

Reported

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

CIVIL APPEAL NO. 1 OF 1998
GRAND COURT CAUSE NO. 315 OF 1997

IN THE MATTER OF THE PROCEEDS OF CRIMINAL CONDUCT LAW 1997

AND

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

AND

IN THE MATTER OF WILLIAM J. McCORKLE et al

BETWEEN: HER MAJESTY'S ATTORNEY GENERAL OF THE CAYMAN ISLANDS
Appellant

AND

(1) WILLIAM McCORKLE

(2) CHANTAL McCORKLE

Respondents

Mr. Sam Bulgin and Mr. Anthony Akiwumi instructed by the Solicitor General for the Appellant

Mr. Alan Jones Q.C., Mr. Charles Quin and Mr. John Lawless instructed by Messrs. Quin & Hampson for the Respondents

Heard on the 21st, 22nd, 23rd April 1998 and delivered on the 30th July 1998.

JUDGMENT

This is an appeal from a judgment of the Chief Justice discharging a restraint order under the Proceeds of Criminal Conduct Law 1996 (the PCCL) which he had earlier made ex parte on the application of the Attorney-General. Under the order William J. McCorkle and his wife Chantal McCorkle had been restrained from disposing or dealing with funds deposited in three accounts at the Royal Bank of Canada, Grand Cayman totalling some US \$7,000,000.00.

The application for the restraint order had been made by the Attorney-General pursuant to a request for assistance by the United States of America pursuant to the Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland relating to Mutual Assistance in Criminal Matters. In order to implement the obligations under the Treaty the Cayman Islands, in November 1986, enacted the Mutual Legal Assistance (United States of America) Law (MLAT). That law came into force in March 1990 when the Treaty was ratified. The PCCL came into force on 23 December 1996.

The basis for the request was evidence collected by United States law enforcement officials in the course of their investigations that the McCorkles had operated a massive telemarketing fraud in the United States. Through infomercials and seminars the McCorkles had marketed instructional videotapes and materials dealing with the purchase for resale of depressed and foreclosed real property. In these infomercials and seminars the McCorkles promised potential customers that they would partner the customers in those real estate transactions by providing the capital necessary to purchase such properties. The McCorkles offered a 30-day money back guarantee in relation to the introductory videotape, the price of which was \$69.00. The McCorkles had failed to provide the capital as promised and had not infrequently failed to honour the 30-day money back guarantee when complaints were made in relation to the introductory videotape. The investigations had revealed that the money in the accounts at the Royal Bank of Canada were directly traceable to the proceeds of the McCorkles fraudulent telemarketing activities.

All of this was set out in an affidavit dated 26 May 1997 by Miss Lisa Agard, an attorney employed

as Crown Counsel in the Legal Department of the Cayman Islands Government. She stated that she had been informed and verily believed that criminal proceedings would be instituted in the United States within the next few months against the McCorkles and that the principal prosecutor in the matter would be initiating civil forfeiture proceedings in the Middle District of Florida by applying for an external confiscation order in Grand Cayman. She also stated that the Cayman Authority had as a result of representations made by the McCorkles sought and obtained assurances from the Central Authority of the United States that the investigation was not for the advancement of a tax investigation in the United States.

The request for assistance in this case fell within the ambit of Article 1 of paragraph 2(g) and (h) of the Treaty which is a schedule to the MLAT. This reads:

- “(g) immobilizing criminally obtained assets
- (h) assistance in proceedings related to forfeiture, restitution and collection of fines....”

No detailed provisions are set out in the Treaty for the implementation of these aspects of assistance.

Article 16 of the Treaty states-

- “1. The Central Authority of one Party may notify the Central Authority of the other Party where it has reason to believe that proceeds of a criminal offence are located in the territory of the other Party.
2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings

related to:
 (a) the forfeiture of the proceeds of criminal offences”

Detailed provisions for the procedure to be followed in the forfeiture of the proceeds of criminal offences are set out in PCCL. The long title of the PCCL establishes this -

“A Law to make new provision for the powers of criminal courts, including provisions for the recovery of the proceeds of certain serious criminal offences; and for connected purposes.”

