

FINANCIAL INTELLIGENCE UNIT v SENTRY GLOBAL SECURITIES LTD

(2012) SLR 331

D Esparon, Principal State Counsel for the appellant
D Sabino for the respondent

Judgment delivered on 7 December 2012

Before MacGregor P, Domah, Twomey JJ

TWOMEY J:

The appellant, the Financial Intelligence Unit (FIU) has appealed against a decision of the Chief Justice in which he found that the FIU had not attained the evidential threshold necessary to permit a section 4 interlocutory order to be made under the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA) against the respondent(s) 1-13 who are accountholders in Barclays Bank (Seychelles) Ltd, the 14th respondent.

The thrust of the appellant's case briefly is that the respondents have in their possession or control property constituting, directly or indirectly, benefit from criminal conduct, that the property as set out in a table annexed to the proceedings, were acquired from criminal conduct. The respondents are persons and legal entities with addresses in Costa Rica and Spain. The total amount standing to credit at 24 June 2010 in the 13 accounts was US\$306, 283.09, equivalent then to R3,781,432.29.

The appellant annexed to the court pleadings the affidavit of Liam Hogan, Deputy Director of the FIU, in which is outlined his belief evidence of the activities of respondents 1-13 who he states are part of a criminal organisation based in Costa Rica. His affidavit is lengthy in that it outlines each and every aspect of matters leading to his belief that the property of respondents 1-13 invested in accounts with respondent 14, Barclays Bank amounting at US\$306, 283.09 constituted directly or indirectly, benefit from criminal conduct and were acquired, in whole or in part, with or in connection with property that, directly or indirectly, constituted criminal conduct.

The grounds for his belief are articulated in his affidavit and it is important to describe them fully for reasons that will become clear:

- i) That as a result of the FIU's investigations, a criminal organisation namely Red Sea Management, based mainly in Costa Rica was identified. This organisation had affiliated to it other companies i.e Sentry Global Securities Limited and Sentry Global Trust Limited.
- ii) That the investigations confirmed that Red Sea Management and its affiliates had also been the subject of investigations by both the United State FBI and Costa Rican police.
- iii) That serious criminal activities by the organisation had been confirmed.

iv) That the investigations revealed that Red Sea Management Ltd was a shell company operating by itself and through its affiliates only for criminal purposes i.e. hiding illegal financial assets and perpetrating securities fraud, mainly “pump and dump” stock schemes designed to defraud investors in public markets.

v) That in November 2007 a civil action was taken by a number of allegedly defrauded investors against Red Sea Management Limited seeking the return of US\$7.4 million in a securities scam. Subsequently on July 31st 2008 other defendants including Jonathan Curshen, the third Respondent in this appeal and the Chief Executive of Red Sea Management Limited were also joined as defendants. A default civil judgment was entered against Red Sea Management limited on the 7th October 2008. A charge of securities fraud was brought against the third Respondent before Judge Sand of the United States District Court on 15th January 2009. (copy of charge sheet and arraignment proceedings exhibited).

vi) Further, that the New York Securities Exchange Commission New York Regional Office brought proceedings against the 3rd Respondent and one Bruce L. Grossman alleging a securities fraud detected by way of a sting operation which occurred between June 27th and July 2nd 2008 and that the 3rd Respondent pleaded guilty to one of the charges preferred against him. (Copy of preliminary statement dated 10th September 2008 before Judge Gardephe of the United States District Court exhibited).

vii) That in separate litigation between the Securities and Exchange Commission and C. Jones & Co. & others, including the Third Respondent to the present appeal, the United States District Court in the District of Colorado entered a final judgment against the Third Respondent finding him liable for securities fraud.

viii) That as a result of his criminal activities on 9th October 2008 the Third Respondent was stripped of his privileges as a diplomat of the government of St. Kitts and Nevis for which he had acted as Honorary Consul in Costa Rica. (Copy of Litigation Release dated September 11th 2008 exhibited)

ix) That subsequent to a Suspicious Transaction Report received from Barclays Bank, the 14th Respondent, pursuant to section 10 of the Anti Money Laundering Act 2008 (AMLA), the FIU established that the Red Sea Management Company and its affiliates and persons

associated with then in the course of criminal investigations, opened a number of offshore accounts with Barclays and these accounts had been corruptly used for the purpose of laundering the fraudulently obtained benefit from the criminal conduct outlined above.

