

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE No POCL 18 of 2020

IN THE MATTER OF an application for a Property Freezing Order, pursuant to section 82 of the  
Proceeds of Crime Law (2020 Revision)

BETWEEN



THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MASSIMO ANDREA GIAVINA BIANCHI

RESPONDENT

IN CHAMBERS

BEFORE: Hon. Mrs. Justice Margaret Ramsay-Hale

Appearances: Ms. Toyin Salako, Crown Counsel I (Financial Crime and International  
Cooperation) for the DPP  
Mr. Jonathon Hughes of Samson Law for the Respondent

HEARD: 23 June 2020 and 2 July 2020

Date draft circulated: 9 September 2020

*The Court also considered oral submissions for costs made by Mr. Hughes on the 22<sup>nd</sup> September 2020, the written submissions of Ms. Salako dated the 27 September 2020 and 13 October 2020 and Mr. Hughes's written reply dated 13 October 2020*

Final Judgment Delivered: 23 October 2020

---

JUDGMENT

---

Introduction

1. This is the decision on the application made by the Director of Public Prosecution (the "DPP") for a property freezing order pursuant to section 82 of the **Proceeds of Crime Law (2020 Revision)**



("POCL") to freeze property under the control of the Respondent, Massimo Bianchi, situate in the Cayman Islands, on the ground that the property is, or includes, recoverable property. It is supported by the affidavit of DC Sarah Mencner of the Royal Cayman Islands Police service, presently attached to the Financial Crime Unit ("the FCU").

### Background

2. Mr. Bianchi is an Italian citizen and Brazilian businessman who owns and operates two Brazilian companies relevant to the application before the Court: Trans Sistemas de Transportes SA ("TTRans") and Mottarone Serviços de Supervisão, Montagens e Comércio Ltda ("Mottarone"). He is also the principal Director and sole shareholder of Dartford Resources S.A., ("Dartford") a company registered in the British Virgin Islands ("BVI").
3. In March 2016, Mr. Bianchi invested US\$1,375,000 in an insurance policy managed by Investors Trust Assurance SPC ("ITA") in the Cayman Islands. The funds were transferred from twenty-two accounts held by him at HSBC Private Bank (Monaco) ("HSBC") SA. Mr. Bianchi advised ITA, in response to their due diligence inquiries, that the funds were investments formerly held in HSBC. He also provided them with what he said were his Brazilian tax records for 2016/2017. According to those records, Mr. Bianchi had a non-taxable income of R\$318,330.94 (US\$79,582.74) and a taxable income of R\$10,095.37 (US\$2,523.84), a total of R\$328,425.37 (US\$82,106.58) in that year. ITA established an Investment Portfolio account, number TSPW006107, in the name of Mr. Bianchi's company, Dartford Resources SA.
4. At various dates in 2017, 2018 and 2019, Mr. Bianchi requested that ITA transfer funds out of the account. A total of US\$635,000 of the original sums invested was transferred to Banque J Safra Sarasin (Monaco) S.A. and a further US\$87,000 to accounts held in Global Custody & Clearing Ltd in Bermuda. At May, 2020 only US\$453,000 remained on the account at ITA.
5. In response to an October 2018 request by Mr. Bianchi that funds be transferred, ITA undertook further customer due diligence checks which resulted in the discovery that Mr. Bianchi was the subject of an indictment in Brazil in relation to offences of bribery, corruption, tax evasion and money laundering.
6. In May 2019, in response to another request by Mr. Bianchi that funds be transferred, ITA undertook further checks which revealed open source reporting that on 23 March 2015, Mr. Bianchi and thirty-two others had been indicted in Brazil for money laundering, corruption, tax evasion, organized and financial crimes.

### The FCU Investigation

7. This information was relayed to the RCIPS which commenced a domestic money laundering investigation into Mr. Bianchi in October 2019 in relation to the foreign predicate offences of bribery and money laundering.