Part I of the PCCL, Sections 1-3, is entitled “Preliminary” and appears to apply to the whole of the law though this is in sharp dispute. Part II, sections 4-28, is entitled “Cayman Islands Offences and Orders” and it deals as stated in sections 4(1) and (2) with confiscation, restraint and charging orders made by the Grand Court in relation to offences committed in the islands and money laundering and other offences as described in sections 21 and 24 committed in the Islands. Part III, sections 29-36, is entitled “Enforcement of External Orders”. This is followed by a Schedule entitled “Modifications to the Law when applied to external confiscation orders and related proceedings.”

Although Part III of the PCCL deals with “external confiscation orders”, the definition of that term is contained in Part I section 2(1) giving support to the view that the provisions of that Part apply to the whole of the Act. An “external confiscation order” is defined (in part) as -

“an order made by a court in a designated country for the purpose -
 (a) of receiving
 (i) property obtained as a result of or in connection with conduct corresponding to an offence to which this Law applies; or
 (ii) the value of property so obtained;

Also defined in Part I s. 2 is the term designated country which means -

“a country designated as such by the Governor-in-Council under section 29”

This section falls under Part III of the Law. Section 29 states in part -

- (1) The Governor-in-Council may by order -
 - (a) designate countries and territories outside the Islands to whose external confiscation orders and proceedings this Law shall, subject to subsection (2), apply;
 - (b) specify appropriate authorities within designated countries that are to give effect to the provisions of this Law in relation to external confiscation orders and to related proceedings; and
 - (c) specify in respect of designated countries the steps (apart from an application to a court for an external confiscation order) that need to be taken there to amount to an institution of proceedings.”

Under the Proceeds of Criminal Conduct (Designated Countries) Order 1997, the Governor has named the United States of America as a designated country and the Director of the Office of International Affairs of the Criminal Division of the Department of Justice as the appropriate authority to give effect to the provisions of the Law. The order specifies that proceedings for an offence are instituted when an indictment, information or complaint has been filed against a person in respect of an offence.

Paragraph 2(2)(b) of the Schedule adds a further step which will be regarded as institution of proceedings - namely when an application has been made to a court in a designated country for an external confiscation order.

Under paragraph 6(1) of the Schedule the Grand Court may prohibit any person from dealing with

realisable property by making an order called a “restraint order”. These powers are exercisable in a number of situations among them a situation in which under paragraph 5(2) of the Schedule -

“...the Grand Court is satisfied that proceedings will be instituted against a defendant in a designated country within 7 days of the application for an order under paragraph 6(1) or 7(1).”

Under paragraph 2(2)(b) -

“Proceedings are instituted in a designated country when

(b) an application has been made to a court in a designated country for an external confiscation order.”

The grounds on which the restraint order had been made against the sums standing to the credit of the McCorkles in the accounts at the Royal Bank of Canada were that they had engaged in criminal conduct which fell within the ambit of the PCCL, that the United States was a designated country and that proceedings would be instituted against the McCorkles in the United States, a designated country, within 7 days of the application for a civil forfeiture in rem of the contents of two identified accounts at the Royal Bank of Canada, Grand Cayman in the names of the McCorkles and of a company which they controlled.

On the inter partes hearing before the Chief Justice he set aside the ex parte order which he had made. It is against that order releasing the funds that the Attorney-General has appealed. The Chief Justice had granted leave to appeal and stayed the execution of his order pending the determination of the appeal.

Essentially, the Chief Justice had set aside the ex parte order on two grounds -

- (1) that the PCCL did not have retrospective effect, and
- (2) that no proceedings in the designated country for an Order required by paragraph 5(3) of the Schedule to the PCCL had been instituted within 7 days of the application in Grand Cayman.

He had ruled against the respondents on 5 grounds which had been urged on their behalf. The respondents filed a notice indicating that the judgment of the Chief Justice could be affirmed not only on the two grounds on which he had found in their favour but also on the 5 grounds on which he had ruled against them.

A core area of dispute was whether or not the PCCL applied retrospectively. Section 2(4) of the Law which is to be found in Part I of the Law states -

“Nothing in this law confers any power on any court in connection with offences committed before the commencement of this law or proceedings against a person for an offence instituted before the commencement of this law.”

As has been mentioned, the PCCL came into force on 23 December 1996.

