

## FINANCIAL INTELLIGENCE UNIT v MARES CORP

(2011) SLR 405

B Galvin, State counsel, for the appellant  
F Elizabeth for the respondent

**Before Domah, Fernando, Twomey JJ**

**Judgment delivered on 9 December 2011 by TWOMEY J:**

While the Proceeds of Crime (Civil Confiscation) 2008 Act (POCCCA) deals with the proceeds of criminal conduct, its provisions are essentially civil in nature and hence are alien grafts upon the Seychelles legal system. The relative novelty of its provisions to the international community but especially to Seychelles has resulted in a learning curve for all concerned. Hence, although proceedings under this Act have been instituted on many occasions since its coming into force, no contested action under its provisions has ever come before this Court.

On or around October 2010, the appellant, a statutory body established by the Anti-Money Laundering Act 2006, caused a deposit account at BMI Offshore Bank, Seychelles, containing the sum of USD1,117,724.95 held by the respondent, an international business company incorporated in Seychelles under the International Business Company Act 1994, to be frozen, pursuant to section 10(1)(e) of the Anti-Money Laundering (Amendment) Act 2008.

On 28 December 2010, the respondent filed a civil suit in the Supreme Court against the appellant for unjust enrichment.

On the 28 March 2011, the appellant filed an application in the Supreme Court seeking an interlocutory order prohibiting the respondent from disposing or dealing with the money in the said account and the appointment of a receiver pursuant to section 4 of the POCCCA. The application was supported by an affidavit pursuant to section 9 of the same Act by Liam Hogan, the Deputy Director of the appellant body.

On the 9 May 2011 the respondent's representative, one Svetlana Vasileva, swore an affidavit whose averments contained facts and beliefs substantially different from those of the appellant's employee.

On the date for hearing of the matter, 27 June 2011, the appellant submitted that the matter was not one which should proceed by affidavit and that since the matter was inter partes and the facts were in dispute, further pleadings remained to be filed and the matter should proceed by oral hearing.

This oral application was refused by the Chief Justice and the application for the interlocutory order proceeded by way of submissions from counsel for both parties from the Bar, each relying on averments in the affidavits filed.

The Chief Justice delivered his ruling on 19 September 2011 dismissing the Appellant's application on the grounds that the respondent had in the affidavit of its representative explained the source of money in question. The appellant then sought special leave to appeal against the ruling. This application was itself rejected.

The appellant has now sought both special leave to appeal to this Court and made an appeal proper to this Court.

It must be noted on the outset that section 22 of the POCCCA provides that " ... an appeal from an order made under this Act. .. shall lie to the Court of Appeal." Hence although the matter concerned an interlocutory order of the Supreme Court, section 22 of the POCCCA would supersede section 12(1) of the Courts Act. The Appellant therefore should have simply proceeded by way of appeal to this Court. The application for special leave to appeal in both courts was misconceived and hence is dismissed.

The appellant has however also filed notice and grounds of appeal in this Court from the learned Chief Justice's ruling and I shall now deal with this matter.

Nine grounds of appeal were filed by the appellant but at the hearing the grounds were consolidated and pursued as follows:

- a) That the Chief Justice did not apply the combined evidential burdens of section 4(1) and section 9(1) of POCCCA but instead examined the grounds set out in the appellant's affidavit as a basis for his belief and balanced the evidential content of those grounds as against the averments in the affidavit of the Respondent's representative.
- b) That the Chief Justice should not have allowed the application to proceed on affidavit evidence given the POCCCA and Seychelles Civil Code provisions.

Counsel for the respondent, Mr Elisabeth, argued on the other hand, that the Chief Justice had appreciated the procedure clearly but had before him all pleadings including affidavits from both sides and had therefore correctly decided that the matter should proceed on the day. Counsel further submitted that Mr Galvin for the appellant had the choice to cross-examine the representative of the respondent, the deponent of the affidavit as she had especially travelled from Bulgaria for the hearing but chose not to do so.

It is obvious that all parties including the trial judge were not only uncertain on how to proceed in this matter but were also unsure of the mechanics of the evidential burden under this Act. Two factors contributed to this uncertainty:

- a) the POCCCA provisions are verbose and anything but clear and precise on the procedural and evidentiary matters;
- b) however such procedural and evidentiary matters could have been made clear and precise with the rules supposed to be made as provided for in section 24 of the Act.

