

# **Financial Intelligence Unit v Cyber Space Ltd**

**(2013) SLR 97**

Domah, Twomey, Msoffe JJA

3 May 2013

SCA 21/2011

**Counsel**      B Galvin for the appellant  
                    F Elizabeth for the respondent

**The judgment was delivered by**

**TWOMEY JA**

[1]        In this first case involving internet copyright infringement in Seychelles, the appellant seeks freezing and receivership orders pursuant to ss 4 and 8 respectively of the Proceeds of Crime (Civil Confiscation) Act 2008 (POCA) against the assets of the respondents being money amounting to R 3,244,081.23 at BMI Offshore Bank (Seychelles) Limited allegedly derived from criminal conduct.

[2]        It is clear from the proceedings that this case has come before the courts in several different actions prior to the present appeal before this Court. For the purposes of this appeal however, we are only concerned with the record of proceedings before us, based on a s 4 POCA application started by notice of motion dated 12 February 2012 before the Supreme Court in which the appellants deposed in the affidavit of its officer, Liam Hogan, that the money in the bank account of the respondent directly or indirectly constituted benefit from criminal conduct.

[3]        Mr Hogan outlined the grounds for his belief as based on the facts that the websites known as [www.torrrrentreactor.com](http://www.torrrrentreactor.com) and

www.torrentpivacy.com belonging to the respondent operate illegally by allowing access or facilitating access to unlicensed and unauthorised materials on the internet. He relied on a number of witness statements namely those of Paul Warren of the International Federation of the Phonographic Industry, James Mullan of EMI Records, Michael Smith of Sony UK and Claire Sugrue of Universal-Island Records, all stating that the websites were not:

licensed, permitted or authorised to make available, upload, reproduce, communicate to the public, distribute, supply or otherwise exploit (including sub-licence), or to aid, abet, encourage, authorise or assist in any way any third party to make available ... or otherwise exploit any album or other sound recordings owned by [their] companies in any format whatsoever in the world.

[4] He further deponed that the overall activity of these websites was to profit by facilitating the illegal downloading of material subject to international copyright and other legal restrictions thereby defrauding the owners of the intellectual property in the material and others who had expended money in its production and distribution. He deponed that such activity amounted to criminal conduct in almost all developed countries and in the United Kingdom amounted inter alia to the common law offence of conspiracy to defraud. He added that the conduct of lodging this money subsequent to the said criminal conduct amounted to the offence of money laundering in Seychelles contrary to s 3 of the Money Laundering Act 2006 as amended in 2008.

[5] The respondent's director and beneficial owner, Mr Dmitry Fakhrudinov swore an affidavit on 11 June 2012 in which he deponed

that the company's websites operated legally and had been in operation for approximately nine years, that there had never been any legal proceedings in any country in the world in respect of the websites, that the websites did not "host or hold any materials, content, data or digital files", that no criminal offence had been committed by the company and that the company operated in compliance with both the United States' Digital Millenium Copyright Act and the European Union Directive (2001/29 EC) on copyright.

[6] Contained in the affidavit of Liam Hogan, the appellant's officer, was a further statement that the respondent in submitting documents of proof of funds in the frozen accounts produced a written agreement for advertising between the respondent and a company named Darton Software Corporation which Mr Hogan stated are false documents created and uttered to mislead the bank and which could amount to an offence under s 339 of the Penal Code. Replying to this averment the respondent's director in his counter affidavit stated that the money in the frozen bank account was proceeds from advertising services rendered to Darton Software Corporation on the respondent's website.

[7] In his ruling delivered on 28 September 2012, the Chief Justice Egonda-Ntende dismissed the application with costs finding that:

the applicant [had] not established the existence of an agreement by the Respondent and another or more persons to defraud any other person [and] on a balance of probability the Applicant [had] failed to show that the Respondent [had] engaged in the crime of conspiracy to defraud the persons or companies that are alleged to be the victims of this matter.

He ordered the applicant to “defreeze the Respondent’s account.”