8. The FCU's investigations revealed that Mr. Bianchi and his company, TTRans, were alleged to be part of a cartel engaged in bidding for subway and commuter rail works and maintenance contracts in the Brazilian state of Sao Paulo between 1998 and 2008, in contravention of Brazilian competition laws. The allegations were the subject of administrative proceedings instituted in March 2014 by the Brazilian Administrative Council for Economic Defence ("CADE"). The Minutes of the Administrative Tribunal's decision dated 8 July 2019 were provided to DC Mencner and is exhibited to her affidavit. The document records<sup>1</sup> that TTRans and Mr. Bianchi each received an administrative fine for their role in the cartel's operations.
9. The police inquiries also confirmed that Mr. Bianchi and others were the subject of a criminal proceedings commenced in March 2015.
10. The investigations prompted an application by the DPP to restrain the funds held by ITA to prevent their dissipation in order that any later confiscation order could be satisfied. The application was granted by Richards J on 20 November 2019 who made a Restraint Order which was extended on 18 February and 19 May 2020.
11. On 8 May 2020, the Crown received from Mr. Marcelo Batlouni Mendroni, a state prosecutor for Sao Paulo, a table of the criminal charges that had been brought against Mr. Bianchi in March 2015. Mr. Mendroni confirmed that all the charges related to public procurement fraud in connection with the award of contracts for the Sao Paulo metro and rail works and maintenance.
12. On 19 May 2020, Mr. Mendroni provided copies of the indictments to the Crown. The indictments are in narrative form and run to 221 pages in Portuguese which had not been translated by the Crown at the time of the hearing before Richards J. A translation was still not available at the hearing of the Crown's application for a freezing order. Mr. Mendroni also advised that one of the five indictments had been discontinued because of Mr. Bianchi's age as he is over 70, that the others remained before the criminal courts.
13. Mr. Hughes who acts for Mr. Bianchi had, in the meantime, filed and served an affidavit sworn by Mr. Bianchi's Brazilian attorney, Mr. Rogério Bassit Sallum on the Crown, seeking to discharge the Restraint Order. In his affidavit, Mr. Bassit Sallum averred, *inter alia*, that the funds in the Cayman Islands represented Mr. Bianchi's income from Mottarone, a legitimate business enterprise not subject of any criminal investigation and exhibited divers documents to support the assertion.
14. The Crown provided a copy of Mr. Bassit Sallum's affidavit to Mr. Mendroni who, in turn, sent two documents to the Cayman authorities which related to Mottarone. These documents are exhibited to DC Mencner's affidavit. As understood by DC Mencner, Mottarone was established

---

<sup>1</sup> Para 563 on page 107 of the Bundle and para 578 on page 108 respectively

in 2017. Referring to the company registration document received - the “*Ficha Cadastral Completa*” - she states that it shows that Mottarone was not incorporated - “*data da Constituicao*” - until 6 April 2017, after criminal charges were filed against Mr. Bianchi. Although the officer notes that the same document also states that the Mottarone had been engaged in activity - “*inicio de atividade*” - since 1998, she does not draw any conclusions from that fact.

15. DC Mencner notes further that, although the document records that the company operates an electrical installation and maintenance business, a property rental business and has capital of R\$7,476,991.00, a sum in excess of US\$1 million, the Brazilian authorities have been unable to find any records of any company employees.

### These Proceedings

16. Having been advised by the Brazilian prosecutor that Mr. Bianchi’s criminal matters may not be resolved for several more years, the Crown considered that it would not be appropriate to seek his extradition to face criminal charges here. They allowed the Restraint Order to lapse and now make this application for a Property Freezing Order to freeze the funds in the ITA account pending an intended application by the DPP to recover the property under section 96 of the law.

### The Law

17. The application is made under Part IV of the **POCL** which deals with the civil recovery of proceeds of unlawful conduct. Section 82 provides:

*“82.(1) Where the Director of Public Prosecutions may take proceedings for a recovery order in the Grand Court, he may apply to the court for a property freezing order (whether before or after starting the proceedings).*

*(2) A property freezing order is an order that—*

- (a) specifies or describes the property to which it applies; and*
- (b) subject to any exclusions (see section 84 (1) (b) and(2)), prohibits any person to whose property the order applies from in any way dealing with the property.*

*(3) An application for a property freezing order may be made ex parte if the circumstances are such that notice of the application would prejudice any right of the Director of Public Prosecutions to obtain a recovery order in respect of any property.*

*(4) The court may make a property freezing order on an application if it is satisfied—*

*(a) That there is a good arguable case-*





- (i) that the property to which the application for the order relates is or includes recoverable property; and
- (ii) that, if any of it is not recoverable property, it is associated property; and

(b) that-

- (i) the property to which the application for the order relates includes property alleged to be associated property; and
- (ii) the Director of Public Prosecutions has not established the identity of the person who holds it and the Director of Public Prosecutions has taken all reasonable steps to do so.”