The fact that POCCCA is a relatively novel statutory creation containing draconian measures novel to this jurisdiction and also sits uncomfortably between civil and criminal law and procedure and also within our mixed jurisdiction, clearly contributed to the general confusion. The term interlocutory order has been used in this jurisdiction mainly in relation to injunctions. In those cases the Seychelles Code of Civil Procedure provides for their process. In any case, such matters are clearly interim in nature as they take place in the course of a suit. The term interlocutory in the POCCCA is however to be read in its own context because it appears from section 4 that it may in many cases in fact be the final proceedings between the applicant and the respondent.

In the absence of the said rules to regulate the procedure and for the avoidance of doubt in similar cases, it is incumbent on this Court both in the exercise of its supervisory jurisdiction and by a careful examination of the POCCCA provisions to give some guidance on how future applications under its provisions should proceed. The supervisory power of the Court is conferred by article 120 of the Constitution and rules 31(3) and 31(5) of the Court of Appeal Rules 2005.

A careful reading of sections 4 and 9 of POCCCA indicates that the procedure in the Act involves a reverse burden of proof to the extent that once the applicant provides the Court with prima facie evidence that is reasonable grounds for his belief in compliance with section 9(1) in terms of his application under section 4(1) of POCCCA, the evidential burden shifts to the respondent to show on a balance of probability (section 9(3)) that the property is not the proceeds of crime.

Section 4(1):

Where, on an *inter partes* application to Court, in that behalf by the Applicant, it *appears* to the Court, *on evidence, including evidence admissible by virtue of section 9*, tendered by the applicant that-

a person is in possession or control of - specified property ... from criminal conduct. .. the Court shall make an interlocutory order prohibiting the person specified in the order ... from disposing of the property ... unless it is shown to the satisfaction of the Court, on evidence tendered by the respondent. .. that- the particular property does not constitute ... benefit from criminal conduct ...

and section 9(1) and (3):

(1) Where the Director or Deputy Director states in proceedings under section 3 or 4 on affidavit or, if the Court so permits or directs, in oral evidence, that he believes, that -

a) the respondent is in possession or control of specified property ... from criminal conduct ...

b) then, if the Court is satisfied that there are *reasonable grounds for the belief* aforesaid, the statement shall be evidence of the matters referred to in paragraph a) ...

(3) The standard of proof required to determine any question arising under this Act, ... shall be that applicable to civil proceedings." (my emphasis)

Hence it is clear that in applications to the Supreme Court made pursuant to section 4 of the POCCCA the procedure should be as follows:

- i. The applicant (FIU), files an application under section 4 of the Act.
- ii. The applicant supports the application either by affidavit (which discloses reasonable grounds for beliefs under sections 9(1) (a) or (b)) and/ or with other evidence. Such application and supporting affidavit is served on the respondent.
- iv. The respondent may or may not respond. At this stage there are three different ways of proceeding depending on the facts -
  - 1) Where no affidavit or evidence is tendered by the respondent, then the Court proceeds to make the interlocutory order pursuant to section 4 (1) and based on the applicant's application and affidavits.
  - 2) Where an affidavit is filed by the respondent but contains matters which can be resolved by the cross-examination of the respondent, and the applicant so elects, the matter proceeds by affidavit evidence before the Court and the Court grants or refuses the application of the interlocutory order.
  - 3) Where an affidavit is filed by the respondent comprehensively refuting the belief affidavit of the applicant, parties are invited to file further pleadings (plaint, defence etc) in order to proceed to trial according to the Seychelles Code of Civil Procedure. An interlocutory order pursuant to section 4(1) issues in the event.

In all the above three eventualities if the Court is satisfied that the respondent is in possession or control of the specified property which are proceeds of criminal conduct (as set out in section 4(1) (a) and (b)), the Court makes an interlocutory order prohibiting the person specified in the application from disposing or dealing with the property unless the respondent can bring evidence to show otherwise, or the making of the order would result in an injustice to any person in which case the onus of proof of establishing that fact shall be on that person.

