IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2011 HCV 01577

IN CHAMBERS

IN THE MATTER OF AN APPLICATION FOR A CUSTOMER INFORMATION ORDER PURSUANT TO SECTION 119 OF THE PROCEEDS OF CRIME ACT 2007

Ms Charmaine Newsome for the Applicant.

Proceeds of Crime – Customer Information Order - Pre-requisites for – Proceeds of Crime Act ss. 5, 55, 84, 91 - 93, 103, and 119-125

16 June and 12 October 2011

BROOKS J

[1] The Assets Recovery Agency was established by the Proceeds of Crime Act (the Act) in 2007. The Agency is empowered by the Act to perform a number of functions with respect to the investigation and prosecution of certain types of offences. These offences mainly involve money laundering and the proceeds of crime and, what the Act describes as, “criminal lifestyle”.

[2] Among the things which the Agency is permitted by the Act to do, is to apply to the court for permission to request information from financial institutions. The information would concern the accounts of clients of the particular institutions. Normally, such information is required, by statute, to be treated as strictly confidential and it is only in certain circumstances that it may be

disclosed. Where an application, as is referred to above, is successful, the order granted is termed a Customer Information Order (CIO).

[3] There are certain pre-requisites which the Agency must satisfy before the court will make a CIO. The issue to be decided is whether the Agency has met those requirements. In this judgment I shall set out a summary of the application, outline the relevant law and thereafter apply the law to the instant case.

The background to the application

[4] In its application, the Agency has identified one main individual whom, it says, has been charged with a number of offences. In order to maintain confidentiality, it is neither necessary nor appropriate to identify the individual or the offences. It is to avoid alerting the suspected individual that applications, such as the instant one, are made without notice to either that individual or the institutions involved. I shall henceforth refer to the individual herein, as X.

[5] The Agency outlined, in the affidavit filed in support of the application, several allegations against X. It set out the methods by which, it asserts, X committed the offences in question, and for these purposes, outlined the use which, it says, X made of certain financial institutions, in manipulating the financial proceeds of the alleged illegal activity.

[6] Items of property were also identified by the Agency as suspected of being derived from X's alleged criminal activity. According to the Agency, X and a number of X's associates have benefitted from criminal conduct. It is to be noted, however, that neither X nor any of these associates has been convicted for any offence.

[7] The Agency had originally applied for a CIO directed at a wide range of financial institutions. It secured a CIO which gave it permission to seek, from those institutions, particulars of accounts held by X, and X's associates and family members. The present application requests a CIO in respect of one specific financial institution, which was not included in the original application.

The relevant law

The relevant provisions of the Act

[8] Applications for CIO's are authorised by section 119 of the Act. One of the pre-requisites for making a CIO is that the application must be made by an appropriate officer. This requirement, which is established by section 119 (1), is explained in paragraph II.018 of *Mitchell Taylor and Talbot On Confiscation and the Proceeds of Crime* 3rd Ed.*:*

> "As this order is extremely intrusive the Act gives added protection to ensure that such orders are only applied for in appropriate cases. An appropriate officer can therefore only make the application, if he is a senior appropriate officer or is so authorised by one."

[9] Section 119 (2) requires the application to state that it is sought for the purposes of a forfeiture investigation, a money laundering investigation or a civil recovery investigation. A CIO is, according to 119 (4), "an order that a financial institution...shall...provide any such information as it has relating to [a specified] person". No order for a CIO will be made unless the applicant satisfies the court concerning certain requirements contained in section 121 of the Act.

[10] Section 121 bears being set out in full:

> "The requirements for the making of 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." (Emphasis mine)

The provisions of this section require reference to section 103 of the Act. Section 103 provides definitions for some of the terms used in the part of the Act in which section 121 falls. Of particular reference are the respective definitions of "civil recovery investigation", "forfeiture investigation" and "money laundering investigation".

[11] Section 103 defines a "civil recovery investigation" as an investigation into whether property is "recoverable property" or "associated property" as defined by

the Act and the particulars of the holding and whereabouts of that property. Both types of property are defined in section 55 of the Act, but section 84 makes it clear that “recoverable property” is property obtained through unlawful conduct.

[12] A “forfeiture investigation” is defined as an investigation into “whether a person has benefitted from his criminal conduct” or into the extent of that benefit. A “money laundering investigation” means an investigation into “whether a person has committed a money laundering offence”. For these purposes, a money laundering offence, simply put, involves knowingly acquiring, possessing or dealing with criminal property (see sections 91, 92 and 93). Section 91 (1) (a) states, in part, that “property is criminal property if it constitutes a person’s benefit from criminal conduct”.