x) That Asset Agents of the FIU analysed the information received relating to the accounts of the first 13 Respondents and prepared a detailed spread sheet setting out the name of each of the account holders, the subject matter of the application for the interlocutory injunction, the name of the individuals operating the bank account, the correspondence address, the authorised signatories, the address of the registered office, the directors, the beneficial owner(s) and the operating address.

xi) That the data disclosed the operating address of all the accounts as Piso 8, Oficina 8-4, Edificio Colon, Paseo Colon, San Jose, Costa Rica. This is the same address given by the 3rd Respondent as his correspondence address.

xii) That as part of the criminal modus operandi of Red Sea Management Company, its affiliates and associates, it was established that employees or nominees of the criminal group actually operated the bank accounts which were created for the furtherance of criminal conduct. The data disclosed and exhibited

in the spreadsheet before the Supreme Court showed that Respondents 1,2,5,6,7,8,9,10,11,12 and 13 appear either by themselves or with others in different combinations as persons operating the individual bank accounts or as authorised signatories.

xiii) That Respondents 1,2,3,5,6,7,8,9,10,11,12,13 have as their correspondence address the same apartment building, namely Apartado San Jose, Costa Rica similar to and believed to be a different description of the same building in San Jose, Costa Rica. The correspondence addresses have the same telephone number, the same fax number and the same e-mail address. Apart from a separate e-mail, fax and phone number for the 4th Respondent, (frank@abellanhos.es, 34629676949, 34660138351) there is no individual fax number, telephone number or e-mail address furnished for any of the bank account holders and first 13 Respondents nor any correspondence address, authorised signatory or registered office address, director, beneficial owner or any operating address.

xiv) That the affidavit of Felix Lostracco, a Federal Agent of the FBI which itself was carrying out an investigation into the criminal activity of Red Sea Management, its affiliates and associates, sworn on September 11th 2009 avers that Red Sea Management group is a corrupt criminal organisation only existing for the purpose of implementing extensive securities fraud including pump and dump schemes. (copy of affidavit exhibited).

xv) That in relation to Respondent 4, the investigations and enquiries have revealed his involvement in a fraudulent Trans-Atlantic pump and dump scheme with others involving US\$13 million. An action brought by the US Exchange Commission entitled Securities and Exchange Commission v Francisco Abellan, et al filed on 14th August 2008, an order was made to freeze the assets of Respondent 4 (copy of litigation release exhibited).

xvi) That the Barclay's Bank account number 7607153 was in the name of Francisco Abellan, residential address, Turo de Monterols 11 3-1. 08006, Barcelona, Spain, with home number and e-mail address given above. That the initial deposit of US\$99,980 on that account was from Sentry Global Securities Ltd, and subsequent to that, two further deposits of US\$50, 059 were deposited in the account on 26th March 2009 and 26th May 2009 from Sentry Global Securities

An order was made by the Chief Justice in January 2011 to issue and serve respondents 1-13 out of the jurisdiction pursuant to section 47(3) of the Seychelles Code of Civil Procedure. On the return date for service Mr Barry Galvin, counsel for the appellant informed the court that although attempts had been made to serve respondents 1-13, none of them had been at the two addresses specified, namely Turo de Monterols 11 3-1. 08006, Barcelona, Spain and Piso 8, Oficina 8-4, Edificio Colon, Paseo Colon, San Jose, Costa Rica. The Attorney and Notary Public, Oswald Bruce, engaged by the FIU to effect service in Costa Rica averred in an affidavit that the address given was that of a funeral services company. The address in Spain also proved to be non-existent. In the circumstances, leave was granted pursuant to section 4(1) of POCCCA to proceed against the 14th respondent, Barclays Bank, for a proceeding in rem, as it had possession and control of the specified property.

The Chief Justice then proceeded to hear the motion for the granting of the interlocutory injunction to freeze the assets of the 1st - 13th respondents pursuant to section 4 and the appointment of a receiver for the said assets pursuant to section 8 of POCCCA. The 14th respondent, Barclays Bank stated that they were not adopting any position in the matter.

No opposing affidavit was filed by any of the respondents. However, in his judgment the Chief Justice dismissed the application finding that the evidential threshold under the Act had not been reached in the case.

