18.8.00
Sanderson

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 767 of 1999

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL PURSUANT TO THE MISUSE OF DRUGS (DRUG TRAFFICKING OFFENCES) (DESIGNATED COUNTRIES) ORDER 1991

AND

IN THE MATTER OF THE MUTUAL LEGAL ASSISTANCE (UNITED STATES OF AMERICA) LAW 1986

AND

IN THE MATTER OF JUAN CARLOS ARIAS LEON ("ARIAS"), HECTOR FABIO BOTERO ARROYAVE ("BOTERO") AND OTHERS

Mr. Bueno, Q.C. and Mr.Charles Quinn for Applicants
Ms. Jacqueline Wilson, for the Crown

Date: 2nd and 3rd August,2000

BEFORE MR. JUSTICE SANDERSON

REASONS FOR JUDGMENT

The Applicants seek to set aside the ex parte Order of Mr. Justice Murphy made on December 9th, 1999. That order provided in part;

"IT IS HEREBY ORDERED THAT:

1. JUAN CARLOS ARIAS LEON, HECTOR FABIO BOTERO ARROYAVE, ARMANDO MOGOLLON BARRETO, JUAN ARTURO MONTOYA DIAZ, AND SAMUEL VALLEJO ZAPATA hereinafter referred to as "the Defendants", whether by themselves or by their agents, directors, servants, officers or otherwise howsoever until further order, be restrained from transferring, assigning, withdrawing, removing from the jurisdiction or otherwise disposing of or dealing with any funds currently deposited to account Nos. 971051 in the name of A., 970483 in the name of B., 972984 in the name of C., 971077 in the name D., and 970358 in the name of E. ... at Banco Bilbao

Vizcaya, Grand Cayman for the benefit of the Defendants, and without prejudice to the Generality of the foregoing from in way however:-

(a) transferring, assigning, withdrawing, removing from the jurisdiction, disposing of or otherwise dealing with any funds deposited to the above-mentioned accounts at Banco Bilbao Vizcaya..."

The Applicants are not "the Defendants" referred to in paragraph 1 of the Order. Those Defendants are persons that the U.S. Government alleges are engaged in drug trafficking and money laundering. They have or are about to be charged with those offences in the United States. The Applicants in this case are the individuals mentioned in paragraph 1 of the Order who have bank accounts in the Cayman Islands and have deposits here.

All of these bank account are with Banco Bilbao Vizcaya, Grand Cayman and are frozen by the order Mr. Justice Murphy.

The applicants argue that their bank accounts should not be frozen because Murphy J., did not have the statutory jurisdiction to make the order he did. Alternatively, the applicants say that only the specific amounts identified in the affidavit material which is alleged to be "drug money", should be frozen and the balances, if any, made available to the applicants. In the further alternative the applicants argue that there was not full disclosure of the material facts before the Chambers Judge and therefore the Order should be set aside in its entirety.

The facts in this case are as follows. From September 1996 through December 1999 the US Government operated an under cover money laundering sting operation which was described as

"Operation Juno". That operation targeted major Columbian drug trafficking organizations in Columbia and their distribution networks in the United States and Europe. U.S. law enforcement agents posed as money launders willing and able to launder drug money for the Columbian drug dealers. The agents received the drug money from the drug dealers which they deposited in various U.S. bank accounts, usually in the same city where the drug money was collected from the drug traffickers. The agents would then direct that these deposits be wire transferred, usually to a bank in Atlanta, Georgia. This is a process know as layering. Once the money was in the bank in Georgia the U.S. agent (launderers) then approached one of two money exchangers operating in Columbia.

The money exchangers are essential to the money laundering operation. They operated through what is the known as the Black Market Peso Exchange. The money exchanger operates as the go between.

The money launderer (or as in this case the U.S. agent), would contact the currency exchanger in Columbia and advise them that they had a certain amount of U.S. dollars (say for example $100,000) that they wanted to exchange for Columbian Pesos. The money exchanger would then contact persons in Columbia, who they knew wanted to exchange Columbian Pesos for U.S. dollars. An exchange rate would be quoted and if the Columbian purchaser agreed to buy the 100,000 U.S. dollars with his Columbian Pesos, he would instruct the money exchanger where the U.S. dollars should be deposited.

