

16.12.91

CS Gill ✓
The Commission

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

ON THE 9TH OCTOBER AND 25 AND 27TH NOVEMBER, 1991
BEFORE THE HON. THE CHIEF JUSTICE
IN CHAMBERS

CAUSE #

IN THE MATTER OF AN APPLICATION UNDER SECTION 16L (A) (6)
AND (B) OF THE MISUSE OF DRUGS (AMENDMENT) LAW, 1988
(LAW 8 OF 1988)

BETWEEN ~~G~~ APPLICANT
AND C of P RESPONDENT

Mr. Ramon Alberga Q.C. and Ms. J O'Connor for the applicant
Mr. Anthony Smellie, Solicitor General for the respondent

MALONE C.J. JUDGMENT

A legal practitioner to whom I shall refer hereafter as "the practitioner", was served with the production order that is the subject of these proceedings.

That order was my order of the 13th August 1991 and had been made on the ex parte application of detective constable K. The order required of the practitioner that he:

"should give a Constable access to and supply such copies as may be necessary of the material to which the said application relates, namely all files, documents and accounts and other records used in ordinary business, whether those records are in written form, are kept on microfilm, magnetic tape or carry other form of mechanical or electronic data retrieval mechanism, paid cheques, inter account transfers, telegraph transfers and correspondence concerning any transactions in relation to the dealings with ("G").

The order was signed by me and stated:

"I am satisfied after hearing the application that the conditions specified in subsection (4) of section 16 L are fulfilled in relation thereto.

You are hereby ordered to produce the said material to a constable for him to take away (see note a)

not later than

(the end of the period of 27 days from the date of this order)"

The practitioner surrendered certain documents under seal to the Clerk of Court and applied by originating summons filed on the 3rd September 1991 for the discharge or variation of the order. Legal history was made on that day as this is the first application of its kind in the Cayman Islands.

The authority to make the order of the 13th August 1991 is derived from statute. The statute being the Misuse of Drugs Law (Second Revision) ("the Law"). Much of the Law is modeled on the English Drug Trafficking Offences Act 1986 ("the parent Act"). In particular section 16 L of the Law is the equivalent of section 27 of the parent Act and the definition of "drug trafficking" in section 2 of the Law follows the definition of that expression in section 38 (1) of the parent Act but omits a portion of that definition. The portion omitted includes in the definition of "drug trafficking" in the parent Act activities which constitute the basis of the offence known commonly as money laundering. That offence is described in section 16 O of the Law and section 24 of the parent Act. Consequently as a result of the omission, the definition of "drug trafficking" in section 2 of the Law does not extend to the money laundering offence created by section 16 O of the Law. It was conceded by the Solicitor General that the omission did have that consequence but he rejected Mr. Alberga's submission that the omission was fatal to the application made in this instance for the grant of a production order. Whether it is fatal or not is not the only issue between the parties on this application. That issue,

however, embraces so much of the relevant law and the facts, that it is deserving of priority of consideration.

Section 16 L and the definition of "drug trafficking" in section 2 of the Law are respectfully ^{submitted,} as follows:

"16 L (1) A constable may, for the purpose of an investigation into drug trafficking, apply to the Grand Court for an order under subsection (2) in relation to particular material or to material of a particular description.

(2) If on such an application the court is satisfied that the conditions in subsection (4) are fulfilled, it may make an order that the person who appears to it to be in possession of the material to which the application relates shall -

- (a) produce it to a constable for him to take away; or
- (b) give a constable access to it, within such period as the order may specify.

(3) The period to be specified in an order under subsection (2) shall be seven days, unless it appears to the court that a longer or shorter period would be appropriate in the particular circumstances of the application.

(4) The conditions referred to in subsection (2) are that -

- (a) there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking;
- (b) there are reasonable grounds for suspecting that the material to which the application relates -

- (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation

for the purpose of which the application is made; and

(ii) does not consist of or include items subject to legal privilege; and

(c) There are reasonable grounds for believing that it is in the public interest, having regard to -

(i) the benefit likely to accrue to the investigation if the material is obtained; and

(ii) the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

(5) Where the court makes an order under paragraph (b) of subsection (2) in relation to material on any premises it may, on the application of a constable, order any person who appears to it to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.