[8] The appellant applied for a stay of execution of the order pending the appeal of the ruling before the Court of Appeal. This was disposed of by the following statement of the Chief Justice:

Perhaps you could talk to our learned colleague; you might easily find agreement on the issue without necessarily invoking a ruling of this court on this matter.

[9] Such agreement did not materialise and the appellant then sought the stay of execution before the Supreme Court which was refused and appealed before a single judge of the Court of Appeal. The President of the Court of Appeal, MacGregor, in his ruling of 13 November 2012 dismissed the application for stay of execution of the defreezing order.

[10] The respondent subsequently filed a notice of motion in which it stated that its account remained frozen despite the court order. He further asked that he be allowed to submit the statement of account and expenses amounting to R 693, 813.57 in relation to losses incurred from the freeze and also his legal expenses. At the hearing of this appeal we were informed that the money in the respondent’s bank account had since left the jurisdiction for Cyprus. This may have been an ill-judged move given the intervening collapse of the banking sector in Cyprus but it disposes of the need for consideration of this application by this Court.

[11] There is also an application before us by the appellants to admit further documentary evidence namely the decision of the World Intellectual Property Organisation Arbitration and Mediation Centre

of 12 January 2011 in case D2010-1803 in which it was found that the disputed domain name [www.torrentreactor.com](http://www.torrentreactor.com) should be transferred to Alexey Kistenev. It is the appellant's contention that this proves that Alexey Kistenev as the beneficial owner of Darton Software Corp is linked in some way to the respondent as the latter claims in the affidavit of its director and beneficial owner Dmitry Fakhruddinov that it is the owner of the website [www.torrentreactor.com](http://www.torrentreactor.com). The application was resisted though not strenuously and we allow it as it is in the circumstances of the case and in the interest of justice helpful in assisting the Court in clarifying some of the issues raised.

[12] The appeal from the ruling of the Chief Justice in relation to the dismissal of the application for an interlocutory order is now before this Court for consideration. The appellant's grounds of appeal can be summarised as follows:

- 1 That the Chief Justice erred in law in not finding that the statutory belief together with the facts adduced in the affidavit and supporting evidence tendered by the appellant at trial were sufficient to warrant the making of the interlocutory order under s 4 of POCA.
- 2 That the Chief Justice erred in law in holding that the respondent had satisfied the Court that the property was not the proceeds of crime.
- 3 That the Chief Justice erred in law in holding that it was necessary for the appellant to establish the crime of conspiracy.
- 4 That the Chief Justice erred in law in holding that the evidence taken as a whole did not establish criminal conduct to the

standard that would warrant an interlocutory order being made under s 4 (1) of POCA.

[13] We shall proceed to consider all the grounds together given the inextricable link between them. We have to acknowledge at this stage that this appeal presents difficult legal issues which have not yet been resolved in this jurisdiction. We say this for the reason that the evidence in the case raises the following issues:

- 1 Has there been an infringement of the artistic works as alleged?
- 2 Do the works alleged to have been infringed benefit from copyright protection in Seychelles?
- 3 Does the facilitation of such infringement by a person amount to a criminal act? If so does it constitute conspiracy to defraud?

[14] These issues were certainly not addressed fully at the hearing of the application and yet are at the crux of this case. At the very least expertise on the technology involved could have been provided to the Court. In fact, a survey of cases in different jurisdictions indicates that the infringement of artistic works over the internet by protocols such as BitTorrent has not yet been satisfactorily resolved. It was also crucial to the success of the appellant's case that it be established that the respondent allows the downloading of BitTorrents or provides peer to peer services (P2P) and that users of its website are engaged in a criminal in Seychelles or elsewhere. Different jurisdictions have tried to tackle the liability of internet service providers or P2P services for hosting, transmitting or publishing user-supplied content that may infringe copyright of the content. There is no universal consensus on this issue and much of what has been decided is based on copyright legislation of individual states.