18. In *Director of the Assets Recovery Agency v Szepietowski and Others* [2007] EWCA 766, the Times 21 August 2017 Waller LJ held that the law requires that,

- (i) The Applicant must establish a good arguable case that a certain kind of unlawful conduct occurred; and
- (ii) A good arguable case that property was obtained through that kind of unlawful conduct.

19. What is a “good arguable case” is not defined in the Law. In *The Neidersachsen* [1983] 2 Lloyd’s Rep 600<sup>2</sup> at 605A, it was held that a good, arguable case related to the merits of the substantive claim, “a case which is barely more than capable of serious argument and yet not necessarily one that the Judge believes to have a better than 50% chance of success.”

20. The case of *Serious Crime Agency (“SOCA”) v Khan* [2012] EWHC 3255 (Admin) established the principle that there may be a good arguable case notwithstanding there are extensive factual disputes and further investigations are required.

### **The Crown’s Submissions**

21. Ms. Salako submits<sup>3</sup> that there is a good arguable case that Mr. Bianchi has engaged in criminal conduct in the circumstances where five criminal indictments have been laid against him for fraud and bribery in the procurement of large multi-million government contracts and the administrative body, seized of the complaints of cartel conduct on which the criminal charges are based, has found the complaints proved and imposed fines on both Mr. Bianchi and his company, TTRans.

---

<sup>2</sup> Not cited by Counsel

<sup>3</sup> See written submissions at paragraph 7

22. Crown Counsel also submits that there is a good arguable case that the funds in issue were obtained through that unlawful conduct. She relies on the fact that the transfers from HSBC to ITA were made after the criminal indictments were preferred. This, she contends, gives rise to an inference that Mr. Bianchi was attempting to remove the funds from scrutiny by the Brazilian authorities because they derived from his criminal conduct. Crown Counsel submits further that Mr. Bianchi's attempt to liquidate the entire policy strengthens the inference that the funds are proceeds of criminal conduct.
23. Ms. Salako also relies on the failure of Mr. Bianchi to notify ITA of the Brazilian proceedings when he opened the account or to identify Mottarone as the source of funds in response to ITA's due diligence inquiries. Relying on the information received from the Brazilian prosecutor, Ms. Salako submits that Mottarone is not a legitimate company as it has no employees and has not declared any activities and that it was not, in any event, incorporated until after the criminal proceedings were instituted and after the funds were transferred to the Cayman Islands and so cannot be the source of the funds in issue.
24. Crown Counsel's submission conclude with the assertion that, as Mr. Bianchi has no known legitimate source of income and is involved in criminal activity, the inference to be drawn is that the funds are the proceeds of that criminal conduct.

#### **The Respondent's case**

25. Mr. Bianchi's response to the application for the Restraint Order and now, is that he is a legitimate businessman who has been operating in Brazil for some 45 years. He contends, as stated above, that the funds subject of the application for a freezing order represent profits earned by Mottarone and paid to him as dividends.
26. With respect to the Crown's suggestion that Mottarone was only incorporated after the proceedings were launched in an attempt perhaps to launder proceeds, obscure the source of the funds or disguise illegal profits, Mr. Hughes submits that the Brazilian Prosecutor assisting the Crown misread the document and that, in fact, the company was already in existence before 6 April 2017. What happened on that day was that a change in the registered format of the company was made. He relies on Mr. Bassit Sallum's evidence in support of that submission which, Mr. Hughes says, should be preferred, as it is supported by the endorsements at the bottom of the first page of the document which reads:



ARQUIVAMENTOS (Filed)

SESSÃO (Session) – 06.04.2017

TRANSFORMADA (Transformation) de NIRE (Format of Registered Company)