The affidavit filed by Maria L. de Marco, a United States Attorney for the Middle District of Florida, stated that in conversations held in February and March 1997 between Mr. F. Lee Bailey, one of the attorneys representing the McCorkles, and attorney for the office of the Attorney-General for the State of Florida, Mr. Bailey had promised that certain of Mr. McCorkle's promises made in an infomercial would be removed from future infomercials. In fact these promises continued to be aired. A seminar was held by Cash Flow Systems, a company controlled by the McCorkles, in

Portland, Oregon on 13 March 1997. The cost was \$7,000.00 per person. Three hundred (300) persons attended for 7 days.

An affidavit filed by Carl W. Coffman, one of the principal investigators, discloses that between 1 January 1997 and 30 April 1997, a sum of slightly over \$2,400,000.00 dollars was remitted from the United States to the accounts owned or controlled by the McCorkles at the Royal Bank of Canada in Grand Cayman.

On behalf of the Attorney-General it has been argued that the Court should take a robust approach to the interpretation of the Law. Its object was clearly to deprive those who engage in criminal conduct of their ill-gotten gains. Unless compelled by the language to do so, the Court should not fix a cut off point beyond which the grasp of the law could not reach. The Law was essentially procedural in character, establishing the steps to be followed in effecting the imposition of restraints and securing the forfeiture of the proceeds of criminal conduct.

There can be no doubt from the language of s. 2(4) set out above that the legislature intended that there should be a cut off date. The argument is that s.2(4) does not apply to the Schedule annexed to the Law which deals with the enforcement of external orders. The Schedule, it is contended, sets up a scheme of its own to which s.2(4) of Part I of the Law should not be applied. It should be applied only to forfeiture and restraint proceedings issued in respect of Cayman offences. Section 2(4) should be read as if the words "in the Cayman Islands" had been inserted at the relevant parts of Section 2(4).

Adopting this unusual course of inserting words in a law enacted by the Legislature was justified on the ground that failure to do so would result in a manifest absurdity.

One example of this absurdity was that there would have been a derogation from international obligations undertaken under the MLAT and the MLAT Law.

Article 16(2) of the Treaty deals with the assistance to be afforded in relation to the Proceeds of Crime. This has been set out above. It needs only to be noted that the assistance is “to the extent permitted by their respective laws”. The MLAT Law to which the Treaty is annexed as a Schedule makes no provisions for dealing with that area of assistance.

Harre CJ commented on this in In the matter of the Mutual Legal Assistance (United States of America) Law 1986 and in the matter of Ryan S. Sherman and others, Cause No. 56 of 96. He stated at p. 5 -

“For Article 16 to come into play, there must be proceedings relating to forfeiture, restitution or the collection of fines in which assistance is to be given to the extent permitted by Cayman Law (my emphasis). There is no evidence of any such proceedings being in place or of any legal basis under Cayman law under which they could be put in place at the present time. Certainly no injunction of the kind sought is needed to facilitate the implementation of the request for production of records which has already been made. In my view to go further by making an injunction against the bank accounts, without any evidence of the prospect of proceedings whereby those accounts could be seized under Cayman law, would be at best premature.”

It was urged that the Chief Justice was dealing with nothing more than an absence of evidence. This interpretation is unacceptable. He was dealing with the lack of a legal basis under Cayman law.

At the close of his ruling he expressed his regret at being unable to order an injunction freezing the sums disclosed by the Bank in consequence of an order for disclosure. He then added -

“It is known that wider statutory provisions relating to the forfeiture of criminally obtained assets are already at the drafting stage. When they are in place the result of such an application as this may well be different.”

This was clearly a reference to the PCCL which came into force at the end of 1996. The ruling is dated 9 February, 1996.

The MLAT of itself did not create an obligation enforceable under Cayman municipal law. It was merely an agreement that powers would be vested in the appropriate state institutions to give assistance by imposing restraints on the movement of the proceeds of crime. It does not appear manifestly absurd that these powers were not to be retrospective in their application, more so when they were not retrospectively imposed as regards crimes committed in the Caymans itself.

A number of other arguments were advanced which call for only brief acknowledgment.

It was urged that unless section 2(4) was made applicable to the Schedule there would be an anomalous situation in which transfers prior to 23 December 1996 could not be touched while transfers after that date could be subject to restraint. This is exactly the situation as regards proceeds of crime in the Caymans deposited in banks in the Caymans prior to the coming into force of the PCCL.