In the present case, I am of the view that this case fell within the outlined alternative 3 above (ie contested facts in the affidavits). The affidavits filed before the court clearly showed contested matters which could not have been resolved even by the judicious appraisal of the averments contained in the affidavits. In my view no trial of the issues had taken place and the trial judge hastily moved to summary judgment. This matter could only have been resolved by a proper trial of the issues bearing in mind the different evidentiary burdens.

During the hearing of the appeal there also emerged several other areas of possible controversy in the POCCCA provisions which cannot be cleared up by any appeal to this Court. Considering the importance of this sector to the economic life of this country we urge the Attorney-General to bring these matters to the attention both to the Law Commissioner and to the National Assembly with a view to clarifying the procedural and substantive uncertainties. In particular this Act should be proofed against existing procedural rules as outlined in the Civil Procedure Code, the provisions should be more reader friendly, the procedure between the application for an interim or interlocutory order and the eventual application for disposal of the

property should be clear and concise, the evidential burden and its standard at different stages should be outlined more clearly. An example of the latter would be the provisions of the Business Tax Act which leaves no doubt as to the evidentiary burden in the parties or the Court's mind when it states in no uncertain terms at section 154(1) In any taxation proceeding, every averment of the plaintiff contained in the information, or complaint, shall be evidence of the matter averred. And section 154 (4) "This section shall not apply to an averment of the defendant."

To summarise, the application for special leave to appeal is dismissed. The appeal proper with which we are seized and which we have heard is partly allowed. I therefore make the following orders:

- 1) The ruling of the Chief Justice made on the 19 September 2011 is quashed.
- 2) The matter is remitted to the Supreme Court for the exchange of pleadings by the parties and subsequent trial of the issues.
- 3) This judgment is brought to the attention of the Attorney-General to address the pending issues raised herein as regards the proposed amendments.
- 4) Each party shall bear its own costs.

#### **FERNANDO J:**

This was an application by the applicant for special leave to appeal against a ruling made by the Chief Justice on the 3 October 2011, refusing an application by the applicant seeking a stay of execution and leave to appeal against the judgment of the Chief Justice of 19 September 2011, wherein the Chief Justice had refused to grant an order under section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 hereinafter referred to as POCA.

The applicant in the skeletal argument in relation to the special leave to appeal had submitted:

An application for an Interlocutory Order under section 4 of POC act is not truly "interlocutory". If the order is granted, and then the final order will be the disposal order under section 5 of the Act transferring the property to the Republic. On the other hand if the Order is refused then, subject to an appeal to the court of appeal, that is the end of the case.

In this case the Supreme Court had refused, as stated earlier, to grant an order under section 4 of POCA. We are of the view that this was for all purposes a final order and not an interlocutory order as contemplated in section 12(2) (a) (i) of the Courts Act. Section 22 of POCA states: "For the avoidance of doubt an appeal from an order made under this Act, other than an interim order shall lie to the Court of Appeal." Interim order referred to herein is one made under section 3 of POCA. Even if one were to be guided by section 12(2)(a)(i) of the Courts Act this was not an "interlocutory judgment or order of the Supreme Court" as set out therein, but a final order which disposed of the whole action leaving no subordinate or ancillary matters for decision by the Supreme Court. These provisions make it clear that the proper procedure to have been followed by the applicant was to have appealed against the judgment of the Chief Justice refusing to grant the interlocutory and receivership

orders sought by the applicant, by filing a notice of appeal. There was no necessity to seek leave to appeal from the Supreme Court or seek special leave from this Court. We decided however to treat this as an appeal as the notice of appeal had also been filed and due to the fact that there had not been any previous jurisprudence as regards the procedure to be followed where the Supreme Court refuses to grant an order under section 4 of POCA.

The challenge by the applicant to the judgment of the Chief Justice of 19 September 201 as per the grounds of appeal may be summarised as follows, namely that the Chief Justice erred:

- (i) In not finding that the facts adduced in the pleadings amounted to reasonable grounds for the statutory belief set out in the said pleadings of Liam Hogan, Deputy Director of the FIU within the meaning of section 9(1) of the POCA,
- (ii) In holding that the applicant had not attained the evidential threshold in the circumstances of this case to permit a section 4 interlocutory order to be made
- (iii) In causing or permitting the proceedings herein to proceed on affidavit when there were factual issues to be determined, without first entering on a hearing as to whether or not facts in these proceedings may be proved by affidavit notwithstanding the objections of the applicant.