The appellant has lodged four grounds of appeal –

1. The Chief Justice erred in law 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
2. The Chief Justice erred in law in not finding that the facts adduced in the pleadings amounted to reasonable doubts 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 POCCCA.
3. The Chief Justice erred in law in determining that the evidence adduced did not attain the threshold of “appearing to the court” within the meaning of section 4 POCCCA.
4. The Chief Justice erred in law in not applying section 9(7) of the Anti-Money Laundering Act 2006 as amended by the Anti-Money Laundering (Amendment) Act 2008 (AMLA).

The 14th respondent in his written arguments and at the hearing of appeal restated his assertion that he took no view on the merits of the case but went on to provide substantive arguments on the evidential threshold in such cases. His counsel stated that did so in the interest of developing jurisprudence on this issue. His arguments in this respect, although academic, are welcomed by this court.

The fourth ground of appeal as submitted is meaningless as it contains a reference to a provision that is non-existent and was not pursued at the appeal hearing.

Respondents 1-13 are added to this appeal for the sake of completeness in that they appear as respondents in the original case. They have not been served the proceedings of this appeal as their last known addresses are bogus. In the circumstances the Court dispenses of the need for personal service of this appeal and deems alternative service the publication of the cause list pursuant to rule 9(2) of the Seychelles Court of Appeal Rules. They do not refute any of the allegations as made by Liam Hogan in the affidavit nor have they filed any proceedings to counter the making of the section 4 interlocutory order.

It seems to us that the only matter to be decided by this Court is whether under the provisions of POCCCA and AMLA there exists sufficient evidence for the making of a section 4 interlocutory order in this case. This calls for a determination of what constitutes “belief evidence” under POCCCA. It would appear that four years on from the passing of these Acts dealing with the proceeds of criminal conduct and although several cases on this issue have been heard both by the Supreme Court and the Court of Appeal, certain evidential aspects and procedures have not yet been clearly bedded down. This is despite our clear decision in *FIU v Mares Corp* (2011) SLR 404 and our call therein to the Attorney-General to bring this to the attention of the Legislature to resolve both procedural and substantive insufficiencies contained in the Act. Furthermore, the Chief Justice although mandated by section 24 of POCCCA to make rules to regulate the procedure before this Court has still not done so even though recent cases have clearly demonstrated that such rules are imperative. This is extremely disappointing and does not in any way help the administration of justice.

While this Court in the absence of rules can exercise its inherent power under section 120 of the Constitution of Seychelles and has the same authority as the Court from which this matter is brought, it can only guide procedure. It cannot substitute itself for the Supreme Court or more precisely the Chief Justice in making rules of procedure when these powers are specifically vested in him by an Act, which is the case in POCCCA. We can only draw his attention to the fact that those rules are not in operation. The only alternative would be for the Legislature to act urgently to remedy the situation. Failure to do so is a hindrance to all concerned in the battle against international crime and money laundering and does not help the image of Seychelles abroad. It also does not assist the innocent investor or account holder whose assets may be confused as proceeds of crime and who is at a loss to understand what procedure to follow in such cases.

Accordingly, in the absence of dedicated rules in such matters, we may only go by already established procedural and substantive authorities on POCCCA bound by precedents established by the Court of Appeal. With this in mind we proceed to the issue in this case.

What is the evidential burden of each party and at each stage contained in the provisions of POCCCA? In *Financial Intelligence Unit v Mares Corp* (2011) SLR 404 we clearly stated that:

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 that the property is not the proceeds of crime... [emphasis ours]

In *Clive Lawry Allisop v R (FIU)* 24/2010 (unreported) we again stated:

POCCCA being a 'standalone proceedings,' it is clear that in order to make an application under sections 3, 4 or 5 of POCCCA there is no need for the applicant to prove the commission of a predicate crime.

It is abundantly clear that section 4 applications under POCCCA involve different evidential burdens used in both criminal and civil cases. Practitioners and judges need to accept once and for all that such legislation introduces new concepts that are not comparable to the law we have hitherto practised. This calls for new ways of practice and adjudication to give effect to the law.

It is important to bring into view the relevant sections of the legislation concerned, namely section 4(1) of POCCCA:

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 the property, referred to in subparagraphs (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 R50,0000.

