

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN IN GEORGE TOWN, GRAND CAYMAN
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5 CAUSE NO. POCL 5 of 2012
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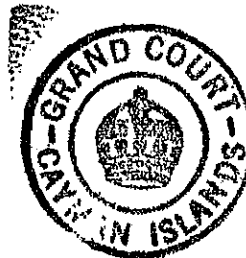
8 IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL FOR
9 A RESTRAINT ORDER PURSUANT TO SECTION 45 OF THE PROCEEDS OF
10 CRIME LAW 2008
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13 AND IN THE MATTER OF EDUARDO SWABY-GUTIERREZ
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18 **Appearances:** Mr. Michael Snape of the Office of the Director of
19 Public Prosecutions for the Crown
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22 **Before:** Hon. Justice Henderson
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25 **Heard:** April 18, 2012
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27 **RULING**

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29 1. On this application under section 28(1) (b) of *The Proceeds of Crime Law, 2008*,
30 the Crown seeks a reconsideration of a confiscation order which is available if
31 there is evidence which was not available to the Attorney-General on the relevant
32 date". The question is what is meant by the word "available" in that section.
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34 2. The defendant Eduardo Swaby-Gutierrez has been convicted of a drug offence.
35 No application for a confiscation order was made at the time of the conviction as
36 the prosecutor had no knowledge of any assets of this defendant which would
37 qualify as recoverable property. The trial was adjourned after the matter was part

1 heard. In this intervening period, customs officers searched the defendant's
2 residence and seized approximately CI \$8,000 in cash. At the time, these officers
3 were investigating a customs violation involving the failure to pay import duty.
4 They were not acting in aid of the police with respect to the drug case or with
5 respect to any other criminal investigation. They did not notify the Attorney
6 General's office of their seizure. Indeed, they may not have known of the criminal
7 prosecution at all.

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9 3. The question then is whether the evidence of the seizure by the customs officers
10 was "available" to the Attorney General on the date his prosecutor decided not to
11 make a confiscation application.

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13 4. It is clear that the reference to the Attorney General is not meant to refer to him as
14 an individual. It must be obvious that (as the court in *H.M. Advocate & Wright*,
15 2007 SLT 597 in effect held) the reference to the Attorney General must include
16 each of his agents and employees. It cannot be right that evidence is not
17 considered available to the Attorney General simply because his agent (the
18 individual prosecutor in the case) does not know of it. The reference to the
19 Attorney General is to the office, not the person.

20
21 5. On the other hand, evidence is not available to the Attorney General simply
22 because someone somewhere in government is aware of its existence. That
23 construction is too restrictive and out of step with the purpose of the legislation,

1 which is intended to remove the profit incentive to commit crimes having a
2 financial reward.

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4 .6. I consider that the legislation was intended to mean that a reconsideration may be
5 held if the missing evidence was, in all of the circumstances, reasonably available
6 to the Attorney General or to any of his agents or employees.

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8 7. Could anyone in the Attorney General's office be reasonably expected to have
9 known of a customs investigation regarding unpaid duty and its resulting seizure?

10 I am satisfied that the answer is "no". I will therefore grant the order.

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12 8. I leave open the question whether it will be reasonable for the Attorney General to
13 be unaware of evidence seized by the police from a defendant in a separate,
14 unrelated criminal investigation.

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16 Dated this 18th day of April, 2012

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Henderson, J.

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Henderson, J.
Judge of the Grand Court