(6) The Chief Justice may make rules governing the procedure in relation to -

(a) applications for the discharge and variation of orders under this section;

(b) proceedings relating to such orders.

(7) Where material to which an application under this section relates consists of information contained in a computer -

(a) an order under paragraph (a) of subsection (2) shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and

(b) an order under paragraph (b) of subsection (2)

shall have effect as an order to give access to the material in a form in which it is visible and legible.

(8) An order under subsection (2) -

- (a) shall not confer any right to production of, or access to, items subject to legal privilege;
- (b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information whether imposed by the Confidential Relationships (Preservation) Law, any other Law or by the common Law;
- (c) may be made in relation to material in possession of the Government.

(9) Where, in relation to an investigation into drug trafficking, an order under subsection (2) has been made or has been applied for and has not been issued, a person who, knowing or suspecting that the investigation is taking place, makes any disclosure which is likely to prejudice the investigation is guilty of an offence.

(10) In proceedings against a person for an offence under this section, it is a defence to prove

- (a) that he did not know or suspect that the disclosure was likely to prejudice the investigation; or
- (b) that he had lawful authority or reasonable excuse for making the disclosure.

(11) A person guilty of an offence under subsection (9) shall be liable on conviction to a fine or imprisonment for a term not exceeding five years or to both such fine and imprisonment.*.

*2. "drug trafficking" means doing or being concerned in any of the following, whether in the Islands or elsewhere -

- (a) producing or supplying a controlled drug

where the production or supply contravenes paragraphs (c) or (f) of subsection (1) of section 3;

(b) storing a controlled drug where possession of the drug contravenes paragraph (d) of subsection (1) of section 3;

(c) importing or exporting a controlled drug where the importation or exportation is prohibited by paragraphs (a) or (b) of subsection 3;".

The portion of the definition of "drug trafficking" in section 38 (1) of the parent Act which is omitted from the definition of that expression in section 2 of the Law is as follows:

"and includes a person doing the following, whether in England and Wales, or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby -

- (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or
- (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other persons's benefit to acquire property by way of investment."

Mr. Alberga's submissions on the fatal effect of the omission from the definition of drug trafficking in section 2 of the Law of the words last cited from section 38 (1) of the parent Act are as follows:

I "When section 16L is read as a whole the investigation into drug trafficking must be an investigation into drug trafficking by the person ultimately specified. It does not mean an investigation into drug trafficking generally in the world."

II "For a production order under section 16 L to be obtained it must be shown that "G" as the person specified in section 16 L (4), was the target of the

investigation.".

- III "The only investigation relating to G was an investigation into money laundering and as money laundering is not defined as any part of drug trafficking in the Misuse of Drugs Law no production order can be made in respect of G.".

The three submissions depend upon two propositions. Namely that:

1. the investigation was not as it must be an investigation into drug trafficking as defined by section 2 of the Law; and/or
2. the person recognised as the specified person under section 16L (4), namely G, was not, as he must be, the target of the investigation into drug trafficking.

To deal with those propositions and the submissions that depend on them it is necessary to consider the facts. As this is an inter partes hearing of the ex parte application which came before me on the 13th August 1991 I shall take account of all the affidavits filed since that day as well as the testimony of constable K recorded on that day.

The ninth paragraph of K's affidavit filed ²⁵ the 13th November 1991 is as follows: [^]

"Because of the evidence which suggests that the (Cs) organisation continues to traffic in drugs, it is of concern to the investigation to establish whether that trafficking actively has continued through the Cayman Islands even after the arrest of (a certain vessel) in 1983 and whether these activities have been facilitated by the channelling and laundering of funds through the Cayman Islands.".