[13] The information which is required, pursuant to a CIO, includes the personal data of the individual or entity, which is the subject of the order. It also involves the details of the accounts held and the transactions done for that particular individual or entity (see section 120 of the Act). These are the main sections of the Act which are relevant to this analysis. It is necessary to now determine how they are applied in practice.

Interpreting the relevant provisions of the Act

[14] There seems to be a dearth of learning concerning sections 119 – 125 of the Act, which are all the sections concerning CIO’s. Some of these provisions are very similar, if not identical, to sections 363 – 369 of the Proceeds of Crime Act 2002 in the United Kingdom (POCA 2002). One may therefore look to learning from that jurisdiction, in respect of those sections, in seeking to resolve

the present issues. It must be noted, however, that POCA 2002 uses the term "confiscation" where the Act uses the term "forfeiture".

[15] In describing some of the requirements of the relevant provisions of POCA 2002, the learned authors of *The Proceeds of Crime Act 2002* (Butterworths 2002), at paragraph 9.38, state, concerning a CIO:

> "...The application must specify a person who is the subject of a confiscation or money laundering investigation, or specify property which is the subject of a civil recovery investigation and the name of the person who appears to hold that property...."

That interpretation is consistent with section 119 (2), which is mentioned above.

[16] The framework of sections 119 – 121 suggests that an application for a CIO should not only state that it is for a purpose stipulated by section 119 (2), but should also support that statement with evidence that satisfies the requirements of section 121. That evidence, in order to satisfy those requirements, should be the allegations made by the applicant against the subject individual or entity, or the details concerning the property in question. As the learned authors put it, in the quotation set out in the last paragraph, the application must demonstrate that there is underway, a confiscation or a money laundering investigation or, alternatively, must identify property which is the subject of a civil recovery investigation.

[17] In interpreting the relevant provisions of the Act it is necessary for me to draw a distinction between offences created by the Act and other offences by which property becomes criminal property. Such offences, for these purposes, may, for convenience, be termed, "criminal conduct", as the term is defined in section 2 of the Act. That portion of section 2 states:

> "criminal conduct" means conduct occurring on or after [30 May 2007], being conduct which –
>
> (a) constitutes an offence in Jamaica; or
>
> (b) occurs outside of Jamaica and would constituted such an offence if the conduct occurred in Jamaica;"

I shall also refer to an offence falling in this category of "criminal conduct", as a "substantive offence".

[18] It is also necessary to note that the constitutional provision, reinforcing the presumption of innocence, is essential to the analysis which will follow, hereafter. It is a fundamental part of our law, that allegations alone are not sufficient to justify any punitive action against any person. With these principles in mind, I now look at the relevant sections, starting with the provisions dealing with money laundering.

[19] Part V of the Act deals specifically with money laundering. When the provisions of Part V, and in particular sections 91 - 93, are considered together, they give the impression that it should be established that a substantive offence has been committed and that some person has been convicted for that substantive offence. The subject matter of the sections, as indeed it is with money laundering, presumes that there is criminal property. As was mentioned above, section 91 (1) (a) identifies criminal property as being a person's benefit from criminal conduct. The sections seem to require that the applicant for a CIO should established that there is criminal conduct. In other words, it seems to me, the applicant must show that there has been a substantive offence committed.

[20] Bearing in mind those provisions, as well as section 121, it does not appear to me that the Act was designed as an investigative tool (as Ms Newsome, appearing for the Agency, has submitted), for assisting in determining if a substantive offence has been committed. Nor, in my view, is it designed to unearth evidence to assist the prosecution for a substantive offence. Indeed, section 123 prevents the use of information provided by a financial institution, pursuant to a CIO, in any substantive prosecution against that financial institution. The Act is, instead, designed, as the short title asserts, "to provide for the investigation, identification and recovery of the proceeds of crime and for connected matters".

[21] Where the application concerns an individual, the context of section 121 seems to require that, the evidence should demonstrate that criminal conduct has occurred and that there is property resulting, either directly or indirectly, from the commission of a substantive offence. In my view, the evidence should, ideally, show that the subject individual has been convicted of a substantive offence.

[22] I will accept, however, that a conviction may not be an absolute requirement. This is because the Act does not make it a requirement. It would have been easy for Parliament to include that requirement if that was its intention. In using terms such as "criminal conduct", "recoverable property" and "a money laundering offence", however, bearing in mind the definitions given to each of those terms, section 121 does imply that it should be demonstrated that,

at least, strong grounds exist for believing that a substantive offence has been committed.

