

DAY v ZIJIN
(2011) SLR 269

B Hoareau for the applicant
M Kumar, State counsel, for the respondents

Ruling delivered July 2011 by Egonda-Ntende CJ:

David Day, the applicant in this matter, is seeking an order of this court under section 4(3) of the Proceeds of Crime (Civil Confiscation) Act, hereinafter referred to as POCA, to vary its order of 21 February 2011 and order the release of the equivalent of British Pounds Sterling £100,000 from the sums of money now held by respondent no 3 as a receiver thereof. The ground of this application is that the applicant has an interest in this sum of money as he parted with this money as a victim of a fraudulent scheme.

The application is not opposed by respondent no 2 and 3. In fact it is actively supported by the said respondents with an affidavit of Mr Declan Barber, the Director of the Financial Intelligence Unit, filed in support of this application. Mr Declan states on oath that Mr Day's money can be directly traced to respondent's no 1 's bank account and that it is in fact part of the sums that were the subject of the section 4 order of 21 February 2011.

Section 4(3) of POCA 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 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.

Mr Basil Hoareau, counsel for the applicant, was of the view that both limbs of section 4(3) (a) and (b) of POCA applied to the circumstances of this case. I do not agree. I find it difficult to fit this case in the first limb under section 4(3)(a). In my view section 4(3)(b) is more appropriate. I take the view that the money which is already the subject of an interlocutory order is in fact, on the basis of evidence available at the time of making the order and now, the proceeds of crime held by respondent no 1. This character does not change merely because a victim is available.

However where a victim is able to come forward and show that he/she was the victim of the criminal activity that led to his/her deprivation of property, the property now the subject-matter of an interlocutory order, it would be an injustice, not to restore the said property to him/her. I would therefore allow this application under section 4(3)(b) of POCA, and vary the interlocutory order to the extent that allows the receiver to put back into the possession of the applicant the funds that belong to him, and which have now been shown to be part of the property, subject to this Court's earlier order of 21 February 2011.

The receiver is authorised to remit to the applicant the said sum of £100,000 as it is the just and equitable solution to the quandry in which the applicant found himself. I am satisfied that there is no evidence to indicate that he had knowledge of the criminal activity that led to his property becoming mixed up with the specified property, the subject of the interlocutory order. Neither is there any indication that suggests that he was negligent.

The application is accordingly allowed.