This did not appear to cause the Hon. Attorney-General any misgiving. He referred in his presentation of the PCCL before the Legislature to section 2(4) in these terms -

“The other section I want to particularly mention is section 2 subsection (4). This is another very important section because it spells out this Law is not retrospective. What that means is that the Law will only affect and bite on offences that are committed after it has come into force. It means that there is no requirement for trolling back through past transactions to see whether or not they conform with this legislation. What we are saying is that we are looking to the future, and we will put this legislation in place.”

It was strongly urged that the Schedule was separate and apart from the Law itself and consequently section 2(4) applied to the Law and not to the Schedule. It should be noted, however, that the power to register external confiscation orders is vested in the Grand Court by section 30 of the PCCL which falls under Part III and not in the Schedule. The Schedule deals essentially with matters of procedure, the prerequisites which must be established before the powers created under section 30 can be exercised. Paragraph I of the Schedule does state that -

“to the extent that it is at variance with the preceding sections of this Law in relation to the administration and enforcement of external orders and proceedings which may result in external confiscation orders the terms of this Schedule shall prevail.”

Section 2(4) is not, however, a section dealing with administration and enforcement. It is a basic section defining the jurisdiction conferred on the court and making clear that it does not extend to offences committed before the commencement of the Law or proceedings against a person for an offence committed before the commencement of the Law.

Attention was drawn to the fact that in section 2(4) the prohibition against retroactivity is defined

in terms of the time when “offences” were committed while the Schedule dealing with external confiscation orders is concerned with conduct which constitutes an offence to which this law applies.

The definition set out in paragraph 3(1)(b) of the Schedule establishes that term “conduct” in the Schedule is equivalent to “offence”. It reads -

- (b) references to conduct to which this Schedule applies are references to conduct which -
 - (i) constitutes an offence to which this Law applies or would constitute such an offence if it had occurred in the Islands, other than drug trafficking offences and offences which relate directly or indirectly to the regulation, imposition, calculation or collection of taxes subject to (ii);
 - (ii) constitutes an offence to which this Law applies or would constitute such an offence had it occurred in the Islands and which involves-
 - (I) wilfully or dishonestly obtaining or conspiring to obtain money, property or valuable securities from other persons by means of false or fraudulent pretences or statements, whether oral or written, or accounting documents regulating or affecting benefits available in connection with the laws and regulations relating to income or other taxes; and
 - (II) wilfully or dishonestly making or conspiring to make false statements, whether oral or written, to government tax authorities with respect to any tax matter arising from the unlawful proceeds of any criminal offence triable on indictment, or wilfully or dishonestly failing to make a report or return to government tax authorities as required by law in respect of, or to pay the tax on, any such unlawful proceeds;”

The argument is, therefore, unsustainable.

A number of arguments have been advanced which would merit discussion if the issue of retrospective applicability was being discussed in a situation in which there was no clause as definitive as is section 2(4). Once that clause is given its clear meaning, issues as to whether vested rights are being disturbed or whether the provisions are penal in character or whether they are

essentially procedural do not arise.

Even if section 2(4) is held to apply to the whole of the PCCL there remains what the Chief Justice in his ruling described as “the alternative submission” that the conduct which constituted the basis of the application continued after the commencement of the PCCL.

The affidavits in support of the restraint order contain evidence that infomercials on behalf of the McCorkles continued to be aired after the PCCL came into force and certainly up to May 1997. An affidavit of Carl Coffman dated 11 December 1997 sets out that between 26 July 1996 (before the coming into force of the PCCL) some \$4,285,464.36 were deposited into an account at the Royal Bank of Canada controlled by the McCorkles. Between 9 January 1997 and 30 April 1997 (after the coming into force of the PCCL) approximately \$2,400,000.00 was deposited into that account.

It was the opinion of the Chief Justice -

“that the fact that further acts alleged to be criminal conduct of a similar nature occurred after the commencement of the PCCL cannot have the effect of bringing acts which occurred before that commencement and in respect of which a specific claim for a restraint order is made, within the subject of the law.”

That in itself led him to the conclusion that the Restraint Order he had made and which related to a substantial extent to transfers of funds made before the coming into force of the PCCL should be discharged.

The Chief Justice stated that the affidavit filed by Mr. Coffman purported to express an opinion that

money laundering was under United States law a “continuing offence per se” but noted that the submission was not “ultimately” relied upon.

