C/S.

3.10.97

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

CAUSE NO. 315/97

IN THE MATTER OF THE PROCEEDS OF CRIMINAL CONDUCT LAW 1996
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

For the Defendants - Mr. Charles Quin
For the Attorney General - Ms. Lisa Agard

Before Harre CJ

RULING

On 21st May 1997 I made an order under paragraph 6 of the Schedule to the Proceeds of Criminal Conduct Law 1996 restraining the defendants, William and Chantal McCorkle from dealing with funds standing in three accounts with the Royal Bank of Canada. This followed a request for assistance under the Mutual Legal Assistance Treaty with the United States. The offences alleged to have been committed there included mail fraud, wire fraud, bank fraud, laundering of money instruments and money laundering.

There followed, on 27th June, a summons by the defendants seeking a declaration that all moneys in an account with the Royal Bank of Canada Trust Company (Cayman) Ltd in the name of Quin & Hampson (in trust for William J and Chantal McCorkle Legal Fund) are legal defence trust funds for the sole purpose of paying William J and

Chantal McCorkle's attorneys fees and defence costs associated with matters now pending in the United States and the Cayman Islands.

Then came a further summons from the Attorney General seeking a variation of my order of 21st May so as to restrict expressly the disposition of funds in that same account. This was sought without prejudice to the position of the Attorney General that these moneys were in any event subject to the original order.

The McCorkle's case is that their business is legitimate. Mr. McCorkle depones that he opened an account in 1992 in his own name with Royal Bank of Canada for a number of purposes, among which was to set aside funds for possible future exposure for litigation, and in particular to have funds safely offshore to pay attorney's fees. It is claimed now that what has now been set up is a trust of which the attorneys retained by Mr and Mrs McCorkle are the beneficiaries.

The rights of their legal representatives in the United States to withdraw from the case are relevant to this issue. One of them, Mr F Lee Bailey, set out his view of the position at length in a letter to Mr Quin dated 5th June 1997 which he confirmed on oath as true. He says this :-

> "Unlike most other jurisdictions, in the United States District Courts especially in the Eleventh Circuit, which comprises Florida, Georgia and Alabama - once a lawyer begins to act for a criminal defendant by "entering an appearance" in writing, that lawyer must remain with the case for so long as it goes on, even through mistrial, retrial, and frequently, appeal. As a consequence, competent criminal defense lawyers normally decline to formally appear for a criminal defendant in a federal prosecution unless they are paid all of their fees before entering a written appearance.

> Fees thus paid are the property of the lawyer, and taxable as income to that lawyer as income the moment they are received, according to the United States Supreme Court. If for some reason a portion of that fee is later returned, the lawyer may take a deduction on his tax return at that time.
>
> The only alternative acceptable to the profession in this District is the establishment of good funds to which counsel may have access according to his or her discretion, not that of the client. If that discretion is abused, the client always has recourse to the Florida Bar Association.
>
> It must therefore be very clear that the trust fund which is in your name at the Royal Bank of Canada is not for the benefit of William J. McCorkle or his family or companies, but only for the benefit of his designated counsel: Bailey, Eagan, Horwitz, your firm, and Mr. Alberga.
>
> In order to show that this is the case, please disregard the requirement in our letter of May 13, 1997 that Mr. McCorkle and I sign for each fee disbursement instruction sent to you for payment."

Evidence of Lisa M. Young, an Assistant Attorney General in the State of Florida, conflicts with that. She says in her affidavit dated 15th July that an attorney may withdraw from a criminal case by presenting a motion to withdraw. She exhibits to her affidavit dated 15th July 1997 Rule 2.03 of the United States District Court for the Middle District of Florida. The relevant part reads as follows -

> "(b) No attorney, having made a general appearance under subsection (a) of this rule, shall thereafter abandon the case or proceeding in which the appearance was made, or withdraw as counsel for any party therein, except by written leave of Court obtained after giving ten (10) days' notice to the party or client affected thereby, and to opposing counsel.
>
> (c) In all criminal cases non-payment of attorney's fees shall not be sufficient justification for seeking leave to withdraw if the withdrawal of counsel is likely to cause a continuance of a scheduled trial date; nor shall leave be given to withdraw in any other case, absent compelling ethical consideration, if such withdrawal would likely cause continuance or delay. If a party discharges an attorney it shall be the responsibility of that party to proceed pro se or obtain the appearance of substitute counsel in sufficient time to meet established trial dates or other regularly scheduled proceedings as the Court may direct."

Provisions of that nature are both familiar and sensible.

It would be astonishing if there were any absolute bar to an attorney withdrawing from a case (and indeed in his oral evidence Mr. Bailey did not go as far as that).

I accept Miss Young's evidence. It is quite artificial to say that the funds in the Quin and Hampson account are impressed with a trust in favour of the McCorkle's lawyers. It is for their own benefit, so that they may pay lawyers. I am fortified in that view by the original arrangement, which was not altered until 5th June, well after the injunction was in place, that Mr. McCorkle and Mr. Bailey should both sign instructions for disbursement of funds from the account.

The relationship between the American attorneys and their clients are governed by the contractual arrangements between them and by the relevant Rules of Court and not by any trust. In my judgment, the funds in the account with the Royal Bank of Canada Trust Company (Cayman) Limited in the name of Quin and Hampson (in trust for William J and Chantal McCorkle legal fund) are subject, being for the benefit of the defendants, to my original order dated 22nd May, but I vary that order now by the insertion of a new paragraph (d) as prayed in the originating summons of the Attorney General dated 11th July 1997, to make that explicit.