The facts alleged in this case are that approximately $650,000,00 (out of a total of $15 million in laundered funds) was deposited in the Cayman Islands, into the five accounts referred to. Once the

U.S. money was confirmed as being deposited into the designated accounts in the Cayman Islands, the Columbian purchaser paid the money exchanger, either in cash or by issuing a cheque for the agreed amount of Columbian Pesos. The cash or cheque (which was then endorsed, often several times,) would ultimately be deposited into various Columbian bank accounts, allegedly controlled by the Columbian drug traffickers.

In this way the Columbian drug dealers would receive in their accounts, laundered Columbian Pesos.

The affidavit material filed by the U.S. Department of Justice described the Black Market Peso Exchange in some detail. The Columbians who purchased U.S. dollars and in particular the applicants in this case , were not alleged to be drug dealers or involved in the drug trade in any way. They were generally business people who for different reasons, want to have U.S. dollars accounts in banks outside of Columbia. Some want the money to pay for goods purchased from U.S. suppliers, others want their money deposited outside of Columbia to avoid duties, taxes, government controls and reporting requirements as well as potential breaches of confidentiality by Columbian banks. Whatever the reason, it was agreed during this hearing that the use of the Black Market Pesos Exchange was illegal or unlawful in Columbia.

The affidavits filed also disclosed that the Black Market Peso Exchange is fueled primarily by illegal drug money and that this fact is well known in Columbia. The applicants did not swear any affidavits on their own behalf to contradict this. Instead, their attorney Mr. Quinn, wrote a letter on their behalf to the Solicitor General, setting out their position. That letter was then attached to

an affidavit sworn to by Mr. Quinn. The facts contained in the letter were never sworn to be true. In these circumstances, I feel I cannot rely on the unsworn evidence offered by the applicants.

However, the applicants can, and do rely of the affidavit material filed on behalf of the U.S. Department of Justice. They are entitled to do so.

On the material before me I am satisfied;

1. There is no evidence that the applicants are involved in the drug trade;
2. The applicants purchased U.S. dollars through the Black Market Peso Exchange and deposited those U.S. dollars in the Cayman Islands in order to avoid Columbian Government scrutiny, taxes, and duties;
3. The U.S. funds they purchased and had deposited in the bank in the Cayman Islands was drug money from the United States.
4. The applicants likely knew that the source of the U.S. funds was illegal drug money;
5. The applicants do not hold any of that money for the benefit of or as agent for any drug dealers;

With this a background I turn to these proceedings.

On November 23rd, 1999 the United States of America, through the Department of Justice, filed a forfeiture complaint in the United States District Court for the District of Columbia. It was an "in rem" action with the named Defendants being" ALL FUNDS IN ALL FOREIGN BANKS

ACCOUNTS REPRESENTING PROCEEDS OF NARCOTIC DRUGS AND MONEY LAUNDERING".

The specific accounts and the amounts sought to be recovered from those accounts, including the 5 accounts in the Cayman Islands were identified in the complaint. The amounts identified were;

1. account 971051 $172,097
2. account 970483 $40,000
3. account 972984 $164,411
4. account 971077 $214,000
5. account 970358 $60,000.

On November 23rd, 1999 the United States District Court for the District of Columbia issued a Warrant of Arrest in Rem directing the Attorney General of the United States to request the proper authorities in the Cayman Islands (and elsewhere) to;

> "arrest, seize, and restrain the Defendant Property to prevent the sale, transfer, or alienation of the defendant property and to detain it in their custody during the pendency of this proceeding or until further order of this Court"

The specific accounts and amounts were again detailed in the Arrest Warrant in Rem. Further, in support of the Arrest Warrant in Rem, the affidavit material filed, specifically identified the accounts and the amounts which were requested frozen.

On December, 2nd, 1999 the Central Authority of the United States requested the assistance of the Central Authority of the Cayman Islands. That request included the seizure or restraint of the

narcotic proceeds deposited in the Cayman Islands and the funds were again specifically identified by bank account number, amount and date of deposit.