Essentially the dispute appears to be the applicability of the ban against retrospective application in section 2(4) where the conduct complained of is a series of acts spanning a time frame which includes a period before and a period after the commencement of PCCL in a situation in which these acts are plainly part of a common design.

There can be no doubt that where a single offence is committed prior to the coming into force of the PCCL and a sum of money obtained as a result of that offence is deposited immediately into a Caymanian bank account, section 2(4) would prohibit a court from restraining in any way the control of that fund. Any attempt to do this would clearly fall within the prohibition of “trolling through past transactions” mentioned by the Attorney-General in his presentations.

Where, however, as in this case, the investigation of an ongoing activity which falls within the definition of criminal conduct inevitably involves related activity taking place before the commencement of the PCCL, the whole being part of a common design, then a purposive interpretation of the PCCL would not require the denial of assistance by reason of a broad interpretation of the prohibition against retroactivity.

Accordingly, I would hold that in the circumstances of this case the Grand Court did have jurisdiction to make the restraint order which was sought.

Consideration must now be given to the issue as to whether the provisions of paragraph 5 of the Schedule were complied with in this case. Paragraph 5(1) confers on the Grand Court powers to make a restraint order where proceedings have been instituted against the defendant in a designated country (the United States of America being such a country) and the proceedings have not been concluded and either an external confiscation order has been made or it appears to the Grand Court that there were reasonable grounds for thinking that such an order may be made in such proceedings of at least the minimum amount.

Paragraph 5(2) states -

- “(2) Those powers are also exercisable where the Grand Court is satisfied that proceedings will be instituted against the defendant in a designated country within 7 days of the application for an order under paragraphs 6(1) or 7(1).
- (3) Where the court has made an order under paragraphs 6(1) or 7(1) by virtue of subparagraph (2) -
 - (a) The Attorney-General shall notify the court immediately if proceedings have not been instituted within 7 days of the application for the order, and
 - (b) the court shall discharge the order if the proposed proceedings are not instituted within 7 days of the application for the order.”

The arguments in this area centre on the interpretation which ought to be placed on the word “institute” in the context of the institution of proceedings in court and on determining when precisely it can be said that there has been “an application for an order under paragraphs 6(1) or 7(1) of the Schedule.

In her affidavit in support of the ex parte originating summons for restraint orders, Attorney-at-Law Lisa Agard stated at paragraph 7 -

“I am advised further that the Assistant United States Attorney of the Middle District of Florida, the principal prosecutor in this matter will within seven days of the date of the application to this Honourable Court, be initiating civil forfeiture proceedings in the Middle District of Florida i.e. applying for an external confiscation order in relation to the funds in the respective bank accounts at the Royal Bank of Canada.”

The summons was filed on 20 May 1997 and the hearing date was fixed for 21 May 1997. The order was made on that very day. In his judgment the Chief Justice stated -

“In relation to an application to the Grand Court for a restraint order “application” must mean more than a mere filing in a court’s office or registry because there is no way in which a Grand Court could be satisfied that proceedings will be instituted against the defendant in a designated country within 7 days of the application for a restraint order unless that application is before it. It must mean the day on which an application is actually before the Court.”

With respect, this does not appear to be necessarily so. An examination of the language of the ex parte summons filed on behalf of the Attorney-General is illustrative. It states -

“Let all parties Concerned attend before the Judge in Chambers at the Law Courts.....on the 21st day of May 1997 at 9 o’clock in the forenoon on the hearing of application by Honourable Attorney-General for orders that.....” (Emphasis supplied)

The correct interpretation would appear to be that the application is made when the summons is filed. It necessarily precedes the hearing, the date for which is fixed after the summons is filed. There can be no difficulty in ascertaining the date when an application has been made because there would be (or should be) a date-stamped document in the Registry attesting to that.

If the date of the hearing of the application is held to be the date of the application, the litigant with an obligation to comply with a deadline would face the difficulty that the date of hearing is necessarily dependent on the convenience of the court, a matter over which the litigant has no control.

It was submitted on behalf of the Attorney-General that computation of the 7 days should commence from the date on which the order was actually made by the Grand Court. There is no reason why such an interpretation should be placed on the clear words of the Law which are “within 7 days of the application for an order under paragraph 6(1) or 7(1)” (Emphasis supplied)

The question remains as to when proceedings were “instituted” against the McCorkles in the United States of America. The Grand Court acts on the basis that it is satisfied that proceedings will be instituted within 7 days. Paragraph 5(3) provides that where the Grand Court exercises that power-

- “(a) The Attorney-General shall notify the court immediately if proceedings have not been instituted within 7 days of the application for the order; and
- (b) the court shall discharge the order if the proposed proceedings are not instituted within 7 days of the application for the Order.”