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. [our emphasis]

Section 9(1) of POCCCA provides:

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 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
(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 R50,0000
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 in paragraph (b) or in both paragraphs (a) and (b) as appropriate, and of the value of the property...
(3) The standard of proof required to determine any question arising under this Act ...shall be that applicable to civil proceedings. [our emphasis]

The Chief Justice in his judgment dated 11 May 2011 found that the “applicant ha[d] not attained the evidential threshold” to permit a section 4 interlocutory order to be made in this case. He based this finding on the examination of evidence before him as set out in the affidavit of Mr Hogan. He stated that:

the fact that the standard of proof here is the civil standard of proof does not mean the applicant may ignore available best evidence to support their allegations against the respondent and then choose to rely on belief of the director or Deputy Director of the applicant. Under section 9 of POCA the court must be satisfied that there are reasonable grounds for such belief. Where there are convictions of criminal offences and civil judgments for fraud it is the production of evidence for such convictions and or civil judgments that can form reasonable grounds for belief. It is unreasonable to rely only on documents that initiated action without making available documents that show the result where such documents exist and are or ought to within reach. Hence the fact that documents produced by the appellant disclose the proceeding brought by the respondents in the courts of the USA they do not confirm the final outcome of the cases.

With respect, the Chief Justice cannot exact the best evidence that could have been brought by the FIU in this case as the legislation, specifically the provisions of section 9 of POCCA, does not set the bar that high. The burden of proof at this initial stage is neither one of a criminal case of ‘beyond reasonable doubt’ nor that of a civil matter of ‘on a balance of probability’. All that is necessary is “a reasonable belief” that the property has been obtained or derived from criminal conduct by the designated officer of the FIU. That belief pertains to the designated officer and hence involves a subjective element. It is therefore only prima facie evidence or belief evidence. No criminal offence need be proved, nor mens rea be shown. As Hardiman J stated in the Irish Supreme Court case of *Murphy v GM* [2001] 4 IR 113 at 148 –

If the legislature had intended that no such order should be made unless it had first been established that the person in possession or control of the property had acquired it with a criminal intent, it would have said so.

As long as there are reasonable grounds for the belief by the applicant that the property is the proceeds of crime it is sufficient evidence to result in the granting of the order. If the FIU relies on belief evidence under section 9 the court has to examine the grounds

for the belief and if it satisfied that there are reasonable grounds for the belief it should grant the order. There are appropriate and serious protections for the respondents as at different stages they are permitted to adduce evidence to show the Court that the property does not constitute benefit from criminal conduct. Their burden in this endeavour is that “on a balance of probabilities.” In other words, once the applicant establishes his belief that the property is the proceeds of crime, the burden of proof shifts to the respondent to show that it is not. Hence, unless the court doubts the belief of the officer of the FIU which is reasonably made he cannot refuse the order. The Chief Justice therefore could not exact better evidence of Mr Hogan as this is not required by the legislation. As he does not state that he disbelieved him and as no evidence to the contrary has been tendered by the respondent or by any other person the order must be made.

That in fact is not the end of the matter for the respondents. They are afforded further protection by the provisions of POCCCA. Section 4(3) provides that where the interlocutory order is in force, the Court can discharge the order if an application is made by the respondent or any other person claiming an interest in the property and showing to the satisfaction of the Court that the property is not one derived from criminal conduct. It is therefore still open to them to come forward and show such evidence.

There is no inequality of arms created by the provisions and there is no need for the court to attempt to redress the difference in the evidential burden to be acquitted by each side. It is particularly instructive to recall Irish jurisprudence on this matter, from which our legal provisions were borrowed. In this respect the corresponding Irish provisions of our sections 3 and 4 of POCCCA are their sections 2 and 3. In *Murphy v GM* [2001] 4 IR 113,155 Hardiman J stated:

As to the submission that there was no 'equality of arms' between the parties because evidence of opinion was permitted in the case of the applicant but not in the case of the respondents, the court is satisfied that no such inequality has been demonstrated: the respondents to an application under s. 2 or s. 3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance without calling in aid opinion evidence.