There is undoubtedly a contradiction in the appellant's grounds of appeal and I have seen this running throughout the proceedings before the Supreme Court, namely on the one hand the appellant is arguing that there was sufficient material before the Supreme Court for it to have made an interlocutory order under section 4 of POCA, while on the other that there were disputed facts which necessarily had to be gone into in a full hearing before the Court could make such an order.

We were also surprised to note paragraphs 1 and 2 of the relief sought from this Court in the notice of appeal, which was not in the alternative and also contradictory of each other, namely:

- 1) An order allowing the appeal and granting the relief sought by the Appellant namely an interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 and thereafter a receivership order under section 8 of that act in terms of the originating notice of motion filed in the Supreme Court herein.
- 2) An order allowing the appeal and remitting this matter to the Supreme Court for the exchange of pleadings and subsequently that a trial of the issues be held on the merits in a manner that would do justice between the parties.

When this was drawn to the attention of the counsel for the applicant by the Court, he made an amendment to the relief sought by renumbering 2 as 1 and 1 as 2 and placing the renumbered 2 in the alternative to the renumbered 1. No other amendments were sought to be made to the Notice of Appeal.

The Chief Justice had by his judgment of 19 September 2011, refused to grant orders sought for by the applicant from the Supreme Court, under section 4 (interlocutory order) of POCA restraining the respondent or any person having notice of the order, from disposing of or otherwise dealing with the sum of US\$ 1,117,724.95 or any part thereof, in the respondent's account with BMI Offshore Bank, Seychelles, and another order under section 8 (Receivership Order) requesting the appointment of Mr Liam Hogan as a receiver of the above-mentioned property.

According to the skeletal argument on behalf of the applicant, the applicant had in October 2010 issued a direction under section 10(e) of the Anti-Money Laundering Act of 2006/2008 prohibiting transactions on the respondent's account with the BMI Offshore Bank, Seychelles subsequent to receipt of a suspicious transactions report, within the meaning of section 10 of the Anti-Money Laundering Act of 2006/2008.

On 21 March 2011, almost 5 months after the direction by the applicant under section 10(e) of the Anti-Money Laundering Act 2006/2008 as stated above, and after the respondent filed a civil suit against the applicant for damages in Civil Side number 630/2011 in December 2011, which case was called in January 2011, as stated by the respondent in the skeleton heads of argument, the applicant made application to the Supreme Court seeking interlocutory and receivership orders under sections 4 and 8 of the POCA, referred to more fully above, with a supporting affidavit sworn by the Deputy Director of the FIU, Liam Hogan, on 21st March 2011, accompanied by 9 exhibits numbering about 80 pages. The said affidavit contained statutory belief within the meaning of section 9 of POCA and the criminal conduct alleged by the applicant against the respondent is forging and uttering commercial documents and money-laundering including money laundering in Seychelles.

Section 9(1) of POCA states:

- (1) *Where the ..... Deputy Director states in proceedings under section 4 on affidavit.. ..... that he believes that*
- (a) The respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or
  - (b) The respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and
  - (c) The value of the property or as the case may be the total value of the property referred to in both paragraphs (a) and (b) is not less than R50,000 then if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in paragraph (a) or paragraph (b) or in both paragraphs (a) and (b), as may be appropriate, and of the value of the property (emphasis by me).

Section 9(2) of POCA states:

The applicant shall not make an application under section ..... 4 or submit evidence of his belief described in this section. except after reasonable enquiries and investigations and on the basis of credible and reliable information that he has reasonable grounds for suspecting-

- (a) The respondent is in possession or control of specified property and that property constitutes, directly or indirectly, benefit from criminal conduct; or
- (b) The respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and that the value of the property or as the case may be the total value of the property referred to in both paragraphs (a) and (b) is not less than R50,000 (emphasis by me).

It is clear from the provisions in section 9 that a filing of a statutory belief statement is not a fishing expedition and a responsibility is placed on an applicant who makes an application under section 4 or submits evidence of his belief described in section 9, to ensure that he makes the application or submits evidence of his belief described in section 9 only after reasonable enquiries and investigations and on the basis of credible and reliable information that he has reasonable grounds for the suspicion.