[23] Some support for the view, that at least a *prima facie* case should be shown by the applicant, may be gleaned from the judgment in *R v Guilford Crown Court, Ex parte Director of Public Prosecutions* [1998] QB 243. In *R v Guilford Crown Court*, the English court was considering a production order, which was prescribed for in a statute, that was, itself, a precursor to POCA 2002. The relevant provision was section 93H of the Criminal Justice Act 1988. Section 93H had been inserted into that Act by section 11 of the Proceeds of Crime Act 1995, of that country. The section has some similarity to sections 119 and 121 of the Act, but for the purposes of the comparison I set out the portion quoted by the court in *R v Guilford Crown Court*:

> "93H
> (1) A constable may, for the purposes of an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct, apply to a circuit judge for an order under subsection (2) below in relation to particular material or material of a particular description.
>
> (2) If, on such application, **the judge is satisfied that the conditions in subsection (4) below are fulfilled**, he may make an order that the person who appears to him 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.
>
> This subsection has effect subject to section 93J (11) below [dealing with High Court orders in respect of government departments].

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

(4) The conditions referred to in subsection (2) above are –

(a) that there are **reasonable grounds for suspecting that a specified person has benefited from any criminal conduct**;

(b) that 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 purposes of which the application is made**; and

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

and

(c) that there are reasonable grounds for believing that it is in the public interest, having regard –

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

(ii) to 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 judge makes an order under subsection (2) (b) above in relation to material on any premises he may, on the application of a constable, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.

(6) An application under subsection (1) or (5) above may be made ex parte to a judge in chambers." (Emphasis mine)

[24] The portions of section 93H which have been emphasised, show sufficient similarity to sections 119 and 121 to consider, for guidance, the judgment in *R v Guilford Crown Court.* That judgment sought to clarify the bases on which it was appropriate to grant an order for the production of material. The headnote accurately outlines the conclusion, at which the court arrived. The relevant portion states, at page 243 E - F:

> "...that in deciding whether to grant a production order under section 93H the question to be asked was what the dominant purpose of the application was; that an order should be made only where the dominant purpose was to determine whether someone had benefited from criminal offending or the whereabouts of the proceeds, and **not where it was to determine for criminal investigation purposes whether an offence had been committed** and, if so, whether production would provide evidence of that offence..." (Emphasis mine)

[25] The court quashed an order for the production of material, because "it was not clear that the predominant reason for seeking production of the documents was not to further the investigation into the suspects' alleged criminality".

[26] In applying these principles to the typical application for a CIO, it would seem that the court should first determine, from the evidence, if it is reasonably clear that a substantive offence has been committed by the suspect, or that there is property, which bears some connection to, established criminal conduct. This would require proof that there has been a conviction for a substantive offence or at least a *prima facie* case of an offence having been committed. The offence would have had to have been committed by the suspect, in the case of forfeiture investigations and in the case of property or money laundering, by some person who may or may not be known.

[27] If those allegations have been satisfied, the court would then ascertain whether the allegations reasonably indicate than the suspect has benefited from his criminal conduct or that the subject property is “recoverable property”. If the court finds that these latter requirements are also satisfied, it may grant the application, depending on how it views the issues of the value of the information and the public interest involved (paragraphs (d) and (e) of section 121).

[28] The point, concerning the requirement of a conviction, or a *prima facie* case, is underscored when one considers the provisions relating to “forfeiture investigations”. The definition, in section 103 of the Act, for “forfeiture investigation” is identical to the definition for “confiscation investigation” as used in section 341 (1) of the POCA 2002. The term “confiscation” was considered in *R v May* [2008] UKHL 28 by the House of Lords. Their Lordships are reported as saying, at paragraph 9:

> “Although "confiscation" is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. **A criminal caught in possession of criminally-acquired assets** will, it is true, suffer their seizure by the state. Where, however, **a criminal has benefited financially from crime** but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. **The object is to deprive him, directly or indirectly, of what he has gained**.” (Emphasis mine)

The emphasised portions demonstrate that confiscation (under the POCA 2002) or forfeiture (under the Act), involves some person being convicted for an offence and so being properly titled, “a criminal”.

