[2013] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 138/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

IN THE MATTER OF AN APPLICATION FOR CUSTOMER INFORMATION ORDER PURSUANT TO SECTION 119 OF THE PROCEEDS OF CRIME ACT, 2007.

Mrs Charmaine Newsome, Mrs Nateline Robb-Cato and Mrs Susan Watson-Bonner for the Assets Recovery Agency

16, 17 April and 31 July 2013

PANTON P

[1] I have read in draft the reasons for judgment that have been penned by my learned sister, Lawrence-Beswick JA (Ag). I agree with them and the conclusion at which she has arrived. Accordingly, I am in favour of the dismissal of this appeal.

DUKHARAN JA

[2] I too have read the draft judgment of Lawrence-Beswick JA (Ag). I agree with her reasons and conclusion and have nothing to add.

LAWRENCE-BESWICK JA (Ag)

[3] The Assets Recovery Agency (the Agency) applied to the Supreme Court for a Customer Information Order, which would have directed a particular financial institution to provide the Agency with specific information regarding 14 named persons. Brooks J (as he then was) refused the application on 16 June 2011. The Agency now appeals that judgment.

A. Background

The Agency and its application

[4] The Agency is defined in section 3(1) (a) of the Proceeds of Crime Act (POCA) as the Financial Investigation Division (FID) of the Ministry of Finance and Planning. Section 3(1)(4) of POCA provides that the Agency shall have the functions conferred on it by the Act or any other Act, and that it "may do anything (including the carrying out of investigations) that is appropriate for facilitating, or is incidental to, the exercise of its functions".

[5] Pursuant to this mandate, the Agency filed a notice of application for court orders on 15 June 2011, supported by an affidavit of that date by its Director, in

which it sought an order that a particular Building Society provide it with the information listed below regarding 14 named persons:

a. Whether the person held or have held account(s) (whether solely or jointly).
b. The account or transaction number or numbers.
c. The person's full name and date of birth.
d. The person's taxpayer registration number or numbers.
e. The person's most recent and any previous address.
f. The date or dates on which he or she began to hold the account or accounts, and if he or she has ceased to hold the account or any accounts, the date or dates on which he or she did so.

[6] This is referred to in POCA as a Customer Information Order (CIO). The POCA provides at section 119(4), "[a] customer information order is an order that a financial institution covered by the order shall, on being required to do so by notice in writing given by an appropriate officer, provide any such customer information as it has relating to the person specified in the application".

[7] About six weeks earlier, on 3 May 2011, the Agency had been granted an Order for other named financial institutions to provide financial information regarding the same persons. However, in his affidavit, the Director of the Agency (The Director) states that subsequent to the granting of that order, the Agency had reasonable grounds to believe that a subsidiary of one of those financial institutions maintains accounts or has in its possession or control information in relation to the named persons and therefore, the Agency was then

seeking for that subsidiary to provide it with additional information for the same persons.

[8] The persons about whom information was being sought are unaware of the orders made and/or sought because of the sensitive and confidential nature of the investigations. They were in the circumstances therefore, not represented in these appeal proceedings. I shall refrain from referring to the parties or the institutions by name.

Investigations

[9] The Director's affidavit indicated that since 2010 the FID has been investigating Mr X and his associates and had completed a financial profile with respect to them. In the affidavit, the Director further stated that he believed that Mr X had been employed at certain named financial institutions and that purchases and sales of securities were being made in the names of two persons Y and Z and the proceeds of the transactions were paid to multiple financial institutions and overseas suppliers.

[10] Further, the Director states, Mr X in a letter in February 2004, wrote to a particular company in reference to a US denominated security in the name of Y, requesting the encashment of the security and the issuing of a US denominated cheque for the accumulated interest in the name of W and asking that the principal of US$1,000,000.00 be used to purchase Euro Bonds, maturing 2009. The Director continues that in March 2004, a draft of US$1,000,000.00 was

purportedly submitted by Y to purchase Euro Bonds which were resold by Y to a bank in settlement of which the bank issued three drafts payable to three financial institutions in the sums of US$400,000.00, US$300,000.00 and US$292,000.00. Y is an office attendant at one of those institutions.