The request from the Central Authority of the United States further identified the 5 Columbian nationals that were going to be prosecuted in the United States for allegedly laundering millions of dollars of narcotics proceeds. As previously stated those 5 individuals (the Defendants) were not the applicants here. There is no evidence to connect the Defendants to the applicants except through the Black Market Peso Exchange. There was no evidence that the applicants were going to be charged or might be charged by the U.S. authorities.

On December 8th, 1999 the Cayman Mutual Legal Assistance Authority, issued a certificate, pursuant to section 6 of the Mutual Legal Assistance (United States of America) Law 1996, directing the Solicitor General of the Cayman Islands to apply to the Grand Court for the Orders that were ultimately granted ex parte by Mr.Justice Murphy on December 9th, 1999.

The jurisdiction of this Court to grant orders of the nature requested is based upon the law of the Cayman Islands. That is, there must be legal authority within this Country's legislation to grant the Order requested. That authority is found in The Misuse of Drugs (Drug Trafficking Offences) Designated Countries Order, 1991. In particular the Third Schedule (Article 3(2)) of that Order.

Section 16 E (1) authorizes the court to prohibit a person from dealing with any realisable property and sec 16 (E) (2) provides that a restraint order may apply to property specified in an external confiscation order.

"16.G. (1) The Grand Court may by order prohibit any person

from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may apply -

(a) where an application under subsection (3) relates to an external confiscation order made in respect of specified property, to property which is specified in that order; and

Under section 2 it defines realisable property;

"realisable property" means –

in relation to an external confiscation order made in respect of specified property, the property which is specified in the order; and

Section 16A (1) and (3) provides;

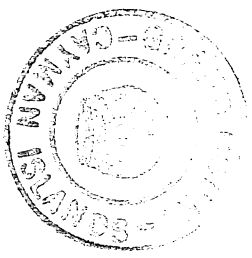
16A (1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Law as an "external confiscation order"

(3) A person against whom an external confiscation order had been made, or a person against whom proceeedings which may result in an external confiscation order being made have been or are about to be instituted in a court in a designated country, is referred to in this Law as "the defendant"

Finally section 16F (1) provides;

"16F. (1) The powers conferred on the Grand Court by subsection (1) of section 16G are exercisable where –

(a) proceedings have been instituted against the defendant in a designated country;
(b) the proceedings have not been concluded; and
(c) either an external confiscation order has been made in the proceedings or it appears to the Grand Court that there are reasonable grounds for thinking that such an order may be made in them.



(3) Proceedings for an offence are instituted in a designated country when –

(b) an application has been made to a court in the designated country for an external confiscation order; and where the application of this subsection will result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earlier of those times

The applicants first argument is that the pre-condition requested by section 16 F (1) (a) has not been met because no proceedings had been instituted against the defendants in the United States and therefore the Court here lacked the jurisdiction to make the order it did. The applicant's counsel submitted that since they were not named as defendants in any proceedings within the U.S. nor was there any evidence that such proceedings were likely or even contemplated, that the proceedings in Rem did not met the statutory requirements of section 16 F (1) (a) and, therefore, no order could be made. He also argued that the proceedings In Rem could not constitute an external confiscation order because it was not a confiscation order against a "person" as required by section 16 A (3).

Both of these arguments are completely answered by the decision of the English Court of Appeal (In Restraint Order: External Confiscation Order) 1995 Q.B. p. 272. In that case the legislative scheme was the same as in the Cayman Islands. The headnote summarizes that decision in this way;

"In July 1990, on the application of the United States Government, a restraint order was obtained in the High Court, pursuant to section 8(1) of Schedule 3 of the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990, in respect of bank accounts opened in London by S. in the names of his then wife's parents. The order prohibited the parents or S. from dealing with the money in the

London bank accounts and was granted on the basis that an external confiscation order was likely to be made against S. in putative criminal proceedings in the United States. The money was alleged to be the proceeds of unlawful drug trafficking in the United States. In the event, no criminal proceedings were instituted against S. since he was believed to be in Columbia, which had no extradition treaty with the United States. In May 1994 the United States Government obtained an external confiscation order from a New York court, in which the defendant was named as all funds on deposit in any accounts maintained in the names of the parents and all funds traceable thereto at the London banks. An application to have the restraint order set aside was refused."

