Hilary Term
[2015] UKPC 1
Privy Council Appeal No 0036 of 2014

JUDGMENT

Assets Recovery Agency (Ex-parte) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Clarke
Lord Reed
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT DELIVERED BY
LORD HUGHES
ON

19 January 2015

Heard on 2 December 2014

Appellant
Michael Hylton QC
Sundiata Gibbs
(Instructed by Sheridans)

Advocate (Pro Bono)
Tana'ania Small Davis

LORD HUGHES:

1. The relatively new Jamaican Proceeds of Crime Act 2007 contains in Part VI provision for specific evidence-gathering orders which may be made by a judge on the application of police and other investigators in defined circumstances. In the present case, the judge and the Court of Appeal have both refused an application by the Assets Recovery Agency for a customer information order ("CIO") pursuant to sections 119-125. The Agency appeals to Her Majesty.

2. If granted, a CIO is directed to a financial institution, such as a bank, building society or investment manager. It requires the institution to divulge to the prosecution personal information about its customer, such as his name, address, taxpayer's registration details and the like. Other related orders include account monitoring orders (section 126), which direct a financial institution to divulge the transactions on a customer's account, disclosure orders (section 105), which require any named person to produce specified information or material to the investigator, and search and seizure orders (section 115), which may be made to reinforce a disclosure order which has not been obeyed.

3. These various orders may be applied for by police officers, customs officers, or officers of the Assets Recovery Agency in aid of specific investigations. Section 103 defines them. They are:

(i) a "forfeiture investigation", which means an investigation into:

> "(a) whether a person has benefited from his criminal conduct; or
>
> (b) the extent and location of a person's benefit from his criminal conduct;"

(ii) a "money-laundering investigation", which is an investigation into:

> "whether a person has committed a money laundering offence;"

and

(iii) a "civil recovery investigation", which means an investigation into:

"(a) whether property is recoverable property or associated property;

(b) who holds the property; or

(c) the extent or whereabouts of the property."

4. These three types of investigation reflect the three principal areas of statutory provision contained in the Proceeds of Crime Act 2007.

(i) The Act provides, firstly, for orders which may be made against a convicted criminal after his conviction. In this Act, those may take two forms. One is a "forfeiture order" which is an order for the seizure of identified property which represents the defendant's benefit from his crime (see section 5(3)(a)). The second is a "pecuniary penalty order", which is an order for the payment, out of any available assets held by the defendant, of a sum equal to the value of his benefit from his crime (see section 5(3)(b) and the definition in section 2(1)). It is to be noted that a "forfeiture investigation", as defined in section 103, covers an investigation with a view to either of these two forms of order.

(ii) Secondly, the Act provides for civil recovery orders, which are orders for the seizure of specific, identified property which is the product of crime; civil recovery orders may be made against any person in possession of the property and independently of any prosecution for that crime (see section 55 and following). The present case is not concerned with civil recovery.

(iii) Thirdly, the Act creates specific criminal offences of money laundering, that is to say of doing, with the prescribed state of mind, specified acts in relation to criminal property (see section 92 and following).

5. The conditions for making a CIO are set out in section 121, which provides:

"121. The requirements for making a customer information

order are that -

(a) in the case of a forfeiture investigation, there are reasonable grounds for believing that the person specified in the application for the order has benefited from his criminal conduct;

(b) in the case of a civil recovery investigation, there are reasonable grounds for believing that -

(i) the property specified in the application for the order is recoverable property or associated property; and

(ii) the person specified in the application holds all or some of the property;

(c) in the case of a money laundering investigation, there are reasonable grounds for believing that the person specified in the application for the order has committed a money laundering offence;

(d) in the case of any investigation, there are reasonable grounds for believing that customer information which may be provided in compliance with the order is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought; and

(e) in the case of any investigation, there are reasonable grounds for believing that it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained."

6. The application in the present case was manifestly defective in a number of ways: see below. The Court of Appeal dismissed the appeal against the judge's refusal to make the order, in part for this reason. As will be seen, the Board is of the clear view that there can be no complaint about this part of the decision in the Court of Appeal. However, in dismissing the appeal, the Court of Appeal also held, inter alia, that:

(i) before a CIO could be made in aid of a money-laundering investigation it was necessary that there should have been a conviction of somebody for the antecedent (or "predicate") offence which had caused the property to be criminal property; and

(ii) further, before a CIO could be made in aid of a money-laundering investigation, it was necessary that the person whose details were sought should be "proved to have some connection with" the criminal property which he was said to have laundered; and

(iii) before a CIO could be made in aid of a forfeiture investigation it was necessary that there should have been the conviction of the defendant in respect of whom the investigation was being made.