[11] The affidavit further details financial transactions by Mr X in November 2008 which the Director states resulted in losses to the bank. Some of those transactions involved not only Mr X, but also W who was his former co-worker. Mr X was arrested and charged on 25 March 2010. W was charged on 16 July 2010.

B. Judgment of the learned trial judge

[12] The learned trial judge in refusing the application for the CIO stated that it was his view that before a CIO could properly be made, it should be shown that either "the suspect" had been convicted of a crime or at least a *prima facie* case of his criminal conduct should be demonstrated. At para. [38] of his judgment he opined:

> "…The structure of the Act may be interpreted as requiring that, before there can be any *[forfeiture, money laundering or civil recovery]* investigation, there should be either be a conviction for an offence, other than one created by the Act or, at least, the demonstration that there is a *prima facie* case establishing criminal conduct by the suspect."

[13] He found that the Agency had not provided evidence that there was a conviction or a *prima facie* case that criminal conduct had occurred as it concerns

any of the named persons and the CIO could not therefore be granted. The learned judge also opined at para. [39] that:

> "The dominant purpose of the application must be to determine whether someone had benefited from criminal conduct or determining the whereabouts of criminal property. It should not be for the purpose of determining whether a criminal offence, other than an offence created by the Act, had been committed."

[14] His view was that although it was stated that the CIO was sought for the purposes of a forfeiture investigation and a money laundering investigation, the evidence supporting the application had not demonstrated that either Mr X nor any of X's associates has been convicted of any offence.

C. Submissions

[15] The Agency filed three grounds of appeal:

Ground 1

> "The Learned Judge erred when he stated that a Customer Information Order was not designed as an investigative tool for assisting in determining if a substantive offence has been committed and he further stated that it was not designed to unearth evidence to assist the prosecution for a substantive offence."

Counsel argued that section 103 of POCA defines the meaning of civil recovery, forfeiture and money laundering, which are investigations into the proceeds of crime. She submitted that Part VI of POCA provides a number of tools which an investigator can use in those investigations, including a CIO, but does not specify

any requirement that there must be a conviction before the application for such an order can be made. According to her, the tools may be used, by an authorized officer, as aids in assisting him to conduct an investigation.

[16] Counsel for the Agency argued further that the CIO allows investigators to "actually go fishing" for evidence of the commission of a crime and she regarded it as an investigative tool relevant to the investigation of financial crimes. It could be used not only to trace the ill-gotten gains of individuals but also to ascertain if criminal conduct exists. It allows the investigators to request an institution to disclose information on the accounts specified, whether held solely or jointly by "the target of an investigation".

[17] Counsel also submitted that the Act gives investigators these valuable tools, including the CIO, to augment their efforts in the "fight against money laundering and financial crimes". Counsel's view was that the Agency must be able to trace the proceeds of criminal conduct and it thus must be able to compel third parties to disclose information and produce documentation relevant to its investigation, even though investigation may not lead to criminal proceedings and/or conviction.

Ground 2

> "The Learned Judge erred when he stated that Section 121 of the Act seems to require that the evidence should demonstrate that criminal conduct has occurred from the commission of a substantive offence and that evidence should show that the subject individual has been convicted."

[18] As it concerns ground 2, counsel submitted that section 121 of the POCA sets out the requirements for making a CIO and the section does not state that the Agency should satisfy the court that a substantive offence, that is, an offence outside of POCA, has been committed.

[19] Counsel's submission also was that the CIO is really aimed at recovering the fruits of criminal conduct rather than for discovering whether a substantive offence, has been committed. She concluded that the essential evidence to be proved for a CIO to be obtained, is that a person has been charged and/or the basic ingredients of the offence have been established.