An affidavit in reply to the affidavit of Liam Hogan was filed on behalf of the respondent by Svetlana Vasileva on 9 May 2011 accompanied by a number of exhibits numbering about 600 pages.

Counsel for the FIU, Mr Barry Galvin, had thereafter on the 23 June 2011 written to Mr Frank Elizabeth, attorney for the respondent, that there were fundamental disputes of facts and that trial by affidavit was not appropriate in this case and suggested a draft case management proposal.

In the skeletal argument the applicant states:

9) This matter was listed for hearing before the Chief Justice on the 27 June 2011. When the case was called, Mr. Galvin handed in the letter and attachment. He submitted to the Court that the case was not suitable for hearing on affidavit as there were disputes of fact and further that whereas the motion seeking an interlocutory order must be brought grounded on affidavit, there is no provision in the POC Act that the hearing which is *described as inter partes should be by affidavit. Mr. Galvin submitted that in order to do justice between the parties. further pleadings were necessary* and an oral hearing held which could have been effectively achieved in a manner approximating the contents the suggested case management document (Underlining by me).

10) Chief Justice refused Mr Galvin's application, and held that because the proceedings were commenced by affidavit and an affidavit was filed in response, the matter had to proceed on affidavit and the only option available was by way of cross-examination of a Deponent.. ..

11) Chief Justice delivered a ruling on 19 September 2011 dismissing the application.

13) The FIU issued motions seeking a stay of execution and seeking leave to appeal which came up for hearing before the Chief Justice on 3 October 2011. Both applications were dismissed.

14) This application for special leave to appeal is brought in light of the said refusal in the Supreme Court.



I set out below the relevant provisions of the POCA Act for an understanding of the procedure that needs be followed in determining an application by FIU for an interlocutory order under section 4 of POCA.

Section 4(1) of POCA states:

Where on an *inter partes* application to Court, in that behalf by the applicant. *it appears to the Court on evidence, including evidence admissible by virtue of section 9 tendered by the applicant, that -*

- a. a person is in possession or control of:
  - i. specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct; or
  - ii. specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and
- b. the value of the property or the total value of the property referred to in sub-paragraphs (i) and (ii) of paragraph (a) is not less than R50,000.  
*the Court shall make an interlocutory order prohibiting the person specified in the order or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or, any part of the property, or diminishing its value, unless it is shown to the satisfaction of the Court. on evidence tendered by the respondent or any other person that:*
  - i. the particular property does not constitute, directly or indirectly, benefit from criminal conduct and was not acquired in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; or
  - ii. the total value of all the property to which the order would relate is less than R50,000

Provided that the Court shall not make the order if it is satisfied that there would be a risk of injustice to any person (the onus of establishing which shall be on that person), and the Court shall not decline to make the order in whole or in part to the extent that there appears to be knowledge or negligence of the person seeking to establish injustice, as to whether the property was as described in subsection (1) (a) when becoming involved with the property.

Section 4 (3) states:

Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming an interest in any of the property concerned, may –

- a. if it is shown to the satisfaction of the Court, that the property or any part of the property is property to which paragraph ( a) of subsection (1) does not apply; or
- b. that the order causes any other injustice to any person (the onus of establishing which shall be on that person)

discharge or as may be appropriate, vary the order, and the Court shall not make the order in whole or in part to the extent the Court shall not decline to make the order in whole or in part to the extent( sic) that there appears to be knowledge or negligence of the persons seeking to establish injustice, as to

whether the property was as described in subsection (1) (a) when becoming involved with the property.

Section 4(7) (d) of POCA states that "an application made under subsection (1) shall be supported by an affidavit verifying the matters set out in the application" and section 4 (8) states: "Oral evidence may be adduced during an application made under this section *if the court shall so require of permit*"(emphasis by me).

Section 5 of POCA makes reference to the disposal order that may be made under 5 (1). Section 5 (1) states:

Subject to subsection (2), where an interlocutory order has been in force for not less than 12 months in relation to specified property and there is no appeal pending before Court in respect of the interlocutory order, the Court, on application to it on behalf by the applicant may make a disposal order directing that the whole or a specified part of the property be transferred, subject to such terms and conditions as the court may specify, to the Republic or to such other person as the Court may determine and such transfer shall confer absolute title free from any claim of any interest therein or encumbrances to the Republic or such person.