[15] Safe harbour or mere conduit statutory defences in the US and Europe, respectively, offer some immunity to intermediaries. In the Irish case of *EMI Records v UPC Communications Ltd* 2010 IEHC 377 Charleton J although sympathising with the music industry accepted that UPC, an internet service provider was a mere conduit with no liability for content travelling on its network. P2P intermediaries have escaped liability in some jurisdictions (vide in Canada - *Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 and *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] SCC 45) but not in others (vide *The Pirate Bay* trial in Sweden - *Prosecutor v Neij* (Stockholm District Court's 5 Division [Stockholms Tingsrätt] No B 13301-06)). Those cases analysed the meaning of *authorisation* by the intermediary to users violating copyright within the definition of copyright laws and individual state laws relating to complicity and conspiracy. The key point of contention is that operators must have *authorised* the users to commit copyright infringement [Emphasis added]. The Court cannot move on to consider the allegation of conspiracy to defraud if it cannot be established in the first place that the respondent's website authorises the violation of copyright laws in Seychelles as was the situation in the Italian case of *Public Prosecutors v Web masters* 0648038112 22/11/2012 (Italy).

[16] We have also considered the decision of the European Court of Justice in the case of *Scarlett Extended v SABAM* Case C-7/10 (European Court of Justice) in which it found that requiring an internet service provider to install a filtering system to monitor electronic communications of users:

would not be respecting the requirement that a fair balance be struck between the right to intellectual

property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.(Paragraph 53).

[17] In the *Scarlett* case, it is clear that the Court emphasised the fact that intellectual property rights were not absolute rights and that they had to be balanced against other rights such as free expression and privacy. Although the case involved internet service providers it is clear that it has similar implications for search engine operators or other websites that act as search engines. The decision in *Scarlett* which indicated the balancing act that must be carried out by courts will undoubtedly be considered in the appeal in the British case of *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268, another case in which the Court considered the responsibility of intermediaries when their end-users carry out infringing acts online, finding in favour of the rights holders of intellectual property.

[18] In the present case it is not clear whether the respondent's websites [www.torrentreactor.com](http://www.torrentreactor.com) and [www.torrentprivacy.com](http://www.torrentprivacy.com) are akin to *The Pirate Bay* websites or are solely advertisers for websites that permit the downloading of torrent for the BitTorrent protocol. No evidence has been brought in terms of what a user accessing the respondent's websites can do. The witness statements of James Mullan, Michael Smith and Claire Sugrue only indicate that the respondent's websites are not licensed to authorise the distribution of sound recordings owned by their companies EMI, Sony and Universal-island records respectively. The evidence of Paul Warren of the International Federation of the Phonographic Industry only confirms that no data is stored on the respondent's website and therefore the downloading of copyrighted material is not from the



respondent's website but from other websites advertised by the respondent. It is unclear from the evidence adduced by the appellant whether the respondent's websites are search engines or only advertising websites; whether accessing the websites enables or assists downloading of torrent files or whether they only advertise the provision of such services by other sites.

[19] This is important as search engines do not own content but only organise and provide access to material that is posted on websites generating revenue by selling advertising. In this context it is interesting to note that the EU Directive 2000/31/EC [37] states that providers of information services are not responsible for the information transferred. In order to be responsible, the service providers must initiate the transfer. It is certainly debatable whether the activity carried out by search engines involving the reproduction of copyright content that has been made available on the internet by third parties gives rise to infringement of such copyright. As pointed out above different cases in different jurisdictions have come to different conclusions. Further, P2P technology distributes large data files by breaking them up into small pieces and sending them over the internet to the requesting user. It has not been considered whether in terms of the technology involved it is possible to determine which of the small pieces were uploaded and downloaded legally.

[20] It should be noted that the Copyright Act, Cap 51 of the Laws of Seychelles does not cover foreign works (vide ss 6 and 7 of the Act), unless they are first made, performed or published in Seychelles. The Act does not provide a definition of copyright infringement, but it does in s 21(1) describe offences that might infringe copyright. It does not impose liability for authorising acts of copyright infringement nor does it contain any provision concerning

internet copyright infringement. Foreign works can be protected but they have to be registered for protection through a licensed agent in Seychelles. Infringement of copyright is indeed a criminal offence in Seychelles punishable to imprisonment for five years and to a fine of R 30,000 (s 21(6)). But in this respect, no evidence was tendered to show that the artists or their agents had registered their copyright in Seychelles. Jurisdictional issues in relation to both users of the website and the owners of copyright were also not addressed in this case.