Ground 3

> "The application presented before the Learned Judge was legally sufficient for a CIO to be granted."

[20] Counsel for the Agency submitted that the Agency stated that it was conducting money laundering and forfeiture investigations and had provided all the information required by law to be granted a CIO as against Mr X and his associates.

[21] In her view, sufficient information was placed before the court to satisfy the court that Mr X was involved in money laundering activities and that there were reasonable grounds for believing that he had benefited from his criminal conduct.

[22] Mr X had been charged with various offences and one of his associates had been charged with one offence. The eight certified copies of the informations which were exhibited supported that assertion. She submitted that there was evidence to support this application because the affidavit of the Director of the Agency had outlined what she describes as schemes used by Mr X to defraud a financial institution. The information being sought was needed to build financial profiles of Mr X and his associates, and would assist the Agency to identify the origins of funds used by them to purchase property and maintain their lifestyles.

[23] She assured the court that if the financial institution had no information, then the Agency would go no further and if the financial institution indicated that it has information then the Agency would then have to apply to the court for a disclosure order before it could properly access other information.

[24] Counsel emphasized that the Agency had not applied for forfeiture orders and/or pecuniary penalty orders pursuant to section 5 of the Act. The learned judge, she complained, had therefore fallen into error in making reference to section 5 of the Act which concerns those orders, and does not concern CIO which is what was being sought and of which there was sufficient evidence.

D. Analysis & Discussion

Grounds 1 and 2

These grounds overlap and I consider them together.

Investigative Tool

[25] One of the main points of divergence between the submissions of counsel for the Agency and the judgment of the learned trial judge is as to the use of the CIO. Counsel submitted that it is properly used as an investigative tool, to unearth any information in the possession of the financial institution to assist in financial investigations generally.

[26] The judgment indicates however that it is to be utilized after a substantive conviction exists, that is, a conviction outside of those created by POCA, or at least the investigations of a substantive crime have proceeded to an extent where there is prima facie evidence that an offence has been committed to which the POCA would apply.

[27] This appeal is limited to an application for a CIO where there are forfeiture investigations and money laundering investigations although POCA also applies to civil recovery investigations. The Act specifies different requirements for obtaining a CIO according to the type of investigation involved.

Forfeiture investigations

[28] As it relates to forfeiture investigations, section 121 of the POCA provides:

> "The requirements for making a customer information order are that –
>
> (a) in the case of a forfeiture investigation, there are reasonable grounds for believing that the person specified in the application for the order has benefited from his criminal conduct;…"

This means that, concerning the person specified in the application for the order, there must be (1) evidence of his criminal conduct; and (2) reasonable grounds for believing that he has benefited from that criminal conduct. What then is "criminal conduct"?

Criminal conduct

[29] Section 2 of the POCA defines criminal conduct as meaning:

> "conduct occurring on or after the 30th May, 2007 being conduct which -
>
> (a) constitutes an offence in Jamaica;
>
> (b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica."

[30] In my view, in order for conduct to constitute an offence, there must be a conviction. An allegation or suspicion of an offence cannot amount to an offence. When an allegation or suspicion of conduct believed to constitute an offence is subjected to the searchlight of cross-examination in a trial, it may well be revealed that the allegation or suspicion is unfounded and the conduct does not in fact amount to an offence or indeed did not occur.

[31] It would follow therefore that, in the case of a forfeiture investigation, a CIO can only properly be granted where the person specified in the application for the order has been convicted of an offence. Only then could his conduct be regarded as being criminal.

Benefit from criminal conduct

[32] The next requirement presented in section 121 of the Act, for the making of a CIO in the case of a forfeiture investigation, is reasonable grounds for believing that the person specified in the application for the order has benefited from his criminal conduct.