27. In further support of his evidence that Mottarone was established before 2017, Mr. Bassit Sallum exhibits the Company's *Proof of Registration and Regularity*,<sup>4</sup> a document which is filed with the Brazilian Federal Reserve. The document shows an incorporation date - *data de avetura* - of 12 May 1998, some 22 years ago and long before the criminal investigations into the cartel commenced in Brazil.
28. Mr. Bassit Sallum also exhibits Mottarone's balance sheets for the years 2014 to 2019<sup>5</sup> which show the company was trading at the time the administrative proceedings were instituted. With respect to the Crown's suggestion that Mottarone was not a legitimate company as it had no record of employees, Mr. Bassit Sallum's evidence is that Mottarone conducts its business by way of outsourcing and consequently does not have any direct employees.
29. Mr. Hughes also draws the Court's attention to a number of other documents exhibited by Mr. Bassit Sallum intended to establish that Mr. Bianchi had an income from Mottarone and it was these funds that had been invested in the ITA policy.
30. The first is a declaration prepared by Mr. Bianchi's accountant, Mr. Ayrton Caielli, who states that the following dividends were paid to Mr. Bianchi by Mottarone for the years 2014 to 2019 as follows:
- |                        |                        |                                     |
|------------------------|------------------------|-------------------------------------|
| 2014: R\$ 1,650,868.14 | 2015: R\$ 679,000.00   | 2016: R\$ 1,282,859.36              |
| 2017: R\$ 318,000.00   | 2018: R\$ 2,441,000.00 | 2019: R\$ 1,925,967.21 <sup>6</sup> |
31. These, Counsel submits, are supported by Mottarone's Income Tax Returns for the years 2014-2019.<sup>7</sup> The documents show that Mottarone's declared its tax exempt and non-taxable income ("*rendimentos isentos e nao tributaveis*") and that the amounts declared in each year mirror the amounts said by his accountant to have been paid to Mr. Bianchi as dividends, as set out above.
32. Mr. Bassit Sallum also exhibits Mr. Bianchi's *Declaration of Brazilian Assets Abroad*,<sup>8</sup> a declaration required by the Brazilian Government, for the years 2015 to 2019. The 2015 Declaration shows that Mr. Bianchi declared that he held the sum of US\$980,755 on deposit in Monaco. In the Declaration for 2016, monies held in the Cayman Islands were declared. In the 2017 iteration, Mr. Bianchi declared his interest in Dartford Resources SA with assets of US\$1,098,760.38. In his 2018 Declaration, Mr. Bianchi again declared his interest in Dartford Resources with assets of US\$917,939.69 and a further US\$105,500 on account with Ansbacher (Bahamas) Ltd. In 2019, Mr. Bianchi declared assets abroad of US\$1,500,689.84.