Adherence to the prescribed time frame is clearly of the essence. Although there was no notification from the Attorney-General, if at the hearing of the application to set aside the order, evidence emerged that proceedings had not been instituted in the designated country within 7 days, the judge would be obliged to set it aside.

The evidence was that the Civil Forfeiture Proceedings in rem were instituted in the Middle District in Florida on 28 May 1997. A copy of the Verified Complaint for forfeiture in rem is attached to the affidavit of Edward B. Gaines dated 10 December 1997.

In computing time to ascertain whether these proceedings had been instituted within 7 days of the application for the order for restraint before the Grand Court, reference was made to the Grand Court Rules. The provisions there were clearly not applicable. The Rules are applicable only to proceedings in the Grand Court.

The applicable provisions are those set out in section 8 of the Interpretation Law Cap. 70. This reads-

- “8. In computing time for the purpose of any Law, unless the contrary intention appears-
- (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;
 - (b) if the last day of the period is Sunday or a public general holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;
 - (c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
 - (d) when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

Under the provisions of subsection (a), 20 May, the day of the application for the order under paragraphs 6(1) and 7(1), of the Schedule, was not to be included in computing the period of 7 days within which proceedings were to be instituted in the designated country. Time would begin to run from 21 May. Since under subsection (d) the period exceeded 6 days, excluded days could be reckoned on the computation of time. On that basis, the period had lapsed on Tuesday 27 May 1997. The complaint was filed on Wednesday 28 May 1997 and was accordingly out of time. The Chief Justice was therefore entitled and indeed obliged to discharge the order under paragraph 5 (3)(b) of the Schedule to the PCCL.

There remain to be dealt with the issues raised by the Respondents in their notice of intention to contend that the decision of the Grand Court should be affirmed on other grounds. These can be summarised under 5 heads -

1. That the application to the Grand Court was not made by the appropriate authority of the designated country;
2. That the application for the restraint order did not set out all the particulars itemised in paragraph 8 of the Schedule to the PCCL and that deficiency was fatal;
3. There was material non-disclosure as the case against the McCorkles was in essence a tax case;
4. The application was an abuse of the process of the court; and
5. The restraint order should have been discharged under the provisions of paragraph 6(6)(a) of the Schedule to the PCCL.

1. The Appropriate Authority

The PCCL (Designated Countries) Order 1997 in its Schedule identifies the Director of the Office of International Affairs of the Criminal Division of the Department of Justice as the Appropriate Authority under the Law for the United States of America. Paragraph 8 of the Schedule to the PCCL prescribes that an application for a restraint order (as was the application in this case) “shall be accompanied by an affidavit by the appropriate authority of the designated country” deposing to a list of specified matters. The request for assistance in this case was signed by Mr. Thomas G. Snow who is described as “Deputy Director Office of International Affairs”. Among the requests was one for a restraint order pursuant to The Treaty and the Schedule to the PCCL. The affidavit in support of that request in purported compliance with paragraph 8 of the PCCL was sworn by Jason B. Carter, a trial attorney with the Office of International Affairs. He states therein that “as a representative of the Director of the Office of International Affairs” he was submitting the affidavit on behalf of the United States Attorney for the Middle District of Florida who is referred to as the principal Prosecutor. This official is Maria L. de Marco whose affidavit is attached. He deposes that that affidavit is based on the personal knowledge of the deponent but he does not state that they are true to the best of his information and belief.

On 8 December 1997, Thomas G. Snow, at that stage acting Director of the Office of International Affairs, swore an affidavit in further support of the request. He detailed United States Statutes and

Regulations which authorise employees of the Department of Justice to perform functions on behalf of the Attorney General in the conduct of litigation. All of this is supervised and directed by the Attorney-General. He states that Jason Carter and Maria de Marco were authorised by virtue of their appointment by the Attorney-General to carry out litigative responsibilities on behalf of the United States.