[33] In my view, it is the judge who must determine if there are such reasonable grounds. The mere assertion or allegation by the Agency that there exists such reasonable grounds cannot be sufficient. The basis for believing that the person specified benefited from his criminal conduct, must be examined carefully, and the Agency must therefore provide evidence which satisfies the judge, on a balance of probabilities, that there are indeed reasonable grounds for believing that the person benefited from his criminal conduct.

[34] It is only when a judge is satisfied as to the presence of those reasonable grounds, that that requirement is met for the making of the CIO. This reflects an age old precept of law that the issue of reasonableness is determined by the court and not the litigant.

[35] I turn now to consider the law concerning an application for a CIO in the case of a money laundering investigation.

Money laundering investigation

[36] Section 121 of the POCA provides:

"The requirements for making of a CIO are that-

(a) …

(b)…

(c) in the case of a money laundering investigation, there are reasonable grounds for believing that the person specified in the application for the order has committed a money laundering offence."

Here the first requirement is that there is a belief that the person specified in the application has committed a money laundering offence, and then there must be reasonable grounds for having that belief. What is a "money laundering offence"?

Money laundering offence

[37] Section 91 of the POCA provides that:

"(a) …

(b) money laundering is an act which –

(i) constitutes an offence under section 92 or 93;

(ii) constitutes an attempt, conspiracy or incitement to commit an offence specified in sub-paragraph (i); or

(iii) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in sub-paragraph (1).

[38] Reference must therefore be had to sections 92 and 93. Section 92 (1) states:

> "(1) Subject to subsection (4), a person commits an offence if that person –
>
> (a) engages in a transaction that involves criminal property;
>
> (b) conceals, disguises, disposes of or brings into Jamaica any such property; or
>
> (c) converts, transfers or removes any such property from Jamaica,
>
> and the person knows or has reasonable grounds to believe, at the time he does any act referred to in paragraph (a), (b) or (c), that the property is criminal property."

Criminal property

[39] In that section, the money laundering offence created involves criminal property, which is itself defined in section 91 (1) (a) of the Act as property, which:

> "constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct)."

Here, as with investigations for forfeiture, the focus is on criminal conduct which was earlier discussed as conduct constituting an offence on or before 30 May 2007. To be considered criminal conduct, that conduct must involve a conviction. However, with money laundering it matters not who committed the offences which amounted to criminal conduct or who benefited from that commission.

[40] A person therefore commits an offence contrary to section 92 (1)(a) of the Act if he engages in a transaction involving such criminal property. If he conceals, disguises, disposes or, brings into Jamaica, criminal property, he commits an offence against section 92(1)(b) of the Act. To convert, transfer or remove such property from Jamaica is an offence against section 92(1)(c) of the Act. Even if a person does not himself commit an offence described as criminal conduct, or does not benefit from its commission, he still commits a money laundering offence if, at the time he does any act referred to in para (a), (b) or (c) of section 92(1) of the Act, he knows or has reasonable grounds to believe that the property involved is criminal property, i.e. a benefit from criminal conduct, which means a benefit from conduct where someone has been convicted.

[41] By section 92 (2) of the POCA, a money laundering offence is also committed if a person:

> "enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

Here again this offence has at its foundation, criminal property which itself must, in my view, arise from a conviction.

[42] Section 93(1) of the Act creates yet another money laundering offence. It provides that where a person: "acquires, uses or has possession of criminal

property and the person knows or has reasonable grounds to believe that the property is criminal property", he commits an offence. Here again criminal property is integral to the offence and, in my view, this must involve a conviction.

[43] Money laundering offences can therefore be committed, in many and varied ways. They all however, involve criminal property which from the definition in the Act arises from criminal conduct.

