

FINANCIAL INTELLIGENCE UNIT v SENTRY GLOBAL SECURITIES LTD

(2011) SLR 129

B Galvin for the applicant
Respondents No 1 to 13 unrepresented
D Sabino for respondent No 14

Ruling delivered on 16 May 2011 by

EGONDA-NTENDE CJ: This is a ruling in respect of an application pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, hereinafter referred to as POCA, seeking an order of this Court to prohibit the respondents, or such other person specified in the order or any other person having notice of the order, from disposing of or otherwise dealing with the whole or any part of the property set out in this application or diminishing its value. Secondly, the application seeks a further order under section 8 of POCA, appointing Liam Hogan to be the receiver of all or part of the property set out in the application with such directions and to such terms as the Court may decide. Lastly that respondents no 1 to 13 bear the applicant's costs of these proceedings. The application is by way of notice of motion supported by an affidavit of Mr Liam Hogan.

Prior to the hearing of this application the applicant obtained an order of this Court for service of the respondents no 1 to 13 outside jurisdiction at the address the respondents provided to Barclays Bank (Seychelles) Ltd, respondent no. 14. All 13 respondents, save respondent no 4 who has an address in Spain, had the same address at Piso 8 Oficina 8-4, Edificio Colon, Paseo Colon, San Jose, Costa Rica. The return of the process server showed that the respondents were not present at the said address and it was now occupied by a funeral services company.

Mr Barry Galvin, counsel for the applicant, then applied that this application proceed as against respondent no 14, who was represented in court, and who was the party currently in possession and control of the property in question, notwithstanding the failure of service upon respondents no 1 - 13. The application proceeded on that basis.

The case for the applicant is founded on the affidavit of Mr Liam Hogan. In the month of April 2009 the deponent became aware of possible criminal conduct involving a Costa Rican criminal organisation by the name of Red Sea Management Ltd. Investigations were commenced in liaison with the American FBI and Costa Rican Police. It was discovered in the course of the investigations that Red Sea Management Ltd was a shell company that was operating with affiliates Sentry Global Securities Ltd and Sentry Global Trust Ltd in a 'pump and dump' operation whereby they fraudulently hyped the stock of a company, lured investors to purchase that stock, and as it rose in value, sold whatever stocks they had, coming out with a 'profit'.

Mr Hogan states on affidavit that Mr Jonathan R Curshen, respondent no 3, was the Chief Executive Officer of Red Sea Management Ltd and chief promoter of this

scheme perpetrated in the United States of America. In November 2007 civil action was taken by a number of allegedly defrauded investors against Red Sea Management Ltd seeking the return of US\$7.4 million dollars for a securities scam. On 31 July 2008 respondent no 3 and other persons were added as defendants. A default judgment was entered against Red Sea Management Ltd on 7 October 2008. Respondent no 3 was also charged at a United States District Court for securities fraud.

With regard to other activities of respondent no 3 Mr Hogan states in part;

9. The New York Securities and Exchange Commission New York Regional Office brought proceedings against Jonathan R. Curshen and one Bruce L Grossman alleging securities fraud detected by way of a "sting" operation which occurred between June 27th and July 2nd 2008. I believe that the said Jonathan Curshen has since pleaded guilty to one of the charges preferred against him. I say that in separate litigation between the Securities and Exchange Commission and C. Jones & Co. & others, including Jonathan Curshen, on the 6th of July 2009 the United States District Court in the District of Colorado entered a final judgment against Jonathan Curshen finding him liable for securities fraud, for acting as a promoter in an internet "pump and dump" scheme. The final judgment enjoins Curshen from violating certain sections of the US Stock Exchange Laws and bars him from participating in any penny stock offering. It also orders him to pay disgorgement of USD\$66,235 representing profits gained from his participation in the illegal scheme. The Court has reserved its judgment as to pre-judgment interest and a civil penalty.

The deponent then attached under LHM 1 true copies of the Securities and Exchange Commission complaint and other published information concerning the foregoing actions against Red Sea Management Ltd and Curshen. Mr Hogan does not attach a copy of the default judgment against Red Sea Management Ltd for the securities scam action for US\$7.4 million. In respect of the proceedings by the New York Securities and Exchange Commission, New York Regional Office in which Mr Hogan asserts that respondent no 3 pleaded guilty to one charge of the charges against him, he does not attach copies of the court documents that show that there is a plea of guilty on such charge and subsequent conviction on that charge by court. Mr Hogan refers to final judgment of the United States District Court of Colorado against respondent no 3 but no copy of such final judgment is attached.