On appeal on the grounds, *inter alia*, that the High Court had no power to make a restraint order in support of an external confiscation order made in proceedings in rem where there was no defendant and no person against whom as external confiscation order could be made-

Held dismissing the appeal, that, on the true construction of section 7 of Schedule 3 to the Order of 1990, the High Court had power under section 8(1) to make a restraint order where an external confiscation order prohibiting dealings in the proceeds of drug trafficking had been made, or was likely to be made, in proceedings in rem in a designated country where no person was named as a defendant; that the reference to "a person" and "the defendant" in section 1(3) did not exclude the possibility of an external confiscation order being made under section 1 (1) without there being "a person" named as defendant, nor was the description in section 1 (3) an exclusive definition of "defendant" that section 7 was concerned to identify the stage of proceedings at which a restraint order might be made, and did not require a particular form of proceedings, nor did it use "the defendant" in the limited sense described in section 1(3); that weight had to be given to the purpose of the Order of 1990 and "defendant" was not to be construed as requiring proceedings in personam: and that, accordingly, "proceedings against the defendant" was to be construed as including proceedings in rem in which the standing of persons with a financial interest in the outcome was, as in the New York proceedings, plainly recognised (post. pp. 276E-F.

Evans L.J. stated at p. 282;

"Ultimately, however, the question in the present case is one of interpretation: is the requirement that there shall have been proceedings instituted in another country "against the defendant" (section 7(1)(a), defined as "a person against whom an external confiscation order has been made" (section 1 (3)), limited to foreign proceedings in which a person has been named as "the defendant," or does it include proceedings which formally are in rem against specified property, where the person or persons interested in that property must necessarily be indirectly impleaded by them? If the statutory provisions cannot support the latter interpretation, then of course no consideration as to the likely purpose of the Order of 1990 can justify giving the words a meaning wider than they can bear.

This makes *The Deichland* [1990] Q.B. 361 directly relevant, for this court held that the disponent owner of a vessel could be regarded as persons who were "sued" in proceedings against the vessel in rem, because they were the persons against whom the proceedings were directed in fact. I agree that the same reasoning can be applied here. The applicant was a "defendant" in this sense to the New York proceedings

against the bank accounts in rem, and the requirements of section 7(1) giving the court power to make a restraint order were fulfilled."

I adopt the reasoning of the Court Of Appeal and conclude that the In Rem proceedings are sufficient to satisfy the pre-conditions of section 16 F(1)(a) and section 16 A (3).

The applicant next argued that the Court did not have jurisdiction or should not have made the order which froze the entire bank account. They submit that if the order was allowed to stand it should be varied to apply only to the specified amount of funds that the U.S. Government was seeking recovery of and had identified with precision in the Warrant of Arrest In Rem and in its formal request for assistance from the Cayman Authority. I was told by counsel during the course of the hearing that there was a surplus of over $8,000,000 in these accounts which, but for the order, would be available to the applicants.

I accept and agree with the applicants submission. Section 16 (G) authorizes this court to ;

1. prohibit any person from dealing with any realizable property, subject to such conditions and exceptions as may be specified in the order (subsection 16 (G)(1)) (emphasis added.)

2. grant a restraint order where an application has been made by or on behalf of a designated country pursuant to an external confiscation order made in respect of specific property, to property which is specified in the order (sec. 16 G (2) (a) (3)(a)) (emphasis added.)

This court therefore had authority to make a prohibition or restraining order under section 16 (G) (1)(2)& (3). Under section 16 (G) (1) the court can prohibit dealings with any with any realizable property as may be specified in the order. Section 2 defines realizable property to mean;

> "in relation to an external confiscation order made in respect of specified property, the property which is specified in the order."