Conviction

[44] An individual must have a conviction, in order to be properly described as being a criminal. In the oft cited decision of the House of Lords, ***R v May*** [2008] UKHL 28, the court was considering confiscation of criminal assets under the UK POCA 2002 which Act bears marked similarity to the Jamaican POCA. Forfeiture in the POCA is the equivalent of the UK's "confiscation order". There the court opined:

> "A criminal caught in the possession of criminally-acquired assets will, it is true, suffer their seizure by the state. Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained."- para. 9

[45] It is clear that in the ***May*** case, the court held the view that the Act is concerned with the assets of a criminal, namely a person with a conviction, speaking specifically as it did, about fruits of crime.

[46] The learned trial judge in the instant matter, relied on ***R v Guildford Crown Court Ex parte Director of Public Prosecutions, R v Southwark Crown Court Ex parte Bowles*** [1998] QB 243 in concluding that before a CIO is granted, a conviction would not necessarily be required but at least a prima facie case should be shown, establishing criminal conduct by the suspect.

[47] The ***Guildford*** case however, concerns a production order which differs from a CIO, though both are part of the legislative arsenal for recovering the proceeds of crime. This appeal does not concern production orders but rather, orders for a CIO. I therefore make no further comment on that conclusion of the learned judge save to say that counsel for the Agency submitted that in this jurisdiction, production orders are not sought under the POCA but instead under section 17 of the Financial Investigations Division Act.

[48] In my view, where forfeiture and money laundering investigations are concerned, the CIO must have a conviction at its foundation. If the CIO is required for forfeiture investigations, the person specified in the application must be proved to have had a conviction. The other requirements stem from that.

[49] If the CIO is required for money laundering investigations, the person specified in the application must be proved to have some connection, as specified in the Act, with criminal property, which itself arises from a conviction of any person. The CIO therefore, is not designed to assist in determining if a substantive offence outside of the Act has been committed, as it is not to be

ordered until there has already been that determination and a conviction exists. The conclusion of the learned trial judge in this regard cannot be faulted. Ground one therefore fails, as does ground two.

Ground 3

Sufficiency of evidence

[50] The requirements for the CIO where investigation for forfeiture and money laundering investigations are concerned are specifically stated in section 121 (a), (c), (d) and (e) of the Act. Section 121(a) and (c) are quoted above.

[51] Section 121(d) and (e) require additional criteria to be met before a CIO can be ordered.

Section 121 provides:

> "(d) in the case of any investigation, there are reasonable grounds for believing that customer information which may be provided in compliance with the order is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought; and
>
> (e) in the case of any investigation, there are reasonable grounds for believing that it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained."

[52] Firstly, there is no evidence to support the assertion that this matter is concerned with forfeiture and money laundering investigations. The

requirements for applying for a CIO depend on the type of investigation being done and therefore proof of that is important.

[53] Further, the Director's affidavit in support of the application for the CIO alleges some activities of Mr X which may be regarded as being suspicious and it also states that Mr X was charged with some offences but there is no evidence of Mr X having been convicted. Not only is there no evidence that the activities culminated in a conviction, or indeed if they would constitute an offence, but in any event some of Mr X's activities, according to the Director's affidavit, were before 30 May 2007 and therefore outside of the definition of criminal conduct in the Act.

[54] There is no evidence of criminal conduct, that is, conduct on or after 30 May 2007 which constitutes an offence. It follows that there is no evidence of Mr X benefiting from his criminal conduct. There is also no evidence of him having benefited from any other person's criminal conduct.

[55] The CIO sought is for Mr X and for persons described as Mr X's associates. The affidavit refers to some of these persons as co-workers and makes no clear assertion that they themselves did any action which the Agency wishes to investigate.

[56] The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter) provides in section 13(3)(e) for persons to freely associate. An individual is not to be condemned or investigated for being

associated with others, without more. It follows that if any CIO is to be properly ordered concerning these alleged associates, the application should show reasons in law, grounding an application for a CIO against him or her.

[57] It is of note that of the 13 persons to whom the Director refers in his affidavit, four are described as actively transacting financial dealings, none of which are clearly shown to be criminal in any manner. Three play passive roles in the dealings and are not alleged to have been aware of any of the transactions involving their names. The allegations against three others are that they are siblings of Mr X, the person who appears to be the focus of the request for the CIO, and share a bank account with him.