<sup>4</sup> RBS/ 6

<sup>5</sup> RBS/3

<sup>6</sup> RBS/1

<sup>7</sup> RBS/2

<sup>8</sup> RBS/4





33. In Mr. Bianchi's personal Income tax return for the 2018 financial year, he declared profits and dividends of R\$2,444,100.00 paid by Mottarone. Mr. Bianchi also declared his interest in TTRans, his ownership of Mottarone and its capital value of R\$7,476,991.10 as well as his ownership of Dartford, with a declared value of R\$ 1,235,576.92 in 2017 and R\$1,644,182.32 in 2018. He also declared the monies held on deposit in Ansbacher (Bahamas) Limited in the amount of R\$398,135 or US\$105,500 equivalent.
34. Mottarone's *Federal Tax and Clearance Certificate* is also exhibited which, on its face, suggests that the company is in good standing with the Brazilian Federal Reserve and does not owe, *inter alia*, any federal taxes.
35. With respect to the administrative proceedings, Mr. Bassit Sallum's evidence is that the decision of the administrative tribunal is being challenged as the finding made against TTRans is inconsistent with the *viva voce* testimony of the informant who provided the evidence of the cartel. According to Mr. Bassit Sallum, the informant told the tribunal that "*TTRANS era uma empresa de dificil entendimento*" which translates as "*TTRANS was a company that resisted agreements*" and he expressly affirmed that TTRans never participated in any negotiations with the cartel. On that basis a motion for clarification in relation to the opinion issued is pending before the CADE. Mr. Bassit Sallum says further TTRans was hired by some of the other contractors to perform parts of the projects and did not engage in cartel behaviour.
36. He also highlights the fact that there have not been any criminal convictions to date, despite the age of these allegations. With respect to the charges brought against Mr. Bianchi, Mr. Bassit Sallum sets out what the true position is to the best of his knowledge. I summarise his evidence in this regard as follows:
- a. Case No. 0026430-48.2014.8.26.0050: On December 31, 2014, the first instance court found that the charge was, *inter alia*, time-barred by the statute of limitations and the appeal filed by the Public Prosecutor was dismissed.
  - b. Case No. 0026497-13.2014.8.26.0050: On April 7, 2014, the first-instance court rejected the information on cartel conduct and held that the conduct was related to bid rigging. The charge was ultimately dismissed by an appeals court on the ground that it was statute-barred and on February 11, 2020, that decision became un-appealable.
  - c. Case No. 0026495-43.2014.8.26.0050: On March 31, 2014, the first instance court dismissed the information and considered the defendants' "*punishability*" to be "*extinct*". On appeal, the Court ordered the lower court to continue the criminal action in relation to the charge of cartel conduct. On June 19, 2019, the first-instance court rendered a new judgment and held that the "*punishability*" of all defendants was extinct. With respect to Mr. Bianchi, the court



accepted that the statute of limitations applied even before the information was received as the limitation period was half as long in his case as he was over 70 years old. The prosecutor's appeals were dismissed by the final court of appeal.

- d. Case No. 0032135-90.2015.8.26.0050: On December 14, 2017, that court accepted the information in relation to the offence charged under section 90 of Law 8666/93<sup>9</sup> but considered the "punishability" of all the defendants extinct in relation to the offence described in Section 96 of Law 8666/93 by virtue of the statute of limitations. The Prosecutor's appeal was dismissed.
- e. Case No. 0026496-28.2014.8.26.0050: This matter is currently awaiting assignment to a Court but that he expected that the outcome will follow that in the other four cases and that Mr. Bianchi will not be convicted of any offence.

### The Crown's Response

37. In response, Ms. Salako notes that Mr. Bianchi did not provide any document to ITA which mentioned Mottarone nor did he list Mottarone as the source of funds even though he was obliged to make such disclosure and invites the Court to speculate whether he failed to mention Mottarone to shield the company from more critical inspection. Ms. Salako notes further that not one of the transfers to ITA originated from Mottarone.
38. Ms. Salako observes that the tax return produced by Mr. Bianchi in these proceedings bears no resemblance to the document he produced to ITA. She questioned why the document produced to ITA was not exhibited in these proceedings and suggests that it has not been produced because Mr. Bianchi cannot produce it, which should put its authenticity in doubt.
39. Ms. Salako also refutes the suggestion that Mr. Bianchi has complied with his obligations to the Brazilian government to declare his assets abroad as he failed to disclose his assets in the Cayman Islands.

### Discussion and Decision

40. Recoverable property is defined in section 123 of the **POCL** as property obtained through unlawful conduct. The Law provides further at section 77 that conduct which occurs in a country outside the Islands and is unlawful under the criminal law of that country and would, if it occurred in the Islands, be unlawful under the criminal law of the Islands, is unlawful conduct.
41. While DC Mencner has given evidence of open sources reporting that Mr. Bianchi and 32 others were charged with of money laundering, corruption, tax evasion, organized and financial crimes and stated that the FCU are investigating the foreign predicate offences of bribery and money

---

<sup>9</sup> The CADE report identifies this offence as "fraud in the bidding": see para 41, page 9



laundrying, the actual offences with which Mr. Bianchi has been charged have not been placed before the Court. I am sympathetic to the position the Crown found itself in, having been presented with 221 pages of criminal indictments too close to the date of the hearing to be translated, but it means that the only evidence before the Court of the charges actually laid against Mr. Bianchi is that of Mr. Bassit Sallum, and his evidence does not support the Crown's assertions that Mr. Bianchi was charged with either money laundering or bribery.