Section 5(3) states:

Subject to subsections (8) and (10), the Court shall make a disposal order in relation to any property, the subject of an application under subsection (1) unless it is shown to its satisfaction by the respondent or any person claiming any interest in the property, that the property does not constitute, directly or indirectly, proceeds of criminal conduct and was not acquired, in whole or in part, with or in connection with the property that, directly or indirectly, constitutes proceeds of criminal conduct.

Section 5(8) states:

In any proceedings under subsection (1), before deciding whether to make a disposal order, the Court shall give any person who the Court believes to have an interest in the property or any part of it, an opportunity to be heard and to show cause, why the order should not be made.

On a perusal of the above provisions I shall set out in brief the procedure in my view that shall be followed when an application for an interlocutory order under section 4 of POCA is made:

- (i) FIU makes an application supported by an affidavit verifying the matters set out in the application. This may include evidence admissible by virtue of section 9 (referred to above), tendered by the applicant. This is the only 'evidence' referred to at section 4 of POCA.
- (ii) The person specified in the order or any other person having notice of the making of the order may tender evidence showing the particular property does not constitute, directly or indirectly, benefit from criminal conduct and was not acquired in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal

conduct; or the total value of all the property to which the order would relate is less than R50,000.

- (iii) The Court after perusal of the evidence tendered by the FIU and the person specified in the order or any other person having notice of the making of the order, will make its decision by either making an interlocutory order or refusing it.
- (iv) I am of the view that the decision to make or refuse an interlocutory order at this stage is purely based on the affidavit evidence before it. This is made clear by the provisions in section 4(8) that "Oral evidence may be adduced during an application made under this section if the Court shall so require or permit." This in my view is purely at the discretion of the Court. Cross-examining the deponent of any affidavit filed, will however be the right of the party opposing its contents. Certainly at this stage the FIU cannot insist on calling the person specified in the order to provide the FIU with material to bolster up its case. This is in view of the provisions of section 9(2) which states that the applicant shall not make an application under section 4 or submit evidence of his belief described in this section, except after reasonable enquiries and investigations and on the basis of credible and reliable information that he has reasonable grounds to base his suspicion. FIU should guard against acting ultra vires the powers given to it by POCA and abusing its powers. There is no burden on the respondent to prove the case of the applicant. The respondent's burden is to satisfy the Court by evidence that is tendered that the particular property does not constitute, directly or indirectly, benefit from criminal conduct and was not acquired in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; or the total value of all the property to which the order would relate is less than R50,000.
- (v) If the court refuses to issue an interlocutory order FIU may appeal against it as they have done in this case. There is also nothing in the POCA to prevent the FIU from making a fresh application for an interlocutory order on the basis of new evidence found.
- (vi) If the Court makes an interlocutory order the respondent or any other person claiming an interest in any of the property concerned may apply to the Court to have it discharged on the basis that the property or any part of the property is property to which paragraph (a) of subsection (1) of section 4 (see above) does not apply. The Court may on such application being made discharge or, as may be appropriate, vary the order or decline such application. This is the stage at which the FIU may call for a full inquiry to make a determination on disputed facts.
- (vii) The FIU may also at any time apply to the court to have the interlocutory order discharged,
- (viii) The interlocutory order shall continue in force until the determination of an application for a disposal order under section 5 in relation to the property concerned, the expiration of the ordinary time for bringing an appeal from that determination or if such appeal is brought, when the appeal is determined or abandoned, whichever is the latest and then lapse.

The Chief Justice had after perusal of the affidavits before him delivered judgment refusing to grant the interlocutory and receivership orders sought by the applicant by stating:

I am satisfied on the facts before me, that there can be only one answer. The respondent has explained the source of the money in question. *No attempt was made to cross-examine the deponent of the respondent's affidavit, leaving that evidence virtually unchallenged.* Against that evidence and explanation is the evidence of the applicant which does not answer at all the respondent's evidence and explanation. Other than Mr Hogan 'interpreting' the information supplied by the respondent, and forming his opinion of it, I do not see any evidence of credible and reliable information obtained by applicant in its inquiries and investigations over this matter which would suggest that the property in question is benefit from criminal conduct. In the result I dismiss this application with cost.