The U.S. Arrest Warrant In Rem is an external confiscation order within the meaning of section 16A, which has been previously quoted. The external confiscation order refers to precise amounts in the 5 bank accounts here and the dates upon on which those amounts were deposited. The realizable property as used in section 16 G(1) is, therefore, confined to those specific amounts described in external confiscation order (or Arrest Warrant In Rem).

Similarly, section 16 (G)(2) (a)& (b) allows the court to grant a restraint order pursuant to an external confiscation order, to property which is specified in the order. Again that specified property is described as certain specific amounts deposited in the accounts here on the days detailed. The specific property identified in the order does not include the entire account balance.

During the course of argument crown counsel agreed that the order of Mr. Justice Murphy should only have been made for the amount requested and that it was not drafted as precisely as it could have been. Accordingly, the application to vary the order of Mr. Justice Murphy, to limit its application to only the amounts specified in the external confiscation order (Arrest Warrant In Rem) is allowed.

Finally, the applicants submitted that the entire order should be set aside because of the Crown's failure to make a full and proper disclosure of all material facts to Mr. Justice Murphy when the original ex parte application was heard. They argued that if the key facts referred to above had been drawn to the court's attention the impugned order would not have been made.

They rely on the fundamental proposition that any applicant to the court, seeking ex parte orders, must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether to grant the relief. (see, Mareva Injunction and Anton Piller Relief – Stephen Gee Q.C., Fourth Edition, p. 127).

In the present case all of the evidence that the applicant relies upon to set aside the order is contained in the material filed by Crown Counsel. Her affidavit was 10 paragraphs in length and in paragraph 6 and 7 she refers to the specific amounts deposited and the dates of deposit into the accounts in the Cayman Islands. She deposed that an Arrest Warrant In Rem was granted in the United States in respect of those sums. The complaint filed in the U.S. proceedings, the Arrest Warrant In Rem and all supporting affidavits in the U.S. proceedings were exhibited and before Mr. Justice Murphy. It is plain, on the material before him, that the U.S. authorities were seeking an order, only in respect of the specified amounts and not the entire account balances. Therefore, it cannot be argued that there was a failure to disclose material facts to the court.

However, the applicants went further and asserted that there was a duty on Crown Counsel to draw these specific matters to the court's attention and that she must have failed to so because if she had, the court would not have made the order it did.

We don't know what was said before the Chambers Judge. I have obtained the bench book of Mr. Justice Murphy and his notes for that application simply state:

> " Order in terms of draft tendered"

Mr. Justice Murphy left the Grand Court on December 31st, 1999 and so of course could not hear this application.

Crown Counsel did not file any notes of her submissions and did not file an affidavit outlining her recollection of what transpired before Mr. Justice Murphy. Instead she simply relied upon the affidavit material that was before him and submitted that it contained full disclosure and therefore the application should be dismissed.

In Mareva Injunction and Anton Piller Relief (supra) the author states at page 130.

> " Further more, on the hearing of the ex parte application it is the duty of counsel to ensure that defenses and evidence in support of them are specifically drawn to the attention of the judge. Merely mentioning the existence of such material without showing it to the judge may in itself be misleading, or give the case a different flavor. Counsel has a personal duty to the Court to ensure that the judge sees all the relevant material".

In this case I think it is fair to conclude that Crown Counsel probably did not in her submissions draw to the courts attention the matters to which I have referred. It is quite likely that the judge having read the material before hand simply advised Crown Counsel that he would grant the order in the terms requested but we do not know.

However, I am not satisfied that there was any intentional or accidental failure to disclose any material facts or issues. On the contrary I think that Ms. Wilson was careful to ensure that all relevant material was before the Court. The crucial evidence is all outlined in her short 10 paragraph affidavit. I conclude that both Ms. Wilson and the Court simply overlooked the specific wording of the order that was ultimately granted and therefore the order could be considered to have been granted "*per incurrium*". Accordingly, the application to set aside the order in its entirety for failure to disclose or point out material facts is dismissed.

Costs to be awarded to the applicant.

Dated this 18th day of August, 2000

Dale Sanderson
Judge of the Grand Court