[58] Mrs X, wife of Mr X, is herself being investigated as being the owner of three assets, two of which were purchased years before the date of 30 May 2007. By section 2 of POCA, conduct can be considered as being criminal only if it occurs after 30 May 2007. The only allegation concerning another of the persons being investigated is that she is the sister of Mrs X.

[59] The Director also seeks an order for a CIO for Mr L, whom it appears the Director in fact views as a victim of financial crimes. At para. 16 of the affidavit the Director says,

> "Based on the investigations conducted it is our belief that [H] conspired with Mr X to defraud Mr L……."

The affidavit then continues with details of the alleged fraud against Mr L.

[60] The 14th person for whom the CIO was sought was not mentioned in the Director's affidavit and therefore has no allegation made against her. The evidence of criminal conduct or criminal property concerning the named persons in the application is therefore insufficient.

[61] Similarly, the evidence of the additional requirements which are to be met before the CIO can be properly ordered is lacking. There was insufficient evidence supporting any belief that the CIO was likely to be of substantial value to the investigation for the purposes for which it was sought or that it would be in the public interest for it to be obtained.

[62] The evidence placed before the learned trial judge fell far short of the requirements of the POCA and was insufficient for a CIO to be granted. The submission of counsel on ground three also fails.

E. Conclusion

[63] The POCA makes specific provisions for the requirements for making a CIO and these requirements differ according to the type of investigation for which the order is required. This appeal concerns a CIO for forfeiture and money laundering investigations.

[64] The name of the Act provides some indication of the intention that Parliament had when it passed the legislation. The long title of the POCA is "An Act to provide for the investigation, identification and recovery of the proceeds of crime and for connected matters". This is a clear indication of its purpose. There

must have been a crime committed, not suspicious activity, and that crime must have generated proceeds. The POCA is designed to identify such proceeds of a crime, wherever they may have been dissipated and in whatever form and to recover those proceeds from whomever knowingly benefited from them. The POCA is designed to recover ill-gotten gains from criminals, not from suspects.

[65] It is well known that the tentacles of crime continue to multiply and, have become more invasive of the social fabric. The need to fight the expansion of crime and to deprive criminals of the proceeds of their criminal activity is as obvious as it is great. However, this must be balanced against the rights of individuals.

[66] The Constitution of Jamaica clothes every person in Jamaica with the presumption of innocence. It is not until he is proven guilty or pleads guilty that he is a criminal and suffers the consequences of having committed a crime. Suspicious behaviour, without more, is not a crime.

[67] Another right which the Constitution provides is the right to property. A person is entitled to own property without question, unless of course, the property is proved to have been unlawfully obtained.

[68] Section 16(5) of the Charter of Fundamental Rights and Freedoms (the Charter) provides:-

> "Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty."

[69] Section 13(3)(j)(iii) of the Charter provides the right of everyone to protection of privacy of property, subject to some exceptions that do not apply here.

[70] In her submissions, counsel for the Agency had urged the court to grant the CIO because the information sought by it was, in effect, information that was minor and inconsequential and that no more information could be obtained without a further court order. I do not agree with that submission. The CIO is the first step in a series of procedures which can properly be utilized in the investigation of the proceeds of crimes, but which, by their very nature, can also be very intrusive of one's privacy. Great care has to be exercised to ensure that the CIO is only utilized for the purposes prescribed by law. The importance and power of the CIO should not be underestimated.

[71] In this matter there is no evidence of Mr X or anyone having been convicted of an offence, or of the requirements of the POCA being met, to allow a CIO to be ordered. The submissions by the Agency were, in my view, without merit. The learned judge cannot be faulted for having refused the application.

[72] I would dismiss the appeal.

PANTON P

ORDER

Appeal dismissed.