDENTS' CASE

(17) The first, third and fourth respondents have denounced the proceedings. They contend that the application constitutes an abuse of the court's process, being an impermissible attempt by the applicant to relitigate issues that were settled in the discharge/variation application.

(18) Learned counsel Mr. Smith contends that the instant application is not made bona fide, but is rather a cloak to revisit the discharge/variation application which has been dealt with, the court having determined the matter by making an order for the Restraint Order not to run for longer than three months from 7th May 2020.

(19) He submits in this regard, that all the matters raised in the affidavits of Richard Mills and Kenville Charles were put before the court at the discharge/variation hearing, or could have been dealt with at that hearing.

(20) He avers that no new matter since the discharge/variation hearing, has been placed before the court in this application for, all the matters relied on in seeking the extension being: the assets of the respondents, the applicant's belief that they are derived from unlawful conduct; that there is risk of dissipation, and the nature and stage of the investigation: begun in 2018, but that the first respondent was arrested in October 2019, were matters before the court in that discharge/variation hearing.

(21) He contends, that there was opportunity for the applicant to inform the court of the impact of the nationwide lockdown in response to the Covid-19 pandemic on the investigation.

(22) He urges, that this court ought properly, to have been apprised of these matters as part of the subject of the discharge/variation hearing which commenced on April 21, 2020, a month after the investigators left the jurisdiction.

(23) He draws the court's attention to the fact that counsel for the applicant made a concession at the discharge/variation hearing and asked that rather than discharging the Restraint Order, that its duration be limited in.

(24) He asserts that in making the said concession, learned counsel for the applicant ought to have presented all matters which would impact on the determination of the duration of the Restraint Order. These matters should have included any difficulty in carrying out the investigation posed by the absence of the investigators.

(25) He notes that the applicant's concession was placed on record in the judgment, and relied on by the court in its consideration of the matter before arriving at its conclusion. Thus, he contends that regard must be had to the principle expounded upon in ***Henderson v Henderson (1843) 3 Hare 100 at 115***, per Sir James Wigram V-C: *"... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest"*, to bar the applicant from making this application. This is because, to permit the applicant to now raise matters which should have been raised at the discharge/variation hearing where they made the concession, will be an abuse of the court's process.

(26) Regarding the alleged risk of dissipation of assets canvassed by the applicant, learned counsel argues that ASP Charles' deposition that that since the order of this court of May 7, 2020, the Scotiabank accounts 35417 and 35319 has been depleted, is an unfortunate characterisation of the matter, because all withdrawals from these accounts were made in the amounts and in accordance

with the court's order. They should then not be held up as evidence of an intention to dissipate assets.

(27) Regarding the progress of the investigation for which the respondents' assets have been restrained, learned counsel complains about the fact that in the three months dispensation given to the applicant, during which time the respondents' assets continued to be under restraint, the investigation has not progressed any further than where it was on May 7 2020.

Learned counsel bemoans the hardship that the Restraint Order (in respect of which the applicant is seeking an extension without any cogent reasons for the 'wasting' of the three months given by the court), has caused to the respondent,

(28) Learned counsel for the second respondent: Mr. James, associating himself with the arguments of Mr. Smith regarding the 'no new evidence' argument, adds that there is no reason why an investigation which has not been demonstrated to be complex, should be so delayed. He contends that lack of diligence, and not the absence of investigators on the Island is the reason for the delay. In this he points to the evidence of Mr Mills who deposed to lack of funds as being a primary reason.

(29) Nor, he asserts, could COVID-19 be the reason for the delay in continuing with investigations when interventions such as the use of audio-visual equipment and exemptions for inter-island travel could have been obtained to allow the investigations to be carried out within the time frame given by the court.

(30) Like Mr. Smith, Mr. James decries the attempt of the applicant to use the respondents' compliance with the order of the court to make withdrawals from certain bank accounts for subsistence, as evidence of dissipation.

REASONS

(31) On 4th August 2020, this court heard the said arguments. Upon hearing Ms. Williams appearing for the Crown in that application, and upon hearing Mr. Oliver Smith for the first third and fourth respondents and Mr. Keith James for the second respondent, I dismissed the application.

(32) In doing so, I reserved my reasons which I now give:

In my judgment, two issues stand out for determination in this application:

1. Whether or not evidence has been led to persuade the court to extend the life of the Restraint Order;
2. Whether or not this application is an abuse of the court's process.

(33) On 7th of May 2020, I delivered the judgment of this court varying the order of this court of 20th February 2020 coram: Ventour J. made upon an *ex parte* application. The judgment was in respect of an application to discharge/vary the said order of 20th February 2020.