Having taken account of the content of K's affidavit on the composition of the organisation and the continuing activity of the organisation, I have no reason to doubt that paragraph 9 accurately expresses the concern of the law enforcement authorities.

Clearly, for those authorities to learn more about the

organisation, they might well have to pursue different lines of inquiry into the different sub-groupings of the organisation. For drug trafficking is big business. At the top are the brains which control the business. At the bottom the pushers. Between them the suppliers, the mules, money launderers and others such as professional men and women ostensibly engaged in rendering professional services but in reality engaged in furthering the interest of the business. In this particular instance the line of inquiry was into the suspected money laundering by G of funds of the Cs or their organisation reasonably suspected of being proceeds of drug trafficking. But because that is the line of inquiry, the investigation does not to my mind cease to be in the circumstances of this application an investigation into drug trafficking as defined by section 2 of the Law. For it would be unreasonable, I think, to conclude that the inquiry into money laundering was unrelated to the investigation into suspected on going drug trafficking as defined in section 2 of the Law. Indeed constable K's affidavit of the 13th November 1991 describes it as part of a wider investigation. If the Cs' or their organisation was not under investigation for drug trafficking and the only investigation was into suspected money laundering by G, I would agree with Mr. Alberga that under the Law that would not be an investigation recognised by section 16L because of the definition of drug trafficking in section 2. However that is not the position. As the inquiry into the money laundering is part of the on going investigation into drug trafficking by the Cs or their organisation, the requirement of section 16L (1) is met. Accordingly in this instance, as the Solicitor General submitted, the truncated version of the definition of drug trafficking has not the fatal effect attributed to it by Mr. Alberga. On those grounds I reject the first of Mr. Alberga's propositions on which he based his submissions.

No form is prescribed for an application made under section 16L (1). In this instance Const. K came before me and made a statement. Enlarged by the affidavits subsequently filed, the salient facts of the application are the following:

1. The Cs are convicted drug traffickers but their organisation is suspected of still being engaged in drug trafficking.
2. With funds provided by the Cs, D Co Ltd, which the Cs control through their agents D.E. and S.E., purchased Brittany Bay.
3. H. P. Co. Ltd. is a fronting company of the Cs and is used to launder the proceeds of drug trafficking by fictitious sales of land at Brittany Bay.
4. R. A. is a Panamanian lawyer who works for the Cs.
5. G is a Panamanian in respect of whom K received a tip from R. A. that G might be another agent of the Cs.

In his affidavit of the 8th October 1991 K described an example of a fictitious sale as follows:

"Using 'front companies', lots (of Brittany Bay) would then be 'purchased' from D Co. Ltd. which would then have a legitimate explanation for being in possession of large sums of cash if questions were ever raised. This money which would have been provided by the Cs in the first place would then be funneled back to them. Further 'washing' could also take place when the 'front companies' purported to 're-sell' their lots at a profit. Even if ownership of the 'front companies' could be traced to the Cs, the money 'washed' at this second level could be explained away as profit on a legitimate investment. By 'layering' the transactions in this manner the ultimate source of the funds would be difficult to pinpoint and the Cs would have the benefit of both the original purchase price (via D Co Ltd) and the subsequent re-sale including profit (via the

'front companies') and would continue to hold the property through their undisclosed agents."

Lots 11 and 16 are two of several lots at Brittany Bay that were reserved for the Cs. However, agreements for the sale of those two lots to G were entered into by D Co. Ltd and U.S.\$29,520.00 paid or purportedly paid to D Co Ltd have not been traced to the accounts of either D Co Ltd or H P Co Ltd. Where those monies went to, if they were paid, is not known. Further since the "sale" to G the same lots have been sold by D Co Ltd to a company called C G P Co Ltd.