The Chief Justice cannot be faulted for not calling for further pleadings or having an oral hearing. Certainly the Chief Justice was not required under the POCA Act at this stage to order the attendance of witnesses to be cross examined by the applicant as averred in Mr Liam Hogan's affidavit filed before this Court in seeking special leave.

On a perusal of the grounds of appeal that was filed it was clear that there was a major contradiction in the applicant's submission. On the one hand the submission is to the effect "that the facts adduced in the pleadings amounted to reasonable grounds for the statutory belief set out in the said pleadings of Liam Hogan, Deputy Director of the FIU within the meaning of section 9(1) of POCA". Mr Galvin in his submissions before the Court on 27 June 2011 having referred to the averments in the affidavit and exhibits had said:

Taking the matter shortly and as I've said it's well set out in affidavit and the exhibits filed ..... There's the belief evidence, I renew my submissions my lord to your lordship not going to repeat it again ..... But what I'm saying to your lordship is that once the statutory belief is there and your lordship finds the grounds as reasonable grounds within the amber (sic) to the submissions that I made to you then the owner (sic) shift on the respondent to prove by evidence as not the proceeds of crime.

Contradicting this, Mr Liam Hogan had said further pleadings were necessary and an oral hearing called for to determine the issues before the Court. In the affidavit of Liam Hogan, filed in support of the special leave to appeal application Mr Hogan has stated: "... as there were fundamental disputes of facts, trial by affidavit was not appropriate in this case." And also

*I further say that unless the learned Chief Justice intended to grant the orders sought, it was the position that a substantial amount of material and information which was particularly within the knowledge and control of the Respondent needed to be particularized and adduced in evidence if the statutory scheme for determination of the issues as set out in section 4 of the POC Act were to be implemented. I further say that in order to judicially determine the disputed facts. Appropriate witnesses should attend in person*

*at the Court to depose same and be subject to cross examination before the trial judge.*

These statements in our view are an affront to the Supreme Court, for the applicant had expected of the Supreme Court to grant them an interlocutory order under section 4 and a receivership order under section 8 on the basis that the averments in Liam Hogan's affidavit amounted to reasonable grounds for the statutory belief within the meaning of section 9(1) of POCA, when in fact the applicant feels they are inadequate.

It is of interest to note having failed to have a full blown hearing to determine the section 4 POCA issue, counsel for the applicant, Mr Galvin, went ahead and argued the case on the basis of the affidavits filed before the Court, without seeking to appeal or indicating to the Supreme Court that he intended to appeal against the decision of the Chief Justice, to proceed purely on the basis of the affidavits. Counsel for the applicant, Mr Galvin, had also not sought to take advantage of the Chief Justice's proposal to cross-examine the deponent of the affidavit that was filed on behalf of the respondent.

I find it inappropriate and an abuse of process for counsel for the respondent and disrespect to Court, to come before us when he himself is not sure whether there was sufficient evidence for the Supreme Court to have made an order under section 4 of POCA. I also find it totally inappropriate for the FIU to have made an application for an interlocutory order under section 4 without reasonable grounds as required by section 9(2) of POCA referred to above. Furthermore to wait for almost 5 months thereafter to make an application under section 4 of POCA to the Court, and that after the respondent had instituted a civil suit against the applicant for the seizure of its money and to wait till the date fixed for the hearing of the application to submit that the case was not suitable for hearing on affidavit as there were disputes of fact and to ask for an adjournment, without having made a prior application to Court shows disregard for the right to property of the respondent enshrined and entrenched in the Constitution and total disrespect to Court.

I therefore have no hesitation in dismissing the appeal with costs to the respondent.

I am also of the view that this Court has no powers to make rules as regards the procedure to be followed in making applications to Court under sections 3, 4 or 5 of POCA or to regulate the procedure before the Court in respect of any matter under the POCA. That power is only with the Chief justice. Section 24 of POCA states: "The Chief Justice may make rules of Court, not inconsistent with this Act, to regulate the procedure before the Court in respect of any matter under this Act."