(34) In coming to my decision, I had regard to all the circumstances of the case, and also, to the concession made by learned counsel for the applicant that the Restraint Order not be discharged, but be limited in duration.

(35) I declined to discharge the order. I however varied it to allow for expenses in accordance with ***S. 42(1) of the Proceeds of Crime Ordinance (POCO) CAP 3.15*** and limited the duration of the Restraint Order to three months from the date of judgment: 7th May 2020. I reproduce excerpts from that judgment of 7th May 2020 at page 22: *"As aforesaid s. 17(1)(b) of the Constitution of the Turks and Caicos Islands permits the deprivation of property if same is justifiable. In my judgment, the instant matter represents justifiable deprivation for the period investigations are conducted, in order that a confiscation order made at the end of a successful prosecution may not be*

rendered nugatory; provided the investigation which is in its sixth month is not open ended;."

and at page 24*:*

"In coming to this conclusion, I also have regard to the concession of counsel for the respondent set out before now."

(36) I made this order in accordance with S. 54 (2) (b) of POCO which provides that the powers of the court *"shall be exercised in a case where a confiscation order has not been made with a view to securing that there is no diminution in the value of realisable property."*

(37) The objective of the order was to ensure that property which may be realised in satisfaction of a foreseeable confiscation order following a successful criminal prosecution, may not be diminished in value.

In doing so, all circumstances considered, it was my view that in three months, the investigators would either, have more evidence to give their case a more solid footing which would make a criminal prosecution viable, or the order would lapse if the investigation was clearly going nowhere. Either way, the three-month extension was intended to ensure that this court would not thwart honest diligent efforts of a state agency carrying out its statutory duty.

(38) But that exercise of discretion, involved having to do a balancing act, for on the one hand was the nature of the Restraint Order: a draconian measure which had deprived persons under investigation of the use of their property, and the other: the work of a state agency discharging its duty in the public interest.

(39) Having had regard to these matters, the order which varied the Restraint Order to allow for household and business expenses (thus to give the order a human face), and to limit its operation to three months from 7th May 2020, was thus

not an arbitrary one, but one made with regard to the principle of balancing individual rights, as against state rights and its power exercised in the public interest.

(40) The instant application to extend the duration of the Restraint Order, would not have been out of place if after diligently working to conclude their investigations in the time allotted by the court, the applicant had come to ask for further time in that enterprise, because there was more work to do.

(41) There was however, no such demonstration of diligent pursuit of the investigation for which the respondents' properties had been put under restraint.

(42) At the hearing of the application, learned counsel for the applicant failed to disclose what had been done in the three months the court had given as the duration of the Restraint Order.

(43) Rather, the case of the applicant was solidly anchored on the fact that the delay in continuing with the investigations was caused by the impact of Covid-19 pandemic which had kept investigating officers away from the Island.

(44) The problem with that information was that at the time of the hearing of the discharge/variation application, COVID-19 was in existence, and the investigators had in fact left the jurisdiction because of it. This country was operating under Emergency Regulations; Regulation 31 was in force, and under it, the airspace of this country had been closed to international traffic.

(45) Indeed, when learned counsel for the applicant made the concession: asking for the court's discretion not to be exercised in favour of discharging the order, but varying it by limiting the time of its operation, Regulation 31 was in force. It expired May 4. Judgment given on May 7. The borders had not been opened.

(46) Thus at the time of argument, there was no certainty that this country would be open to international traffic. If indeed the investigation was going to be

carried out by investigators who were not in the jurisdiction and who (learned counsel now says) could not perform their duties except in person, why was that concession made?

(47) If as learned counsel now says, the physical presence of the investigators was crucial to the conduct of the investigations, then at the point when the investigators were out of the country, and could not return in the foreseeable future because of the closure of the airspace, that request was made with levity.

(48) I have taken particular issue with the submission contained in the applicant's skeleton argument that the inability of the investigators to return was not foreseeable.

(49) In the circumstance in which due to COVID-19, investigators had left the country, the airspace had been shut by Regulations in place, and there was no certainty as to when international travel would resume, it seems to me that the said submission must be received in the spirit in which it was made: lightly.

(50) These matters inform my view, (and my questions to counsel during the hearing), that the order which was canvassed for by the applicant: that the Restraint Order not be discharged but be limited in duration, was not one asked for with any degree of sincerity, that investigations would proceed if the time requested for was granted.

(51) As an officer of the court, the word of learned counsel Ms. Williams: that a little more time given by the court would help the investigations, was not taken lightly. Thus, in the face of an order which deprived a husband and wife of all their properties (without limitation), counsel's concession was given pride of place, and all the circumstances considered, the Restraint Order was varied with limitation placed on its duration.

