IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV1290 OF 2003

BETWEEN	DIRECTOR OF PUBLIC PROSECUTIONS	APPLICANT
AND	ROXROY MENDEZ	RESPONDENT

Ms. Tasha Manley, instructed by Director of State Proceedings for the Applicants.

Mr. Charles Johnson, instructed by H. Charles Johnson & Company for the Respondent.

Pecuniary Penalty Order - The Drugs Offences (Forfeiture of Proceeds Act, 1994 - Offenders Benefit Obtained - Assessment of Benefit Obtained – Realisable Benefit - Section 17(2), "the lesser sum"- Constitutionality of Confiscatory Orders.

Heard: 22nd November 2006, 26th October 2007 and 18th March 2011

Campbell, J.

Background

1. On the 14th June 2005, Roxroy Mendez, a former employee of Victoria Mutual Building Society (VMBS), pleaded guilty to 32 counts of money laundering. He was sentenced to two years imprisonment and fined $1,000,000.00; in lieu of payment of the fine, to serve one year imprisonment. He had been charged with offences, contrary to the Money Laundering Act, for falsifying the General ledger Account of his employer, by debiting various sums, and engaging in transactions which resulted in crediting sums to accounts in his name and persons connected to him. On the 24th July 2003, before the investigations into the charges had been completed, the Director of Public Prosecutions (DPP) was granted interim restraint orders. The Second Respondent, the wife of Mr. Mendez, had

similar charges against her withdrawn; the Court then ordered that the pecuniary penalty applications against her be withdrawn.

2. On the 17th July 2003, the DPP had filed a fixed date claim, seeking to restrain several bank and investments accounts in the names of the First and Second Respondents, held severally or jointly with others at several financial institutions. On the 9th March 2004, VMBS had sought leave to intervene in the matter on the grounds that it would be affected by any order that the Court would make.

3. On the 27th October 2005, the DPP filed a Notice, seeking Orders that Roxroy Mendez had benefited from the offences of money laundering, and should be made to pay to the Crown the sums of £291,759.86, US$996,169.00 and J$418,573.15, being sums derived from those prescribed offences and that the restraint orders in place in respect of the several accounts be revoked on such a determination being made.

4. On the 28th February 2006, VMBS sought declarations that they had an interest in the money, the subject of the pecuniary penalty order, to the extent and value of £141,970 US$292,457.99 and J$465,866.66 and that those funds should be paid directly from the institutions where they were being held directly to VMBS, and that the costs incurred in the application be taken out prior to any funds being disbursed to the Crown. VMBS' application was subsequently withdrawn based on undertakings given by the Crown. Among the grounds on which the applications rested were the convictions of the First Respondent, and that the Crown was seeking a Pecuniary Penalty Order against the First Respondent.

The Statutory Framework

5. The statutory authority for the grant of pecuniary penalty orders are to be found in **The Drugs Offences (Forfeiture of Proceeds) Act, 1994,** (The Act), which provides at S3 (2) for two orders:

> "Where a person is convicted of a prescribed offence committed after 15th August 1994, the Director of Public Prosecutions may apply to a Judge of the Supreme Court (hereinafter referred to as a Judge) for one or both of the following orders:
>
> a) A forfeiture order against any property that is tainted property in relation to prescribed offence
>
> b) A pecuniary penalty order against the person convicted in respect of the total value of any benefits derived by or accruing to the person convicted from the commission of the prescribed offence."

6. The person against whom either order is directed must have been convicted of one of the offences in the schedule to the Act. The court is empowered to make an order for the confiscation of the total value of any benefits derived from the offender's commission of the offence.

The pecuniary penalty is more amply described at S14 of the Act, which provides that;

> "The Judge shall, if satisfied that the person has benefited from that offence, order him to pay to the Crown an amount equal to the value of his benefits from the offence or such lesser amount as the Judge certifies in accordance with section 17 to be the amount that might be realised at the time when the pecuniary penalty order is made.

An assessment by the Court of the benefits derived by the person is required by Section 17, which provides;

> "(1) Subject to subsection (2), the amount to be recovered under the pecuniary penalty order shall be the amount which the Judge assesses to be the value of the persons benefit from the prescribed offence.