Mr. Alberga submitted that the re-sale of lots 11 and 16 to C G P Co Ltd might be no more than an act of greed on the part of D Co Ltd. I think that submission too naive. It seems to me there is sufficient evidence reasonably to suspect that the sale of the two lots to G is a fictitious sale. The evidence that constitutes reasonable grounds for that suspicion is:

1. the tip that G might be the other Panamanian;
2. the fact that the transaction is with D Co Ltd, which is suspected, in relation to Brittany Bay of fronting for the Cs and of laundering the Cs' or their organisation's proceeds of drug trafficking by sham sales;
3. the fact that after the sale of one of the lots to G it is resold to C G P Co having in the first place been reserved for the Cs;
4. the fact that the money purportedly paid to D Co Ltd cannot be traced to the accounts of that company and has simply disappeared.

Having found there are reasonable grounds to suspect a fictitious sale it seems to me only reasonable to suspect on the facts set out above that the fictitious sale was a laundering by G of the proceeds of drug trafficking by the Cs or their organisation. I therefore cannot agree with the practitioner when he deposed as follows in his affidavit filed the 12th September, 1991:

"It is ridiculous to contend that by agreeing

to purchase lots in Brittany Bay that (G) might be providing money on behalf of the Cs to purchase land at Brittany Bay".

Nor, am I able to accept Mr. Alberga's submission that:

"K's evidence when analysed does not show reasonable grounds for suspecting that G had laundered any money for the Cs' organisation or was in any way connected with the companies used by that organisation".

as I consider that the suspicions I have formed are based on reason. Coupled to the finding that the investigation was into drug trafficking it is, I think, clear that G was the target of the investigation so that he satisfies Mr. Alberga's test which I accept that the person recognised as the specified person under section 16L (4) must be the target of the investigation. Accordingly I reject Mr. Alberga's second proposition and therefore reject his submissions that depend on the two propositions I earlier identified.

In the parent Act the words:

"or has benefited from drug trafficking"

in section 27 (4) thereof are defined in section 1 (3) thereof as follows:

"For the purposes of this Act, a person who has at any time (whether before or after the commencement of this section) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.".

The Law has no equivalent definition. Does that omission result in G not being a person who can be regarded as benefiting? I think not for two reasons. The first is that in the context of section 16L (4) which contrasts the carrying on of drug trafficking with benefiting from drug trafficking, the natural meaning of the latter expression comprehends receipt of a payment or other reward in connection with drug trafficking carried on by another. As in this instance the facts disclose that "G" may reasonably be suspected of being a source

for the laundering of the drug trafficking proceeds of convicted drug traffickers or their organisation he is caught by the natural meaning of the words. The second is that having regard to the words:

"doing or being concerned in"

of the definition of "drug trafficking" in section 2 of the Law the words:

"has benefited from drug trafficking"

must mean:

has benefited by reason of doing or being concerned in any activity listed in paragraphs (a), (b) or (c) of that definition.

Money laundering by itself is not such an activity. As I have pointed out earlier, however, this is a case of reasonably suspected money laundering by G of funds of the Cs or their organisation reasonably suspected of being proceeds of such on going activities. G is not himself carrying on any of those activities but he is reasonably suspected of being a part of the organisation carrying on those activities. Therefore he can properly be said to be concerned in drug trafficking. Did he benefit? Since it is reasonable to suspect G of money laundering for the Cs or their organisation, the circumstances provide reasonable grounds for the suspicion that G knowingly received a benefit from the drug trafficking under investigation. I therefore reject Mr. Alberga's submission that:

"There are no reasonable grounds for suspicion by K that G benefited from drug trafficking"

The remaining submissions of Mr. Alberga for setting aside the order I made were the following:

1. there were no reasonable grounds for suspecting that the material to which the application relates satisfies the requirement of section 16L (4) (b) (i) and (ii);
2. there were no reasonable grounds for believing it is in the public interest having regard to the provisions of section 16 L (4) (c) (i) and (ii) that the material to which the application relates should be produced;

3. no particular material or material of a particular description was asked for in the application and none was specified in the order therefore the order made is vitiated;
4. no material was specified in the application consequently a suspicion or belief as to the value of the material to the investigation or as to the likely benefit to the investigation of the material obtained could not be arrived at;
5. the order having been made without the benefit of submissions as to why it should not be made was wrongly made.