(52) The fact that on the admission of the applicant, no progress has been made on the investigations in the three months contained in the variation order whilst the properties of the respondents remained under restraint, informs my view, that the applicant does not merit any further exercise of discretion in their favour.

(53) I am reinforced in my opinion by this fact of which I take judicial notice: COVID-19 is a scourge that sadly, has no certain expiry date. It existed at the time the concession was made, and cannot then be used as an excuse not to do what was promised.

(54) In this day that remote transactions have gained currency (I take judicial notice of this), if on the showing of the applicant, investigations cannot not be carried out except to have the investigators physically present in this country, and, as Ms. Williams has conceded: *"the COVID-19 situation remains fluid and will not admit of certainty of date for completing the investigation",* then not only will it serve no useful purpose to further extend the order in such a circumstance, but it will be unconscionable to do so having regard to its purpose: that it should keep the respondents' properties under restraint pending a possible prosecution which should follow an investigation which learned counsel for the applicant has stated, has no end in sight.

(55) Learned counsel for the applicant now makes another concession in seeking an extension. She is asking that this court extend the order, and supervise the progress of the investigation and if not satisfied therewith, to discharge the Restraint Order. Armed with an authority from the United Kingdom: ***R v S [2019] EWCA 1728*** which is decided on recent legislation in the United Kingdom: a 2015 amendment to the Proceeds of Crime Act 2002, she urges this court to apply that statutory requirement informally, here.

(56) Perhaps this submission/concession would have carried some weight in another circumstance, but not in this one. This is because the court in the not distant past, took into account of learned counsel's concession in its consideration of the application for discharge/variation, and being satisfied that a case had been made for the extension of time for three months, granted such, and it was not used.

(57) Beyond these matters I have adverted to, is the nature of the investigation which I took into consideration in the May 2020 judgment. In this application, ASP Charles has alleged that he is in charge of a corruption, money laundering, and other offences investigation. That was not the evidence before Ventour J, or myself.

(58) To secure the order, the allegation made by the Crown, contained in the affidavit of ASP Charles, was that the first respondent had had nefarious dealings with one Michelle Fulford Gardiner.

(59) The said dealings were described as: corruptly securing work permits for otherwise unqualified candidates, charging them for it, and splitting the booty between the first respondent and the said Michelle Fulford -Gardiner.

(60) The main alleged culprit was Michelle Fulford Gardiner who was said to have used her position then as Labour Commissioner, to facilitate the corrupt grants of work permits. The said lady who was arrested and interdicted because of these very investigations, and upon whose crimes the allegation of corruption against the first respondent hinges, has reportedly returned to work, and is now in an enhanced position.

(61) That this raises questions regarding the case against the first respondent and the second respondent who is her husband, cannot be gainsaid. Even so, as I observed in my judgment of 7th May 2020, at the point of investigation, the burden of proof was so much lower than a prosecution, I considered it prudent

to let the Restraint Order continue (albeit in modified form, and especially upon the concession of Ms. Williams to a limited duration), in order that investigators might continue in their work to acquire the evidence needed for a criminal prosecution, the goal of the Restraint Order. I reproduce an excerpt from the May 7 2020 judgment in this regard: *"I have examined the evidence adduced by both sides, and have come to the conclusion that while ASP Charles did make some unsubstantiated accusations, the court has been provided with evidence which though somewhat lacking in certainty, nevertheless informs a determination that the continuing investigation of the first applicant for criminal conduct is viable, and activities suggesting her profiting therefrom have been provided as evidence…"*

(62) The individual's right to property is enshrined in the Constitution and ought not to be taken away except for good reason, see: ***s 17(1)(b) of the Constitution***.[2]

(63) The reason for depriving the respondents of their property, justifiable in May 2020, has not in my view, been sufficiently demonstrated at this time, to merit the further exercise of discretion in the applicant's favour.

(64) In this application the court has been asked to extend the life of a restraint order. That the grant of a Restraint Order is an exercise of discretion cannot be gainsaid: s. 41(a) of POCO places that discretion in the court. In the exercise of this discretion, I have been mindful of the statutory provisions contained in Ss 41(1) (a) which reads: *"41. (1) The court may exercise the powers conferred by section 42 if—*

[2] The Constitution of the Turks and Caicos Island 2011 Cap 1.01

(a) a criminal investigation has been started in the Islands with regard to an offence and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct".