In case I am wrong in anything I have said so far I need to say that I find that the account concerned was opened on or about 12th May 1997 even though the document bearing the authorised signatures for its operation were sent to the bank only on 22nd May.

The next question which I have to consider is whether I should vary the restraint order to allow funds to be released for the payment of legal costs. The order was made under paragraph 6 of the Schedule to the Proceeds of Criminal Conduct Law to preserve assets so that they are available to satisfy an external confiscation order. It is common ground that the restraint order may be subject to exceptions under paragraph 6 (1) and that legal costs may be a proper subject of the exception. It is a matter of discretion.

Although they are closely analogous, Mareva injunctions and restraining orders under the Proceeds of Criminal Conduct Law arise in very different circumstances. The views of this court as to principles applying to former are to be found in a judgment dated 12th November 1996 in Cause No. 266 of 1996 Laager v. Kruger. I need not repeat them here. It is with them in mind however, that I draw analogies in more detail from the English provisions of the Drug Trafficking Act 1994 and the Criminal Justice Act. While the court must exercise its powers to preserve the assets for the satisfaction of the Confiscation Order, there is no general principle that a defendant may not draw upon tainted money to pay legal costs. If there are unrestrained assets which the defendant could use to pay legal expenses and the assets under restraint are required to satisfy a Confiscation Order which might be made the court should not permit the defendants access to the restrained funds. In AVC (No 2) 1981 QB 961 (a Mareva case) the court refused to permit the defendant access to restrained funds within the jurisdiction where he had sworn no evidence in respect of potential other

funds. That is far from being so in the present case and I shall now make some reference to the quite extensive evidence on each side relating to this issue. What a defendant has to prove will depend on the circumstances in each case.

Both Mr and Mrs McCorkle have sworn affidavits and Mrs McCorkle gave oral evidence also. I am directing my mind in particular to that part of the evidence which relates to the views of the respective parties as to the financial position of Mr and Mrs McCorkle in the United States. The evidence as a whole has one very curious feature. Their company continues to carry on its operation in spite of the seriousness of the allegations made. The offences alleged under United States law as the basis for the application by the Attorney General for a restraint order included mail fraud, wire fraud, bank fraud, laundering of money instruments and money laundering. The nature of the allegations against the company operated by Mr & Mrs McCorkle was that they failed to honour refund policies and failed to "partner" their clients as promised by the provision of capital for the purchase of real estate. The essence of the various allegations against the McCorkle's operation is that it deceives people into purchasing video tapes and instructional material by promising falsely to do that.

As late as the 29th July Mr McCorkle swore an affidavit in which he described how during the preceding week his company had attempted to conduct seminars in Canada for the sale of its real estate programmes and had incurred extensive expenses in that connection. In that affidavit he says that he does not have sufficient funds to partner the deals now that the government has seized "the vast majority" of his company's assets and the assets of his wife and himself. There is also an affidavit sworn a few

days earlier, on the 23rd July, by Lisa M. Young an Assistant Attorney General assigned to the Division of Economic Crimes in the State of Florida to which she exhibits an advertisement running in the Edmonton Journal indicating that there would be seven seminars in Edmonton. It is headed "Multi Millionaire Uses His Cash to Help You Get Ahead" and claims that "right on the spot he actually puts up all the money necessary to close the deals that meet the criteria of his programme."

Mrs. McCorkle gave evidence in this court that seminars were also planned for Florida and Alabama.

In the light of that I look with the greatest scepticism on the affidavit and oral evidence of this couple as to the unavailability of funds in the USA to fund their legal expenses. That scepticism was heightened by the evidence about a concealed account in the name of one Lori Nassofer which according to the evidence of Lisa M Young in her first affidavit had deposits totaling approximately $700,000 during a six week period since it was opened on 16th May 1997. Miss Young says that this account was not disclosed to the US government by Mr and Mrs McCorkle or their counsel and she learned of it as she was tracing income to them derived from property they own.

Where the evidence of Mr. & Mrs. McCorkle and Miss Young differs I prefer that of Miss Young.

As has been tellingly pointed out by Miss Agard on behalf of the Attorney General none of the authorities cited contain any guidance with regard to the payment of legal

costs out of a restrained fund for the purposes of legal representation in proceedings out of the jurisdiction. Miss Young as an Attorney at Law and an Assistant Attorney General in the State of Florida is entitled to give evidence as to the law in the United States and she has done so in her affidavit dated 15th July 1997.

On any view of the authorities which she cites courts in the United States adopt a more robust view about the release of restrained funds for the purpose of paying legal expenses than would the courts in the Cayman Islands. Nevertheless, the United States is a jurisdiction in which the principles of the common law and natural justice are followed and respected and I do not think that it lies with this court in the circumstances of this case to allow the use of funds which have been deposited here offshore in a way which subverts that.

On the other hand there are proceedings on foot in this jurisdiction also. I think that Mr. & Mrs. McCorkle should be allowed to pay for any future proceedings in these Islands from the fund in question. I therefore order that monies in an account with the Royal Bank of Canada Trust Company (Cayman) Limited in the name of Quin and Hampson (in trust for William J and Chantal McCorkle legal fund) may, by way of exception to the Restraint Order made on the 21st May 1997 as amended be used for the sole purpose of paying William J and Chantal McCorkle's attorneys fees and costs associated with proceedings in the Cayman Islands, including the costs of this application and the statutory security of $50 for the due prosecution of any appeal and a further sum of $2,000 as security for the costs of an appeal. Leave to appeal granted.

3rd October 1997

G.E. Harre
Chief Justice

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