42. The evidence of Mr. Bassit Sallum is that charges brought against Mr. Bianchi were, as set out in his paragraph 17 (a) to (d), relate to 'cartel conduct,' which in the CADE report is said to be a "crime against the economic order"<sup>10</sup> an offence under a specific criminal statute in Brazil not mirrored in our law, and 'bid rigging' or 'fraud in the bidding' process for the award of tenders for the subway and rail works.<sup>11</sup>
43. In the absence of any allegation that the bid rigging process involved bribery of a public official - and I was not referred to any specific allegation of bribery by the Crown nor did one appear in the CADE report - I would hold no good arguable case of bribery has been established. That said, insofar as bid rigging involves a fraud in the bidding process for the tender and award of government contracts, the conduct in which Mr. Bianchi and others were engaged would arguably amount to a conspiracy to defraud the government in our law.
44. In the premises, I hold that there is a good arguable case that a certain kind of unlawful conduct had occurred.
45. In my judgment, however, the Crown has not established any nexus between the unlawful conduct and the funds in the Cayman Islands. It is not enough to say that a defendant is guilty of unlawful conduct. The statute requires that some causal link between the conduct and the property be shown and, for the reasons I set out below, the Crown has failed to establish a case which is even "barely capable of serious argument" that the funds were obtained in the cartel scheme.
46. The Crown relies on the fact that the funds were transferred while the criminal proceedings were ongoing in order to conceal the funds from the Brazilian government but, as set out in paragraph 27 above, Mr. Bianchi made Declarations of Brazilian Capital Abroad between 2014 and 2019 in which he disclosed his assets held abroad, including funds held in Monaco, in the Cayman Islands<sup>12</sup>, in the BVI (Dartford) and in Ansbacher (Bahamas) Ltd.
47. Ms. Salako seeks to rely on the fact that Mr. Bianchi did not declare to the Brazilian authorities that he held the policy at ITA but, as a matter of law, he did not; the policy was held by Dartford.

---

<sup>10</sup> At para 39 page 9

<sup>11</sup> supra at footnote 3

<sup>12</sup> Defence Bundle page 87



Mr. Bianchi did, however, declare his 100% beneficial interest in Dartford and, therefore, in its assets, wherever those assets are held. I can see no reason for him to go further and declare that Dartford, which is a person in its own right, held investments in the Cayman Islands and no reason for me to hold that his failure to do so supports a finding that there is a good arguable case that the funds were obtained through unlawful conduct.

48. The Tax Returns exhibited disclose that a source of Mr. Bianchi's annual income is dividends paid to him by Mottarone and that he receives a dividend in every year. Although DC Mencner states in her affidavit that her initial investigations revealed that the information in Mr. Bianchi's Tax Returns "*is not in accordance with the official declarations made to the Brazilian authorities*", those competing declarations have not been produced.
49. Mottarone's tax returns have also been exhibited, as well as its balance sheets, its "*Proof of Registration and Regularity*" documents, setting out the date of the company's incorporation and its activities, and its tax clearance certificate. Taken together the documents undermine the Crown's submission that Mottarone is a sham company which was not, in any event, incorporated until 2017 and chips away at another plinth on which the Crown seeks to build its case, which is that Mr. Bianchi had no other source of income than the TTRans, the company engaged in public procurement fraud.
50. The tax return which Mr. Bianchi provided to ITA discloses on page 2 of 8 that Mr. Bianchi had received dividends from Mottarone in the sum of R\$318,000.00, contrary to Ms. Salako's submission that Mr. Bianchi did not produce any document to ITA in which Mottarone was mentioned.
51. Crown Counsel also submitted that the tax return Mr. Bianchi provided to ITA bears no resemblance to the tax return exhibited by him in these proceedings. It is right that the tax returns are for different years but the format of each tax return is the same. Importantly, what the tax return exhibited in these proceedings confirms is the correlation between Mottarone's non-taxable income<sup>13</sup> and the dividend it pays to Mr. Bianchi <sup>14</sup> Nothing turns on the fact that the return provided to ITA was not provided to the Court.
52. Ms. Salako's further submission, that Mr. Bianchi did not disclose Mottarone as the source of the funds transferred from Monaco takes the matter no further: Mr. Bianchi disclosed the source of funds as investment accounts held in HSBC Monaco - which they were - and disclosed his personal source of income as, *inter alia*, deriving from dividends and profits paid to him by Mottarone.
53. The Crown's case rests primarily on the timing of the transfer of the funds and the assertion that Mr. Bianchi had no legitimate source of income. The one is insufficient and the other cannot be