S. 42 which reads: *"42. (1) If any paragraph in section 41(1) is satisfied, the court may, on the application of the prosecutor, by order, prohibit any person specified in the order from dealing with any realisable property held by him, subject to such conditions and exceptions as may be specified in the order."*

and S. 54(2) which provides the reason/purpose of the order which a court must have regard to 54 (2):

"(2) Subject to this section, the powers—

(a) shall be exercised with a view to the value for the time being of realisable property being made available, by the property's realisation, for satisfying any confiscation order that has been, or may be, made against the defendant."

(65) I have also had regard to the other matters I have set out at length regarding the reason for the grant, the extension of three months, the conduct of the applicant since then, and the significance of the order upon a balance of individual rights as against state rights. I am cognisant of the fact that a Restraint Order does not affect investigations or its outcome.

It is not granted to aid investigations, nor will its refusal impede investigations. Per ***S. 54 (2)*** *(supra)*, it is granted to safeguard realisable property at risk from dissipation so that a successful prosecution which ends in a confiscation order may not be rendered nugatory.

No demonstration has been made that the properties of the respondents are at such risk.

(66) In the variation judgment of 7th May 2020, I noted thus: *"…With regard to the fear of dissipation of the applicants' assets, ASP Charles deposed to the following as justification for seeking the order:*

"a. The (first applicant) has been arrested by the Integrity Commission Investigators and has been released on bail and is aware of the criminal investigation against her.

b. The (first applicant) who although is domicile [sic] in the Turks and Caicos is of Haitian descent and has the freedom to travel and live there.

c. There is nothing preventing the (first applicant) from disposing of the funds standing as credit balances on the accounts and the properties …;and therefore are of great risk of being depleted by the (first applicant with a view to avoid them being subjected to any recovery or confiscation proceedings by any of the investigative authorities."

The said matters deposed to are clearly speculative, not providing any substance from which it could be properly inferred that there was imminent dissipation of the applicants' properties at the time of the application. The second applicant has countered these, by pointing out that there had been no dissipation of assets between the time of the first applicant's arrest: 7th November 2019, and the time of the order: 20 February 2020. That argument, which echoes the opinion of the court in R V. B [2008] EWCA 1374, would have been weightier, had the time referred to been longer than the roughly three months between the time of arrest and the order. It seems to me that no forceful argument was made except for the argument as to time, regarding opportunity to dissipate their properties, which the applicants may have passed up. Yet while there has been no direct evidence of attempts to dissipate their assets, the court has been presented with evidence of a high turnover of

the bank balance of the account into which the fourth applicant's funds were deposited".

(67) At this time, three months after these observations were made, no evidence of dissipation has been presented.

What has been held up as evidence of dissipation, is a sad caricature of a witch hunt indeed: that monies withdrawn by order of the court for expenses should be held up to demonstrate that the respondents have depleted the account and are guilty of dissipation.

(68) It is my view that the application for extension of the Restraint Order has little substance to merit the exercise of the court's discretion to extend an order which has been described as 'draconian', especially as the time allowed by the court upon the applicant's concession (three months), has on the applicant's showing, been wasted.

(69) Is this an abuse of the court's process? It is difficult, having followed through the ex parte application and the variation application to the present one, not to conclude that while no malice or vexation is intended by this application, that the process of the court is not being subjected to abuse.

Per Kerr LJ in ***Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd, Ulster Marine Insurance Co Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132 at 137*** :

"To take the authorities first, it is clear that an attempt to relitigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same."

(70) What stands out in this application is that no new evidence has been presented, and the grounds set out in support of the application, are a regurgitation of

what was placed before the court and given consideration to, in the May 2020 judgment.

(71) The matters that were not placed before the court in the variation hearing, being the alleged COVID-19 impact on the investigation, is information that was available to the applicant at the time of the variation hearing, and would seem to bring this application within the categorization of Sir James Wigram in ***Henderson v Henderson (supra) at 115***:

"... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

(72) While I would consider the instant application of little merit, I would not go so far as to describe it as an abuse of the court's process. This is because while the application which seeks an extension of an order limiting time, has the hallmarks of an attempt to relitigate issues, and would appear to vex the respondents by subjecting them to unnecessary successive proceedings, [see per ***Sir Thomas Bingham MR in Barrow v Bankside Members Agency Ltd (1996] 1 All ER 981 at 983***], it is in my view, simply an ill-advised attempt

to move the court's hand to once again exercise its discretion in the applicant's favour after wasting the indulgence granted in May 2020.

(73) Thus while obviously unhappy at the turn of events, I shall not go so far as to describe it as an abuse of process. The applicant however, plainly does not merit the exercise of the court's discretion in its favour for all the reasons I have given.

(74) Thus is the application dismissed.

(75) I reserved the matter of costs for this sitting when I would hand over my reasons.

This will be the subject of further submissions.

Sgd.

M.M. AGYEMANG

CHIEF JUSTICE