It is these propositions of general application which have been the subject of examination before the Board, which has had the advantage of submissions by Mr Hylton QC on behalf of the Agency which were clearly very different from those made to the courts below. It has also been much assisted by cogent submissions by Ms Small Davis, appearing pro bono as amica curiae.

Money laundering investigations

7. The Proceeds of Crime Act 2007 creates new substantive offences of money laundering. They are contained in sections 92-93. Under both sections, the offences created consist of doing specified acts (with the prescribed state of mind) in relation to "criminal property". In turn, "criminal property" is defined in section 91(1)(a) as follows:

> "91 (1) For the purposes of this Part -
>
> (a) property is criminal property if it constitutes a person's benefit from criminal conduct or represents such a benefit, in whole or in part and whether directly or indirectly (and it is immaterial who carried out or benefitted from the conduct);"

This definition therefore depends in part on the meaning of the expression "criminal conduct", for which one turns to section 2, where it is defined as follows:

> "'criminal conduct' means conduct occurring on or after the 30th May, 2007, being conduct which -
>
> (a) constitutes an offence in Jamaica;

(b) occurs outside of Jamaica and would constitute such an offence if the conduct occurred in Jamaica;"

8. There can be no doubt that this means that before a substantive offence of money laundering can be committed, there must have been an antecedent (or "predicate") offence committed by someone, which generated the criminal property concerned. The antecedent offence might of course be one of several different types. Fraud, drug trafficking, smuggling and the management of prostitution are no doubt common kinds of offence which generate money benefits which fall within the definition of criminal property, but there are also many others. So, for a prosecution for a substantive money laundering offence to succeed, the Crown must prove that such an antecedent offence was committed by somebody. The House of Lords so held in relation to similar earlier English legislation in *R v Montila* [2004] UKHL 50; [2004] 1 WLR 3141.

9. It does not, however, follow that for a defendant to be convicted of a substantive offence of money laundering, there must have been a *conviction* for the antecedent offence. What has to be proved is that an antecedent offence was committed, not that a conviction followed. It may quite often happen that there has been no conviction, for example if the antecedent offender has died before he could be prosecuted, or has escaped to a place from which he cannot be extradited. A conviction is only one way of proving that an offence has been committed.

10. Moreover, it may often happen that a plain case of money laundering is revealed but it cannot be known exactly what the antecedent offence was. In other cases, there may be a plain case of money laundering but a mixture of antecedent offences. In the kind of case where the money launderer is someone misusing a business which has a legitimate reason to handle large sums of cash, such as a bureau de change or a casino, it may well happen that what is proved is that there were numerous clandestine receipts of a great deal of cash, perhaps delivered in anonymous places by anonymous couriers, and payments out justified by invoices for consumables which can be proved to be forged documents emanating from non-existent suppliers. The service may well be being provided to a mixture of drug dealers, fraudsters and cigarette smugglers. Exactly which the antecedent offence(s) is or are may be uncertain, but the inference that some antecedent offence(s) were committed may be sufficiently irresistible to amount to proof to the criminal standard. In such circumstances the Board held in *Director of Public Prosecutions of Mauritius v Bholah* [2011] UKPC 44 that proof of a particular predicate crime is not necessary in order to prove a substantive charge of money laundering to the criminal standard. That decision, which was not brought to the attention of the Court of Appeal in this case, upheld similar decisions to the same effect in the Court of Appeal (Criminal Division) for England and Wales, for example *R v Anwoir* [2008] EWCA Crim 1354; [2009] 1 WLR 980.

11. Since that is the law in relation to proof of a substantive offence of money laundering, it follows a fortiori that the same applies when, at the stage of an application for a CIO in aid of a money laundering investigation, what has to be established is not that a defendant has committed a money laundering offence but that there are reasonable grounds for believing that a prospective defendant has done so. The Proceeds of Crime Act 2007 makes it clear in section 121(c) that a CIO may be made in order to assist the prosecution to find out whether a money laundering offence has been committed or not. It is designed to aid an enquiry into a possible offence. One necessary part of the enquiry into whether a money laundering offence has been committed may be to find out whether the antecedent offence has been committed. True it is that a money laundering offence cannot be committed unless the property handled was criminal property, and that it cannot be without an antecedent offence being committed by someone. But at the investigation stage, one may still be trying to find out whether the property is criminal property or not. It would be contrary to the wording of the statute to impose a requirement that there be proof that a particular, or any, antecedent offence has been committed, and even more so to impose a requirement not only that there should be proof of an antecedent offence but also a conviction of someone for it.