Comparison of the affidavits of Maria L. de Marco and Carl Coffman, who can be described as the principal investigator and whose affidavit is headed "Master Affidavit" shows that significant portions of the de Marco affidavit may have been transcribed directly from the tape of the Coffman affidavit.

For the Attorney-General it was submitted that on the principles of Carltona Ltd v Commissioner of Works [1945] 2 all E.R. 560, Jason Carter was the alter ego of the Director of the Office of International Affairs. Such a use of the principle seems impermissible. It is a peculiarly English principle springing from the system of constitutional and administrative structures in England. It is presumed that Parliament is well aware that when powers are conferred upon ministers who have charge of large departments such powers would not be exercised by the Minister in person. The powers would in the normal course of affairs be exercised by officers in their departments. The position is very different here. An official has been designated pursuant to Treaty obligations to carry out important functions in relation to those obligations. It would be expected that he or she would, on the face of the record, accept responsibility for the performance of these functions.

An annex to the affidavit of Thomas G. Snow sets out an order No. 918 - 80 which confers on the Assistant Attorney-General in charge of the Criminal Division -

“the authority [to] perform the functions of the ‘Central Authority’ or ‘Competent Authority’ (or like designation) under treaties and executive agreements between the United States of America and other countries on mutual assistance in criminal matters which designate the Attorney-General or the Department of Justice as such authority. The Assistant Attorney-General, Criminal Division, is authorised to re-delegate this authority to the Deputy Assistant Attorney-General, Criminal, and to the Director and Deputy Directors of the office of International Affairs, Criminal Division.”

While the original application may have been technically flawed in that Mr. Carter, rather than Mr. Snow, swore to the affidavit, it can reasonably be deduced that Mr. Snow who signed the letter making the request was familiar with its contents and accepted responsibility for their accuracy.

His affidavit in further support of United States Government’s request for the restraint order makes reference to the affidavits of Jason Carter and Maria L. de Marco and are indicative of his support of the contents of these affidavits. At that level such an official could hardly be expected to have personal knowledge of the facts deposed by subordinates. The official could only be expected to put them forward as true to the best of his or her belief by reason of his or her confidence in the officers deposing to their truth.

Accordingly, the finding of the Chief Justice that the affidavit of Mr. Snow satisfied him that the application was supported by an affidavit from the appropriate authority can be upheld.

2. Compliance With Paragraph 8 Of The Schedule

There is no merit in the contention that the affidavit in support of the application for the restraint order did not fully comply with paragraph 8 of the Schedule to the PCCL.

In answer to paragraph 8(e), “a description of the property in respect of which the order is sought.”

Miss de Marco stated “the property sought is United States currency in an amount exceeding 7 million dollars.”

It is urged that this is imprecise and that a sum of \$20 million would fall within the description “exceeding 7 million dollars”. The argument carries logic beyond the bounds of common sense.

The description would be understood to mean above but approximately \$7 million. The money was in a bank account the balance in which can be fluctuating.

The criticism that names the victims of the fraud have not been set out, though they would clearly have an interest in any sum which might be forfeited springs from a difference of interpretation of paragraph 8(h). Under the heading of the names and addresses of persons who may have an interest in that property and the nature of their interest the reply lists the McCorkles and their companies as owners of the accounts in which the funds were. This was quite reasonable. While victims of the fraud could reasonably assert that they had a claim against the McCorkles for which they could sue for judgment, they could not reasonably be thought to claim an interest in any sum deposited in a bank in an account under the control of the McCorkles.

3. Material Non-Disclosure That This Was A Tax Case

It is submitted that this was in reality a tax case and, therefore, did not fall within the provisions of the PCCL. This contention was raised quite early in the course of the Cayman proceedings. By letter dated 12 May 1997, Mr. Hampson complained to the Cayman Authority that the matters involving Mr. McCorkle and his companies had nothing to do with the serious crimes that were the subject matter of MLAT but related solely to the regulation of tax collection.

The basis for the submission would appear to be that the principal investigator who signed the "Master Affidavit" was Carl Coffman who since October 1995 has been a Special Agent of the Internal Revenue Service and prior to that was attached to the IRS as a Collections Officer. In his affidavit he states that he was initially contacted by the office of the Attorney General of Florida which had received numerous complaints about the refund practices of the McCorkles and their companies. Whatever may have been the factors which led to Mr. Coffman being assigned to launch the investigation the record reveals that he marshalled a body of information which could be the basis for a reasonable suspicion that a serious fraud had been committed.