---

<sup>13</sup> Defence Bundle page 38

<sup>14</sup> *Ibid* page 111

maintained. The Crown having failed to show a good arguable case that the funds were obtained through unlawful conduct, the Crown's application for a freezing order is dismissed.

## Costs

54. Subsequent to the circulation of the draft judgment, the Court received submissions on costs from the parties. The general jurisdiction of the Court to award costs in civil proceedings does not apply in applications for property freezing orders. The power to award costs in restraint and like proceedings is set out in section 198 of the *POCL* which provides that,

### *"Costs*

*198. Notwithstanding any other law or rule of court, costs shall not be awarded against the Director of Public Prosecutions-*

*(a) where, under this Law or any other law*

*...*

*...*

*(iii) the Director of Public Prosecutions has made an application for an order under Part IV;*

*and the Grand Court determines that it will not make the order concerned;*  
*or*

*(b) where the Grand Court has varied or discharged an order made under this Law,*

*unless it is shown to the satisfaction of the Grand Court that the Director of Public Prosecutions' application in relation to the order concerned was made in bad faith or was frivolous or vexatious."*

55. Mr. Hughes submits that the application was frivolous in the circumstances where (i) the only evidence offered by the Crown to demonstrate that the funds in ITA were recoverable property was the fact that Mr. Bianchi and his company TTRans were subject of criminal prosecution in Brazil and that the funds were transferred from Monaco to the Cayman Islands a year after those proceedings were instituted, evidence which, the Court has found, fell well below the threshold required and where (ii) before the proceedings were instituted, the Crown had sight of Mr. Bassit Sallum's affidavit and annexures, which demonstrated that Mr. Bianchi had a legitimate source of income, and also had in their possession the tax return Mr. Bianchi provided to ITA in which he identified Mottarone as the source of his income.
56. Counsel invites the Court to accept the definition of 'frivolous' as it appears in the decision of Court of Appeal in *R v Taylor* [1979] Crim LR 649 and find that the application was frivolous as being so unmeritorious that there was no realistic prospect of it succeeding after full argument.



57. Ms. Salako, in response, submits that the application was not frivolous as the Crown was investigating a complaint made by a financial institution as to the source of their client's funds and Mr. Bianchi remains under investigation and pending prosecution in Brazil. She asserts that the Crown relied in good faith on the information it received from the Brazilian authority that Mottarone was not a legitimate business and says further, that Mr. Bianchi understood that the investigation concerned the source of the funds yet he failed to provide the material that treated with that issue until 29 June 2020. Mr. Hughes, however, points out that exhibits 1 through 5 of Mr. Bassit Sallum affidavit (see paras 28-32 *supra* and footnote 5 to 8 on page 7), which identified Mottarone as Mr. Bianchi's source of income, were served on the Crown before the proceedings were instituted.
58. Ms. Salako also asks the Court to consider that the making of adverse cost orders against the Crown, simply because an application for a property freezing order was not successful, may have a chilling effect on what should be the prosecution's robust approach to its duty to discharge its responsibilities ancillary to its duty to enforce the criminal law against the Crown.
59. I agree with that submission, which is why the Legislature allows for such costs to be awarded only where the application which was not successful is made in bad faith or was frivolous or vexatious. In the instant case, I am persuaded by the submissions made by Mr. Hughes on Mr. Bianchi's behalf that the application was frivolous. I therefore award the cost of these proceedings to Mr. Bianchi on an indemnity basis.
60. I make no order in respect of the earlier proceedings for a Restraint Order as I was not seized of that matter.

DATED THE 23<sup>rd</sup> OCTOBER 2020

  
RAMSAY-HALE J  
Judge of the Grand Court