12. For these reasons, the Board is satisfied that the Court of Appeal fell into error insofar as it held that section 121(c) requires the existence of a conviction for the antecedent offence before an application for a CIO can be entertained in relation to a money laundering investigation.

Forfeiture Investigations

13. A forfeiture investigation, unlike a money laundering investigation, is not an enquiry into whether an offence has been committed. It is an investigation into the prospect of the court being asked to make an order under section 5, that is to say either a forfeiture order for the seizure of specific property or a pecuniary penalty order for the payment of a sum of money equal to the defendant's benefit from crime. Neither of these section 5 orders can be made unless and until the defendant is convicted of the substantive offence with which he is charged. This structure led Ms Small Davis, as amica curiae, to tender the submission that a comparatively intrusive order such as a CIO ought not to be granted until after there has been a conviction, and the necessity for forfeiture proceedings is known.

14. It does not, however, follow from the fact that a forfeiture or pecuniary penalty order must await conviction that the forfeiture investigation must do likewise. In practice there will frequently be good reason why it should not. This is recognised by the Act. Whilst no doubt often the forfeiture hearings will be postponed until some little time after the end of the criminal trial, section 15(1)

expressly contemplates that they may not be. The court may, under section 15(1)(a), proceed to consider section 5 and make either a forfeiture or pecuniary penalty order before sentencing, thus shortly after the end of the trial. This is likely to involve the preparation and service of the prosecution statement of information (section 17) before the end of the trial, and in practice probably before it begins. Even if the more common procedure of postponement of the forfeiture proceedings is contemplated, there is every reason why an investigating team should enquire into the benefit from crime, and especially into its whereabouts, sooner rather than later, for the trail may well go cold if investigators stand still until the end of the trial. Moreover, in many cases active consideration ought to be given to an application for a restraint order (section 32) to avert so far as possible the risk of the defendant hiding the proceeds of crime or his assets. Cases differ, but in a serious case such an application is likely to have to be made well before the trial, and indeed sometimes before arrest, if that risk is properly to be reduced. Providing that a criminal investigation has been started, the test for the making of a restraint order is, by section 32(1)(a), very similar to the test for the making of a CIO, namely whether:

> "there is reasonable cause to believe that an alleged offender has benefited from his criminal conduct"

15. There is thus no reason why a forfeiture investigation should not be begun contemporaneously with the criminal investigation, and often every reason why it should be. However, the difference between a forfeiture investigation and a money laundering investigation is important. In the case of a forfeiture investigation, the evidence-gathering orders cannot be sought in aid of the main criminal enquiry, but only in aid of the ancillary forfeiture enquiry. Thus, if what is under investigation is drug trafficking, the prosecution is not entitled to ask the judge for a CIO (or the other evidence-gathering orders created by the Proceeds of Crime Act) in order to help find out whether the prospective defendant is or is not guilty of drug trafficking, but is entitled to ask for such an order in aid of the ancillary forfeiture enquiry. How is the judge to deal with an application in such a case, where it is made before the trial?

16. The answer was given by the House of Lords in *R v Southwark Crown Court Ex p Bowles* [1998] AC 641. There, the legislation under consideration was section 93H of the Criminal Justice Act 1988, which was the precursor of provisions now found in the current UK Proceeds of Crime Act 2002. The statute allowed the Crown to seek a production order in aid of an enquiry into whether any person had benefited from any criminal conduct, if there were reasonable grounds for suspecting that the person had so benefited. Thus the statutory wording was in all material respects similar to that of section 121 of the Jamaican statute now under consideration. Although the case concerned a production order rather than a customer information order, there is no material difference between the two orders, nor between the statutory conditions for making them, either in the UK