[29] Two other cases, dealing with confiscation orders, make the point. The first is *R v Clarke* [2009] EWCA Crim 1074. The second is *R v Vincent Clipston*

[2011] EWCA Crim 446. In the latter case the Court of Appeal of England and Wales said at paragraph 44:

> "As it seems to us, there is nothing in these sections of POCA [2002] which, on a natural reading, suggests that confiscation proceedings are other than criminal in nature. **Their starting point, as noted, is the prior conviction of the defendant of a criminal offence**. The scheme, backed by a sentence of imprisonment in default, undoubtedly has draconian features, reflecting the legislature's determination to part criminals from the proceeds of crime...." (Emphasis mine)

[30] Those perspectives are consistent with section 5 of the Act. It is my view that section 5 requires a conviction as a prerequisite to a forfeiture order. Section 5 (1) states:

> "Subject to subsection (9), the Court shall, upon the application of the Agency or the Director of Public Prosecutions, act in accordance with subsection (2) if the Court is satisfied that a defendant is-
>
> (a) convicted of any offence in proceedings before the Court, or
>
> (b) committed to the Court pursuant to section 52 (committal from Resident Magistrate's Court with a view to making forfeiture order or pecuniary penalty order)."

Subsection 2 requires the court, among other things, to determine if the defendant has a criminal lifestyle, while subsection 9 speaks to the court ordering a valuation of the property involved. Neither detracts from the requirement for a conviction.

[31] The main principle to be gleaned from the assessment of the relevant provisions of the Act is, therefore, that the applicant should satisfy the court that the material sought, through the CIO, is aimed at identifying and recovering the fruits of criminal conduct rather than for discovering whether a substantive offence has been committed. The court should not grant the CIO if it is of the

view that the application for it is for the purpose of furthering the investigation into the commission of a substantive offence, or, at least, is not convinced that it would not be so used. I now seek to apply this principle to the instant case.

Application to the instant case

[32] In the instant case there has been compliance with the formal requirements prescribed by section 119. Firstly, it is the director of the Agency, who is the appropriate officer, who has sworn to an affidavit supporting the application for a CIO. Secondly, the Agency has stated in the application, that the CIO is sought for the purpose of money laundering and forfeiture investigations. That statement is required by section 119 (2). Those requirements being satisfied, the application should be considered in the context of the requirements for each of those types of investigations.

Money laundering investigations

[33] Money laundering investigations, as pointed out above, seem to require proof of the existence of criminal conduct. In the instant case, there has been no conviction. It cannot, therefore, yet be said that there is criminal property, for the purpose of determining whether money laundering has occurred. Even if it is accepted that proof of a conviction is not essential, the Agency should, at least, provide evidence which establishes a *prima facie* case that X is guilty of criminal conduct.

[34] In seeking to fulfil that mandate the Agency stated the details of what it believed X had done. In also pointed to the fact that X was arrested and charged for various offences relating to the actions which it had mentioned. I am not

convinced that the Agency has demonstrated that the CIO is not for the purpose of the criminal investigation as to whether an offence has been committed.

[35] For those reasons, I find that the statement in the application, that it is for the purpose of a money laundering investigation, has not been supported by evidence. There cannot, in my view, be any CIO made, on that basis.

Forfeiture investigations

[36] Based on what has been said above, in the absence of a conviction, there cannot be any forfeiture proceedings. It cannot, therefore, be accurate for the application, in the instant case, to state that the CIO is required for forfeiture investigations. The application cannot succeed on this ground.

[37] Even if I am wrong, in coming to this position, I still find that the Agency has not shown why it seeks information from the particular institution named in its application. It would therefore still fail in securing a CIO.

Conclusion

[38] The provisions of the Act which govern applications for CIO's require certain prerequisites to be in place. Among those requirements are statements and evidence in support thereof, that the CIO is required for the purposes of a forfeiture investigation, a money laundering investigation or a civil recovery investigation. The structure of the Act may be interpreted as requiring that, before there can be any such investigation, there should be either be a conviction for an offence, other than one created by the Act or, at least, the demonstration that there is a *prima facie* case establishing criminal conduct by the suspect.

[39] The dominant purpose of the application must be to determine whether someone had benefited from criminal conduct or determining the whereabouts of criminal property. It should not be for the purpose of determining whether a criminal offence, other than an offence created by the Act, had been committed.

[40] The present application seeks to satisfy those prerequisites by stating, as is required by section 119 (2), that the CIO is sought for the purposes of a forfeiture investigation and a money laundering investigation. The evidence provided in support of the application, however, demonstrates that neither X nor any of X's associates has been convicted of any offence.

[41] In the absence of a conviction and the absence of a *prima facie* case that criminal conduct has occurred, the Agency has not demonstrated that the dominant reason for its application, concerning this particular financial institution, is to determine whether X and X's associates have benefited from criminal conduct. In that case, the Agency cannot satisfy the requirements of section 121 of the Act. I therefore find that the application should fail. In light of the importance of the issues involved, I rule that leave to appeal, if required, should be granted.

It is, therefore, ordered as follows:

1. The application for a CIO filed herein on June 15, 2011 is refused;

2. Leave to appeal granted.