7. The purpose of the Act is clearly penal. Its aim is to disgorge offenders of ill-gotten gains derived from the commission of a set of prescribed offences, by so doing deter, dissuade and hinder the targeted conduct. Mr. Justice Elias, in **Neuberg, R v (2007) EWCA Crim** 1997, in referring to the confiscatory scheme provided by the **Criminal Justice Act 1988**, as amended by the **Proceeds of Crime Act 1995**, the provisions of which are similar to those found in the Drug Trafficking Act 1994, and which itself is substantially similar to the Jamaican Legislation, quoted Lord Steyn **in R v Rezvi 2003 1 AC 1099**, at paragraph 14;

> "'The provisions of the 1988 Act are aimed at depriving such (habitual) offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises.' That an application of the statutory principles can be draconian and lead to hardship is recognized but is not a bar to the assessments being made. Mr. Justice Elias appears to cast grave doubts on 'whether there is a residual principle,' in the scheme of these confiscatory provisions for a judge's exercise of discretion with a view of mitigating the severity, injustice and harshness, that the orders so made may impose on persons."

8. Counsel for the appellant had submitted that the Court had a broad –ranging discretion, which obliges the sentencing judge "to stand back" and say "whether it's in the interest of justice to impose" an order, if there is a significant risk of injustice, Mr. Justice Elias, in response, at para 36 of **Neuberg**, says;

> "However, it is plain from the legislation and the decision to which we have made reference that the orders will sometimes have a more draconian effect than that. They are meant to discourage and deter those who might otherwise involve themselves in criminal activity from so doing. They may in some cases cause an injustice and may impose a harsh penalty. We therefore doubt whether there is a residual principle of this nature. We note that in R v Jones (2006) EWCA Crim 2061, in a judgment given by the Vice President, Latham LJ, the court held that under similar provisions in The Proceeds of Crime Act 2002, there was no general discretion given to a judge to make an order in the sum calculated by reference to the statutory provisions merely because it would cause hardship to an individual defendant. We would add that, even if there is

a residual discretion of the kind relied upon by Mr. Hotten, it seems to us that it would apply only in the most exceptional cases."

9. The rules for determining the benefit and assessing their value; the reception of statements on which the court will rely; the amount that can be recovered, under a pecuniary penalty order, are contained in S 15 of the Act;

S 15 (1) Where a person obtains property as a result, or in connection with the commission of a prescribed offence, his benefit is the value of the property so obtained.

(2) Where a person derives an advantage as a result of, or in connection with the commission of a prescribed offence, his advantage shall be deemed to be the sum of money equal to the value of the advantage so derived.

S 17 (1) Subject to subsection (2), the amount to be recovered under a pecuniary penalty order shall be the amount which the Judge assess to be the value of the person's benefit from the prescribed offence or, if more than one, all the offences in respect of which the order may be made.

a…… shall do so if satisfied that the amount that might be realized at the time the pecuniary penalty order is made is less than the amount that the Judge assesses to be the value of the person's benefit from the prescribed offence or, if more than one, all the offences in respect of which the pecuniary penalty order may be made.

10. The court has first to determine whether the offender has benefited from the offence for which he has been convicted; secondly, to quantify the amount of the offender's benefit, and finally, determine the amount that can be realised at the time the Order is made. The Court must, if satisfied that the amount to be realized is less than the amount of the benefit that the offender obtained, make an order in the amount of the lesser sum. See paragraph 10, **Rigby & Bailey v R (2006) EWCA Crim 1653**, Lord Justice May outline the process that the Court embarks on to determine the amount to be realized in the pecuniary (confiscatory) order.

Analysis

11. Has there been a benefit derived by Mr. Mendez from the commission of the offences for which he has been conviction? In answering that question, our first concern would be to ascertain what constitutes a benefit, for the purpose of the Act. S2 (1) of The Act defines "benefit" as follows, "**includes any property, service or advantage whether direct or indirect**." The term property is defined as "**includes money and all other property, real or personal, including things in action and other intangible or incorporeal property.**" The only benefit cited by the DPP that accrued to Mr. Mendez as a result of his commission of the prescribed offences is money. S15 (1) of The Act provides that "where a person **obtains** property, his benefit is the value of the property. Property so obtained is not synonymous with the property being retained, held on to, or preserved. It may be a notional amount that reflects a sum that the person would have been subjected to, or would not have been entitled to, had he not committed the offence.