or in Jamaica. Under the Proceeds of Crime Act 2007, a production order may be part of a disclosure order under section 105: see sections 105(3)(a)-(c). The statutory conditions for making such a production order are expressed in section 106(1) in terms essentially identical to those of section 121. In *Ex p Bowles* the House of Lords rejected the Crown's argument that a production order could be granted in aid of the prosecution's enquiry into whether the prospective defendant had committed the substantive offence. It held that such an order could only be granted in aid of the ancillary enquiry into benefit from criminal conduct, and thus in aid of the prospective confiscation proceedings. It held that if the information given under the order sought might be useful to the prosecution for both reasons, the judge should grant the order only if satisfied that the dominant purpose of the application was the ancillary (confiscation) enquiry. It also made clear that incorporated into the ancillary confiscation enquiry might well be an enquiry into whether a restraint order ought to be sought, and that a production order could legitimately be made in aid of prospective restraint order proceedings. At 647E Lord Hutton referred to what Simon Brown LJ had said on this topic in the Divisional Court and at 647H-648A went on to say:

> "However, I consider that Simon Brown LJ was right to hold that ... section 93H is concerned with an investigation into the proceeds of crime to assist the authorities to obtain information which may enable an application to be brought for **a restraint order or** a confiscation order."[emphasis supplied]

He further said, at 651G:

> "Accordingly I consider that if the true and dominant purpose of an application under section 93H is to enable an investigation to be made into the proceeds of criminal conduct, the application should be granted even if an incidental consequence may be that the police will obtain evidence relating to the commission of an offence. But if the true and dominant purpose of the application is to carry out an investigation whether a criminal offence has been committed and to obtain evidence to bring a prosecution, the application should be refused.
>
> I further consider that if the police discover evidence of the commission of an offence in the course of an investigation consequent upon an order properly made under section 93H, the fact that the evidence was discovered in this way would not be a reason for the exclusion of the evidence under section 78 of PACE on the ground of unfairness at a trial where the prosecution sought to adduce such evidence."

17. For these reasons, the Board concludes that the Court of Appeal was wrong to hold that an application for a CIO could not be made, in aid of a forfeiture investigation, until the defendant has been convicted of the offence with which he is charged. It is legitimate to investigate benefit, and the location of assets, from an early stage, and the essential necessity in some cases to seek an early restraint order demonstrates the relevance of the evidence-gathering orders at that stage. The investigation contemplated by section 103 is an investigation into whether there is or is not benefit from criminal conduct and that necessarily includes enquiry whether there has been criminal conduct. Similarly, the first condition under section 121(a) for making a CIO, that there are reasonable grounds for believing that the person concerned has benefited from his criminal conduct, necessarily includes reasonable grounds for belief that he has committed criminal conduct.

"Reasonable grounds for believing"

18. The first statutory condition for the making of a CIO, as in the case of other evidence-gathering orders, is that there exist reasonable grounds for believing that the person concerned has benefited from his criminal conduct (forfeiture investigation; section 121(a)) or has committed a money laundering offence (money laundering investigation; section 121(c)). In both cases, the next statutory condition, under section 121(d), is that there are reasonable grounds for believing that the information sought is likely to be of substantial value to the investigation under consideration. In both cases, the third statutory condition, under section 121(e), is that there are reasonable grounds for believing that it is in the public interest to make the order, having regard to the benefit likely to accrue from it. Subsections (a) and (c) concern reasonable grounds for believing a primary fact to exist. Subsections (d) and (e) concern value judgments committed to the judge hearing the application.

19. Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief. Nor is it helpful to attempt to expand on what is meant by reasonable grounds for belief, by substituting for 'reasonable grounds' some different expression such as 'strong grounds' or 'good arguable case'. There is no need to improve upon the clear words of the statute, which employs a concept which is very frequently encountered in the law and imposes a well-understood objective standard, of which the judge is the

arbiter. Reasonable belief in the presence of stolen goods in premises was the historic test for the grant of a search warrant at common law: see *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299, per Lord Denning at 308. The same test is made the condition for the exercise of several police powers under sections 50B, 50E and 50F of the Constabulary Force Act 1935, just as it is typically the condition for English powers of arrest (see section 24(2) Police and Criminal Evidence Act 1984). Nor is its use confined to matters of criminal procedure: see for example section 2(1) of the Misrepresentation Act 1967, establishing a right to damages in civil claims arising out of contracts.

20. For these reasons, the Court of Appeal was in error in this case in holding at para 49 that before a CIO could be made in relation to a money laundering investigation, the person specified must be "proved" to have some connection with criminal property.