In the recent case of *McK v H and H* [2006] IESC 63 at 10-11 Hardiman J expressed the view that, once the two statutory pre-conditions were met in relation to the belief statement, that it is held and expressed, and that there are reasonable grounds for it, then the belief constitutes evidence. He continued:

This evidence is not conclusive and may be counteracted by evidence called by or on behalf of the defendant. Accordingly, the effect of the expression of an admissible belief under the Section, if it is not undermined in cross examination, is to create a prima facie case which may be answered by the defendant if he has a credible explanation as to how he lawfully came into possession or control of the property in question, and established this in evidence.

The high evidential bar placed by the Chief Justice in this case is decidedly out of line with previous cases decided on much less evidence and which were unlike the present case contested. For example in *FIU v Allisop* SSC 144/2009 (unreported) a vigorous defence was mounted on much less prima facie evidence produced by the FIU and yet the interlocutory order was made. In the present case 18 grounds for the belief of the designated officer supported by document evidence is set out. None of these grounds are contested. Most of these averments would of their own have, in our opinion, sufficed to cause the interlocutory order to be made.

In summary, and in order to guide courts in similar cases, we state:

1. On an application by the designated officer of FIU, if it appears to the Court on prima facie evidence (or reasonable belief evidence) of the designated officer of the FIU that the property is the benefit of criminal conduct and the respondent neither appears nor contests the application, the Court must make the order.
2. Where, in response to the prima facie evidence or belief evidence the respondent engages in the court process, be it by filing an affidavit or by leading direct evidence and is able to show to the satisfaction of the court (on a balance of probabilities) that the specific property is not wholly or partly directly or indirectly the benefit of criminal conduct, the Court shall not make an order under section 4 of POCCCA.
3. Where the Court is not satisfied that the respondent has adduced evidence on a balance of probabilities that the property is not the proceeds of crime then the Court shall make the interlocutory order.
4. In a case where the respondent has met the evidential burden, the Court should proceed to examine the evidence adduced by the applicant and balance that evidence against the respondent's in the usual way and decide the issues.

In the present case step 1 only had been reached and as we have pointed out there was no reason for the Chief Justice to exact more than the requisite statutory standard of evidential proof. The application of the designated officer of the FIU was comprehensively and ably supported by an affidavit showing grounds for his reasonable beliefs and also by documentary evidence.

Finally, in the last paragraph of the ruling of the Chief Justice is the statement:

In the result I am satisfied that *presently* the applicant has not attained the evidential threshold in the circumstances to permit a section 4 interlocutory order.
[emphasis ours]

Mr Galvin for the appellant has submitted that operating under the belief that the FIU could subsequently submit further evidence to meet the threshold, attempted to introduce copies of orders of the courts of the United States against some of the respondents. This was refused by the Supreme Court. We exercised our discretion under rule 3(2) of the Seychelles Court of Appeal rules and permitted him to produce the evidence. Among other documents he produced we have had sight of the *USA v Jonathan Curshen* Criminal Information dated 15 January 2009, the Department of

Justice notification detailing the conviction of Jonathan Curshen and anor and the order of the United States District Court, Western District of Washington at Tacoma against Jonathan Curshen of 7 December 2009. This was in no way necessary to support the making of the order pursuant to section 4 of POCCCA. We did so only to further ensure that all evidence so far gathered by the FIU was on record.

In view of our findings above we allow this appeal and make the following orders:

1. An interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, prohibiting the respondents 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 standing to credit in the accounts set out in the table attached to the affidavit of Liam Hogan in this application or diminishing its value;
2. Thereafter an order pursuant to section 8 of the Proceeds of Crime (Civil Confiscation) Act 2008, appointing Liam Hogan as the Receiver of the specified property and to hold the same in an interest bearing account in Barclays Bank (Seychelles) Ltd.
3. That the Receiver be entitled to appoint agents or counsel, or any other person considered by him to be necessary, and pay the costs and expenses of same and his own costs and expenses as they shall arise from time to time out of the funds he shall receive under this order.
4. That the present order remain valid until a disposal order is made pursuant to section 5 of the Proceeds of Crime (Civil Confiscation) Act 2008.
5. That respondents 1 to13 pay the costs of this case.
6. That a copy of this judgment is brought to the attention of the Legislature, specifically in reference to the fact that rules of court to regulate the procedure before it in respect of the Proceeds of Crime (Civil Confiscation) Act 2008 have yet not been made and need to be made to ensure the fair, just, timely and effective resolution of proceedings under its provisions.