The Court, on application, admitted additional evidence, part of which was a copy of the true bill which had been returned by the Grand Jury. It set out 90 counts, none of which related to offences involving the Inland Revenue Service,

The Chief Justice was correct in holding that the request for assistance from the Cayman Authority was not in respect of a tax matter outside the ambit of the MLAT. He was also correct in holding that the Cayman Authority was not misled by the failure to disclose that the principal investigator

was an agent of the Internal Revenue Service. The important consideration was the character of the facts which he discovered.

4. Abuse Of Process

It was submitted that there was an abuse of the process of the Cayman Court and, following from that, the Chief Justice ought to have exercised his discretion under paragraph 6(6)(a) of the Schedule to discharge the order for restraint.

It appears reasonable to conclude on the record that the attorneys appearing for the United States of America were diligent and astute in exploiting the United States criminal procedure system to preclude the McCorkles from making use of funds which would otherwise have been available to them. The process of a civil forfeiture in rem was an available and legal method of placing under restraint the McCorkles' assets in the United States. The procedure of having the complaint sealed and not served on the parties affected by it appears also to be permissible under United States law.

Despite this, the McCorkles were able to challenge the seizure before a United States Magistrate Judge, the Hon. David A. Baker. As would be expected, the procedures in the United States did make provision for redress for an individual adversely affected by such governmental action.

It seems clear on the documents that the United States authorities did not inform the Attorney-General that they did not intend to proceed expeditiously to a hearing of the civil forfeiture in rem proceedings which was the basis for the grant of the ex parte restraint order. It may well be that the Court may not have considered granting an ex parte interlocutory order had it been made aware of

that.

But it must be remembered that a prosecutor and a criminal defence attorney in the United States of America would have regarded these proceedings as normal and provoking no comment. There was a procedure which gave the McCorkles access to the American Courts to challenge the civil procedure in rem which had been sealed and not served on them. A reasoned judgment was delivered denying their claim and an appeal from that judgment was dismissed.

There were also estimates given as to when the McCorkles would be formally charged. At least three of those turned out in the event to have been wrong. There was no evidence to indicate that they were intended to be deliberately misleading.

Against that background, a finding of an abuse of the processes of the Court would not be justified.

It must be borne in mind that a special role can be said to have been assigned to the Attorney-General in the Schedule to the PCCL. The duty is placed on that official to inform the Court in circumstances in which a restraint order is made, on the basis that proceedings would be initiated in the designated country within 7 days, that such proceedings had not in fact been initiated

The proceedings are initiated in the name of the Attorney-General and, at least nominally, the charge of abuse of the processes of the Court would be laid at his or her door. Where the conduct of criminal proceedings by the investigators, prosecutors and the courts of a designated country appear to diverge significantly from what would be considered acceptable in the courts of the Caymans, the

Attorney-General should bring the divergences to the attention of the Court for its consideration.


5. The Exercise Of Discretion Under Paragraph 6(6)(a) Of The PCCL

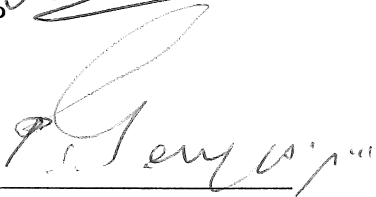
The contention that the Chief Justice should have exercised his discretion in favour of the respondents by discharging the order under powers vested in him by paragraph 6(6)(a) of the Schedule does not need to be discussed. He had correctly found against the respondents on the facts which could have justified such an exercise of the discretion.

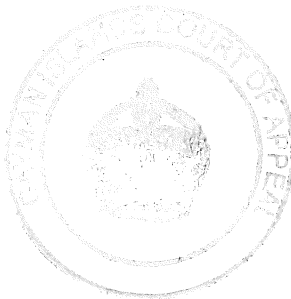
In the result the appeal is dismissed on the ground that proceedings were not instituted in the courts of the designated country within 7 days of the application for the restraint order in the Grand Court.

The respondents have failed on all the contentions which they raised on the notice to affirm the judgment of the Chief Justice on other grounds. Consideration of these matters occupied much time.

Accordingly, the respondents are awarded fifty percent (50%) of the costs of the appeal.


Zacca, P


Georges, J.A.



Collett, J.A.