Scrutiny of applications

21. These conclusions do not mean that these evidence-gathering orders, including a CIO, are available to the prosecution or Agency whenever they want them. The Act expressly makes them available only when the judge determines that they ought to be granted. The role of the judge is crucial. Moreover, the duty of the applicant to the court is of great importance. Applications of this kind will normally be made ex parte. All ex parte applications impose on the applicant the duty to disclose to the judge everything which might point against the grant of the order sought, as well as everything which is said to point towards grant. That is especially so when, as here, the financial institutions may well have little interest beyond ensuring that anything they are required to do is covered by the order of the court, whilst the persons whose affairs are under investigation may not find out about the order until long after the event. The duty of the applicant in such circumstances is, in effect, to put himself into the place of the bank, but also of the person whose affairs are under investigation, and to lay before the judge anything which either could properly advance as reasons against the grant of the order sought. The role of the judge is to ensure that the order is justified. In the context of a CIO that means:

    (a) in both forfeiture and money laundering investigations, ensuring that the condition in sections 121(a) or (c) is met, and there are objectively reasonable grounds for believing, as the case may be, either that the person specified has benefited from his criminal conduct or has committed a money laundering offence; this will normally mean asking the applicant to show what criminal conduct, or what money laundering offence, is believed to have been committed, and requiring a brief outline of the grounds for suspecting benefit or money laundering, as the case may be.

(b) in the case of a forfeiture investigation, ensuring that the dominant purpose for which the order is sought is the ancillary forfeiture enquiry and not the underlying criminal enquiry; this will normally mean asking the applicant how far the criminal enquiry has got and why the order sought will help, not the criminal enquiry, but the forfeiture enquiry; it will often also mean asking what if any proposals are entertained in relation to a restraint order.

(c) in both cases, testing whether the condition in section 121(d) is met, namely that the information sought is likely to be of substantial value to the relevant investigation; this is likely to mean asking how it will help.

(d) in both cases, testing whether the condition in section 121(e) is met, namely that there are reasonable grounds for believing that it is in the public interest for the information sought to be ordered to be provided; this means performing a balance between the public interest in the detection of money laundering offences or the recovery of the proceeds of crime (as the case may be) and the legitimate interests of the individual whose affairs are in question to preserve the privacy of those affairs.

The present case

22. As the Court of Appeal rightly held, the present application and its affidavit evidence in support were deeply flawed. Amongst the principal defects were the following.

(i) There was a wholesale failure to distinguish between money laundering investigation and forfeiture investigation, but simply an assertion that the order was sought in aid of both, apparently without realising that different considerations apply to them.

(ii) Some 13 (or in two places 14) persons were listed as under investigation without any attempt being made in the case of most of them to say what they were suspected of doing. Of some, all that was said was that they were related to others on the list. One person listed in the application was not referred to at all in the affidavit in support.

(iii) Included in that list of persons whose details were sought was one who, according to the affidavit in support, could not have been within sections

119 and 121 because it was said that he was the innocent victim of some of the other named persons, rather than a suspected offender.

(iv) The assertions of suspected criminal behaviour, where made, included much which was said to have taken place before 30 May 2007, and thus which could not have been criminal conduct, and could not have generated criminal property, for the purposes of the Proceeds of Crime Act 2007 - see section 2(1).

(v) The affidavit in support included (at para 9) a recital of facts which might not involve any criminal offence at all, nor was any such possible offence suggested.

23. For these reasons the Court of Appeal was correct to dismiss the Agency's appeal against the judge's refusal to make the CIO sought. The defects are too extensive to warrant remitting the present application to the judge. Whether a fresh, and properly framed and supported, application could succeed must await adjudication if such an application is made.

24. It is to be noted that the present was a supplemental application against a single financial institution. An earlier application had been made against some 14 other institutions, and had been granted. The earlier application was not before either the Court of Appeal or the Board, but if the evidence in support was the same, it may well be that it suffered from similar defects and it is far from clear that it received the analysis which was called for.

Disposal

25. The Court of Appeal was right to dismiss the Agency's appeal against the refusal of the judge to make a CIO, because the flaws in the application meant that the statutory conditions for making the order had not been made out. For this reason the Board will humbly advise Her Majesty that the Agency's further appeal ought to be dismissed. But the Board records that on the three points of general principle set out in para 6 above, the Court of Appeal ruling was in error. The correct approach to section 121 is set out in this judgment.