The Queen's Bench Division in *R v Central Criminal Court, ex parte Francis & Francis (a firm)* (1988) 1 A.E.R. 677, to quote from the headnote at pp 677 -678 held:

"that an application by the police under section 27 for production of documents should be heard ex parte rather than inter partes."

As the section 27 referred to in the passage just cited is section 27 of the parent Act I accept that passage as authority I should follow. Therefore it was not wrong to hear the application of Constable K ex parte and make the order without benefit of submissions that it should not be made. Mr. Alberga's fifth submission is rejected.

In the Francis case (ibid) and under Mr. Alberga's first submission in this case, it was argued that an order should not have been made as there were no grounds for suspecting that the material to which the application related did not:

"..... consist of or include items subject to legal privilege"

(See section 27 (4) (b) (ii) of the parent Act and section 16L (4) (b) (ii) of the Law.) The argument in Francis' case (ibid) was that if the Recorder could not have been satisfied that there were grounds that the material did not consist of or include such items it would follow that he could not have had jurisdiction to

make his order. The argument is as available to the applicant in this case as to the applicant in Francis' case (ibid) for although in England "items subject to legal privilege" are defined by statute, the statute expresses the common law which applies here. Its application, however, is subject to the decision of the House of Lords in Francis' case (ibid) that items which would otherwise be subject to legal privilege are not so privileged if the solicitor or other person holding them has the intention of furthering a criminal purpose or if that intention is the intention of the client or a third party. The headnote of the House of Lords decision which is to be found in (1988) 3 A.E.R.776 continues as follows:

"Accordingly, conveyancing documents which were innocently held by a solicitor were not subject to legal privilege"

In this case there is evidence from constable K that provides reasonable grounds to suspect the existence of documents held by the practitioner which related to the activities of G. Indeed the practitioner's affidavit of the 12th September, 1991 supplements the evidence of constable K. Thus in paragraphs 3 (a), 3 (c) and 3 (h) he deposes as follows:

"(a) I do have a client named (G) for whom I have acted in connection with the purchase by him of, originally, two lots but essentially only one lot of land at Brittany Bay from (D Co Ltd.)

(c) My client purchased land which had already been purchased by (D Co. Ltd.) for the purpose of division and sale.

(h) I did receive a fax from G directing me to pay funds which I had received from him, to (D Co Ltd) for the purchase of a lot which he had agreed to buy pursuant to the agreement which he had signed and which I have in my file."

~~Those documents are of importance not only to the inquiry into~~

Those documents are of importance not only to the inquiry into the money laundering activity of G, but also, because of G's reasonably suspected association with the C's and their organisation, they are of importance to the drug trafficking under investigation. It may very well be that the practitioner holds the documents innocently but as there are reasonable grounds to suspect the client G of the intention to use them for furthering the criminal purpose of money laundering, they are not by virtue of the decision of the House of Lords in Francis' case (ibid) subject to legal privilege. Therefore they were not within the terms of section 16L (4) (b) (ii). Their value to the drug trafficking investigation is likely to be substantial as by identifying another agent of the Cs or their organisation they serve further to define that organisation and the extent of its activities. Therefore the material is material that satisfies the provisions of section 16L (4) (b) (i). In the light of the expressed concern of knowing whether drug trafficking has continued through the Cayman Islands even after the arrest of (a certain vessel), the attempt at defining the organisation and the extent of its activities seem to me to provide reasonable grounds for believing it to be in the public interest that the material should be produced.

For the foregoing reasons I am satisfied that unless there is substance in the third and fourth of Mr. Alberga's submissions, the conditions of section 16L (4) (b) and (c) of the Law are met by the application made for the order granted and consequently Mr. Alberga's first and second submissions should be rejected.