LHM 1 contains 3 documents. There is a litigation release by the US Securities and Exchange Commission No 20712 of September 11 2008 which notifies that the Commission had charged 2 people including respondent no 3 before a federal court in Manhattan with market manipulation. Secondly there is a preliminary statement issued by the Commission for the plaintiff against, among others, respondent no 3. Thirdly, there is a criminal indictment against respondent no 3 filed on 15 January 2009 by the United States of America Federal Government. All the foregoing documents show that civil and criminal proceedings were initiated against respondent no 3 and no more than that. The affidavit of Mr Hogan asserts that judgment has come out in at least 3 of the proceedings against respondent no 3 but for unexplained reasons fails to put copies of such order before the Court, which are the best available evidence of matters that Mr Hogan has alleged against the

respondent no. 3. The applicant has indicated on oath that FIU is in collaboration with the FBI, a federal government law enforcement agency in the US. The availability of the said documents, documents ordinarily regarded as public documents in many jurisdictions, would ordinarily present no difficulty.

An examination of the respondents' addresses, save for respondent no 4, reveal that they share the same office address, email and phone/fax numbers and in the view of the applicant, their accounts are used for money laundering proceeds of criminal activity outlined in the affidavit of Mr Hogan. That may well be so. However, where there are allegations on the case for the applicant that there have been convictions or civil judgments obtained, in my view, it is incumbent on the applicant to put before the Court such evidence and then the link can be made that associates the respondents in those criminal activities.

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 the 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 for criminal offences and 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 or ought to be within reach.

The case against respondent no 4 is set out initially in paragraph 17 of the affidavit of the applicant, save for the fact that respondent operated out of Barcelona, Spain. For a pump and dump scheme perpetrated in the US, an action was brought by the Securities and Exchange Commission and a freezing order made for his assets and a prohibitory order made against any further dissipation of assets. The respondent's bank account with Barclays Bank (Seychelles) Ltd received money from Sentry Global Securities Ltd.

The evidence against respondent no 4 is in LHM 3 and LHM 4. LHM 3 is an application and affidavit for seizure warrant filed in the United States District of Eastern District of Virginia on September 11 2009. The subject-matter is for the seizure of funds in account no. #10596, held in the name of Sentry Global Securities Limited at Barclays Bank Seychelles Ltd Independence Ave, Victoria, Mahe, Seychelles. The results of that application are not provided. Neither is an explanation provided as to why the results of the application have not been made available to this Court.

LHM 4 is a litigation release from the US Securities and Exchange Commission dated August 15 2008. It is in respect of a civil action filed against Francisco Abellan in a Trans-Atlantic "pump and pump" scheme and reports it had obtained a freezing order against Abellan's assets and prohibiting him from further dissipating those assets, most of which were in multiple accounts in the principality of Andorra. The second document in this bundle is the complaint (equivalent to a plaint) by the Exchange Commission. The freezing and prohibitory order order which was presumably issued by the United States District Court Western District of Washington at Tacoma was not included in the bundle. Neither is the position known

with respect to the progress of this case and whether or not it is defended.

The applicant offers no explanation as to why a copy of the order of the Court in that proceeding is not part of the evidence he has put forth in this case. As it were, only initiating documents for different actions have been put forth without the results of such proceedings being provided to this Court. A litigation release is a press statement. However correct it may be I except, investigations to go beyond press releases.

The sum total of the evidence before the court at this moment is able to show that proceedings were begun against respondents no 3 and no 4 separately for different 'pump and dump' schemes in respect of which it is alleged they used respondents no 1 and no 2 as vehicles for laundering proceeds from those schemes. In respect of respondent no 3 it is alleged a civil judgment and criminal conviction have been obtained against him in respect of those schemes. No copy of such judgment or conviction has been laid before this Court. With respect to respondent no 4 other than the initiating documents for two different actions, nothing more has been put before this Court.

Apart from the absence of orders of the respective courts in which those actions were initiated, lifting copies of proceedings from one court in a foreign court to Seychelles, I would have expected some certification of some kind by a competent authority for those documents to have efficacy in proceedings before this Court, in accordance with section 28 of the Evidence Act as amended by Act no 16 of 1996. This is not the case with the documents contained LHM 1, 3 and 4.

In the result I am satisfied that presently the applicant has not attained the evidential threshold in the circumstances of this case to permit a section 4 interlocutory order to be made. This application is dismissed with no order as to costs.