[21] The appellant also contends that the respondent through its associated website [www.torrentprivacy.com](http://www.torrentprivacy.com) also derives income from providing anonymity for users to access sites that permit the downloading of copyrighted material. Anonymity on the internet is yet another challenge for internet crime but the issue in the present case is not whether it is illegal or not to provide or use anonymity for downloading material but whether the provision of such a service may or may not authorise the illegal downloading of copyrighted material. The appellant has been unable to demonstrate this necessary causal chain to the Chief Justice and to us.

[22] When the matter came for hearing before the Supreme Court on 18 July 2012, there was a discussion between counsel and the Chief Justice in reference to the procedure to be adopted for the hearing of the motion. This discussion emanates from the fact that although s 24 of POCA mandates the Chief Justice to make rules to regulate the procedure in such cases this has still not been done. Further, although the Court of Appeal in both the cases of *Financial Intelligence Unit v Mares Corp* (2011) SLR 404 and *Financial Intelligence Unit v Sentry Global Securities* (2012) SLR 331 made strong and urgent calls for the making of such rules, they are still

awaited. The Chief Justice at the hearing of the present case stated that that part of our judgment in respect to procedure “must be treated with respect but has no legal effect.” He further stated that the Court of Appeal:

was attempting to write rules of procedure which was not their business... We have to continue applying the law and hopefully the Court of Appeal will continue clarifying it. I hope it won't throw us in more confusion than it has done.

(verbatim transcript of P2 of Supreme Court proceedings of *FIU v Cyberspace*).

[23] With all due respect to the Chief Justice the procedure laid down in *Mares Corp* (supra) by the Court of Appeal was interpreted from the provisions of POCA, in an attempt to assist him in filling an important gap in this difficult area of law. This interpretation was clearly within the remit of this Court's jurisdiction. The Court can properly interpret laws - in fact that is its duty - and the interpretation of legislation consists of both the elucidation of its substantive provisions as well as its procedural provisions. This is especially so in this case since POCA expressly provides for the making of rules and five years nearly have elapsed since its enactment with no rules forthcoming. Further, the interpretation of the Court of Appeal of legislation is binding on the Supreme Court. Until the Rules are made, *Mares Corp* (supra) remains the law with respect to the procedure therein stated.

[24] It is an open secret that, cases taken under POCA run the risk of being dismissed for want of proper procedure or worse still for the lack of a fair hearing. Evidence in such cases which may help either

side in furthering its case is not being presented because of the uncertain and sometimes chaotic procedure adopted in the absence of strict rules of procedure. The procedure adopted in his particular trial is an example of this unhappy state of affairs.

[25] The present application was contested. The Court should have followed the procedures as indicated in POCA and on established precedent. It should have considered whether there was evidence for the reasonable belief of Mr Liam Hogan. If it so concluded, it should have then ruled on whether a prima facie case was made out. The whole thrust of the POCA legislation, as can be gleaned from a reading of s 4 is for the judge hearing the application to test the belief evidence of the applicant to see if a prima facie case is made out before shifting the onus of proof onto the respondent and to determine whether the burden of proof shifted onto the respondent has been satisfied. We said as much in both *Mares Corp* and *Sentry Global Securities*. The precedent of the Supreme Court of Ireland in the case of *F McK v GWD (Proceeds of Crime Outside the State)* [2004] 2 IR 470 is extremely useful on this point. We found it both proper and logical to turn to that Irish precedent given the fact that the Seychelles POCA 2008 is a replica of the Irish POCA 1996. In that judgment McCracken J identified the different functions of ss 3 and 8 (the equivalent of our ss 4 and 9 of the Act) in relation to the procedures to be adopted by the trial judge in considering an application when presented with belief evidence (see p 491 of his judgment). The procedure identified by McCracken J was as follows:

... the correct procedure for a trial judge in circumstances such as those in the present case is:

... He should consider the evidence given by the member or authorised officer of his belief and at the

same time consider any other evidence ... which might point to reasonable grounds for that belief;

if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised office is evidence;

only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the members or authorised officer under s. 8 and indeed the evidence of the other police officers;

he should make a finding whether this evidence constitutes a prima facie case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;

he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;

if he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;

if he is not so satisfied he should then consider whether there would be a serious risk of injustice.