Mr. Alberga's fourth submission is to my mind without substance as it has been shown that there is material which fulfills the conditions specified in sections 16L (4) (b) (i) and 16 L (4) (c) (i) and (ii). As regards his third submission which relates to section 16L (1), the application was about obtaining an order that would make available particular

material or material of a particular description and amount

granted. I, therefore, do not accept that no particular material or material of a particular description was asked for in the application or specified in the order. If Mr. Alberga's contention is that the application and order are not what they seem to be because the material asked for and specified is not particular material or material of a particular description within the meaning of particular material or material of a particular description, I can say now that I do not accept that contention and will explain why I do not when I turn next to determine whether the order should be amended. Before I do so, however, I record my rejection of Mr. Alberga's third and fourth submissions and confirm the rejection of his first and second submissions.

The evidence (Proceedings in other Jurisdictions (Cayman Islands) Order 1978 ("the Imperial Order") provides as follows in section 2 (4) (b) of the Schedule thereto:

"An order under this section shall not require a person -

(a)

(b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or likely to be, in his possession, custody or power."

The requirements of that section were stated as follows: by Rowe J.A. in *The United States v Carver and four others* (1980 -83) C.I.L.R. 297 at p 318:

"The requirements of section 2 (4) (b), however, are not in my view satisfied by the specification of classes of documents. What is called for is the specification of 'particular documents' which I would construe as meaning individual documents separately described."

The words:

"or material of a particular description"

in section 16L (1) of the Law are not to be found in the Imperial Order. Both counsel, however, were of the view that those words meant the same thing as the words:

"particular documents".

As Mr. Alberga expressed it:

"that is a distinction without a difference"

I do not agree. In the reports are to be found many cases in which the judges have interpreted the words of the Imperial Order. When some ten years later those words are repeated in a later Act but disjunctively with additional words it would be remarkable, I think, if Parliament had intended the additional disjunctive words to have the same meaning as the original words. To my mind Rowe J.A. in Carver's case (ibid) indicated the meaning which later Parliament intended the additional words to have when he said in the passage I earlier quoted from his judgment that:

"The requirements of section 2(4) (b) however are not in my view satisfied by the specification of classes".

I think that by the addition of the disjunctive words, Parliament intended that section 27 (1) of the parent Act will be satisfied if either the material is:

individual material separately described

or it is:

material of a specified class.

Where "particular" qualifies "material" I agree with Rowe J.A. that material separately described is intended. Where "particular" qualifies "description" then material of the qualified description falls within that class. An example illustrates the point. A cheque described by its number is particular material. Because it is particularised it can be picked out from other cheques without difficulty. If on the other hand the material is simply described as a cheque it is only material of a particular description. It may be that difficulty will be experienced in determining whether an item is particular material or material of a particular description. The difficulty, however, is not one that matters as

if the material falls into one or other of the two classes albeit it may not be certain into which one of the two it does fall that will suffice.

In the instant case, the materials ordered for production comprise materials with the common factor that they concern transactions relating to dealings with G. That is enough to bring them within section 16L (1). I think, however, that the limitation to transactions relating to dealings with G does not correctly represent the true position as the evidence concerns transactions relating to dealings between G the Cs and their agents. Therefore the order should, in that respect, be more restricted as it is too widely expressed. On the other hand because the facts appear to be limited to documents is not a reason, I think, for restricting the material to documents as today material is recorded in so many different ways. Therefore I shall amend the order by deleting all the words after "relation" in the last line thereof and by substituting therefor:

"to dealings between (G) and any of the following persons or entities, D.E., S.E., R.G, the Cs, R.A., R.E., C Co Ltd., H.P. Co Ltd. and G.E. Inc.".

It was suggested that the amendment to be made should be subject to an exception excluding legal advice given by the practitioner to G. Having regard to the provisions of section 16L (8) (a) of the Law and to the decision of the House of Lords in the Francis case (ibid) I am of the view that the exception is not needed.

The application in so far as it seeks a discharge of the order made on the 13th August 1991 is dismissed. In so far as it seeks a variation of the order the order is amended in the terms spelled out above.

Denis E. G. Malone
Sir Denis Malone

16th December, 1991.