If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case.

[26] The procedure as outlined by McCracken J could not be clearer. In *Mares*, we tried to resolve the procedure in contested cases by using the general provisions of the Seychelles Code Civil Procedure absent specific rules under POCA. It is eminently clear that there is logic and sense in that approach as in the absence of precise rules of procedure this would avoid a miscarriage of justice. POCA is without doubt a completely new area of law, the scope and limits of which have to be learnt. The Court is conscious of the very great potential unfairness of permitting hearsay evidence and belief evidence in any legal proceedings. Both are capable of gross abuse and this is why clear procedures should be used to safeguard against such abuse. In this case, the applicant had called a witness from the UK probably at great expense while the respondent's director has also flown in from Russia also at great expense. Neither had been served with notices to appear for cross-examination of their statements or affidavits. Both were sitting outside the courthouse when without notice they were called to be cross-examined in Court, in this case extraordinarily and without much explanation the respondent's witness was called before that of the applicant!

[27] This resulted in the respondent's case being made before that of the applicant contrary to the provisions of both the Civil Procedure Code and POCA. There had been no finding of a prima facie case made out by the appellant. We can only state in the politest of terms that had the rules been made or *Mares Corp* applied such a questionable procedure would not have occurred. It is not only contrary to current rules of procedure but also probably

unconstitutional as it breaches fair procedure requirements. The belief evidence of Mr Liam Hogan as contained in his affidavit was never challenged by cross-examination in the s 4 proceedings but the appellant's attorney Mr Galvin proceeded to first cross-examine Mr Fakhrudinov followed by the respondent's attorney, Mr Elizabeth cross-examining the applicant's witness, Mr Paul Warren.

[28] The procedure adopted at trial was not challenged by the appellant in his grounds of appeal or even by the respondent. The departure from established rules of procedure is in our view a serious case for concern. Seychelles has an adversarial system. Applications under POCA have to follow the established procedures in this jurisdiction which are similar to those of common law countries. We cannot put it any simpler than by saying the prosecution or the plaintiff goes first! The only exception to this general rule is in the procedure for personal answers contained in s 12 of the Seychelles Code of Civil Procedure. However, as things stand, even if we are to follow the correct method of procedure as we have established, this case falls at the first hurdle. Given the uncertainty in terms of criminal conduct resulting from the technology of the BitTorrent protocol the trial Judge was in no position to form a view as to whether or not the belief evidence was reasonable and whether a prima facie case was made out by the appellant. It was not even necessary to shift the burden of proof onto the appellant and to consider whether the respondent had on the balance of probabilities acquitted himself of the burden of proof.

[29] It is also evident that the respondent's director has not been truthful in his evidence as concerns the relationship between Cyberspace and Darton and the provenance of the money in the bank account of Cyberspace. However, it is our view that the appellant

produced a lot of material which only diluted the real issue of his application. It was unable to establish a prima facie case under s 4 of POCA. A simpler and more focussed application might have won the day before the trial Court. We are unable to come to a different conclusion to the Chief Justice and in the circumstances see no merit in any of the grounds of the appeal and dismiss them in their entirety with costs.

[30] We wish to place on record that we have found the extensive submissions of counsel extremely helpful in both the procedural and substantive issues raised in this case. The law established by POCA is still developing in Seychelles and the cooperation of the Bar and the FIU in this context is gratefully acknowledged. We are reassured to hear that rules of procedure under the Act are to be submitted to the National Assembly in the near future. It cannot come soon enough.