12. In **Smith v R (2001) UKHL 68,** the sentencing court had ruled that in evading the duty payable on cigarettes, **Smith** had derived a pecuniary advantage, he was therefore deemed to have obtained a sum of money equal to the amount of the duty he evaded. The Court of Appeal, in overturning the judgment, held, inter alia, per Burton J; "But there was, and is, in the view of this court, no benefit to the appellant as a result of the deferment. He has never had or sold on the cigarettes, he has not retained any sum from which he could be said to have benefited and indeed he now remains liable for the duty." The House of Lords, in reversing the Court of Appeal's decision, adopted the views of Laws LJ in **R v Dimsey and Allen**, as to the natural meaning of pecuniary advantage in a case where a debt

is evaded or deferred. The House found that Smith derived a benefit by evading payment, although the cigarettes were eventually seized.

13. The actions resulting in the "obtaining" pursuant to The Act must have been carried out and executed by the person against whom the determination is to be made. His actions must have materially contributed to the **obtaining** of the benefit. He need not have been the sole actor, but his actions ought not to be insignificant. (See **Neuberg v R** (**2007) EWCA Crim 1994**, at paragraph 18, of the judgment of Mr. Justice Elias). The facts before us are clear that Mr. Mendez was the sole actor. The affidavit of Mr. Devon Watkis, at paragraph 7, details the methods used by Mr. Mendez in effecting the commission of the offence. He used the computer system to convert and then reconvert foreign currency amounts between the general ledger account of VMBS and accounts held in his name. Funds would be transferred from the general ledger account to an account of Mendez or a person connected to him. The funds would next be retransferred to the General Ledger account at a rate of exchange which would leave an amount in his account. The evidence before this court is that the transactions were totally the work of Mr. Mendez, who, using his knowledge of his employers system, the password assigned to him, was able to transfer funds of his employer to accounts controlled by his wife and himself or persons connected to him. The investigations revealed that he owned, operated and controlled seventeen (17) bank and investments accounts.

14. Central to the determination of the measure of benefit derived by Mr. Mendez is the assessment of the amount of VMBS' funds that were transferred to his accounts or to

accounts over which he had control. It is clear that based on the principles enunciated in **Smith**, whatever happened to those funds subsequently could not affect the assessment of the benefit derived by Mr. Mendes. The judgment of House of Lords is emphatic, that factors subsequent to the obtaining, is not to be taken into account. Lord Roger of Earlsberry says;

> "Except, therefore, where the actual property obtained by the offender has subsequently increased in value, the courts is simply concerned with its value to the offender "when he obtained it." It therefore makes no difference if, after he obtains it, the property is destroyed or damaged or is seized by customs officers; for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it."

On the facts before the court, it must be that the time when Mr. Mendez obtained the benefit was when it was transferred from the general ledger to his various accounts that he had control of, it matters not that some portions of the funds were subsequently re-transferred to the general ledger accounts of VMBS. In R v Richards (2005) EWCA Crim. 491, it was held that;

> "Section 71(4) bites at the moment the property is obtained or the pecuniary advantage is derived … it is entirely irrelevant that the property is thereafter destroyed, transferred to a third party or simply dissipated to no profitable advantage."

15. Mr. Johnson, on behalf of the offender, submitted that his client never deprived VMBS of the sums of monies for which the forfeiture was levied and further, the accounting figures on which VMBS relied were vague and that VMBS did not actually lose any money or did not lose any amount in the quantum alleged . There was no evidence adduced to contradict the evidence of the applicant's witnesses. Mr. Leslie Burke, Assistant Forensic Examiner of the Financial Crime Unit, in a prepared report, which presented at Table 1, a

total of all the benefits derived by the offender, based on the offences for which he was convicted. That table shows the dates of the transactions, the bank accounts to which the sums were lodged, and the amount in the transaction currency. The total amounts, according to the currency involved, are US$996,169.00; £291,759.86; J$418,573.15. Mr. Lawrence Palmer, Manager of Internal Audit Unit, VMBS, states in his affidavit that "the total monies involved in the transfers from VMBS pound sterling General Ledger Account was £501,759.86 of which transferred £359,789.86 into the General Ledger account, resulting in a net deficit to VMBS pound sterling General Ledger account of £141,970."

16. Mr. Palmer affidavit continued, "As regards VMBS United States dollar General Ledger Account, the total sum transferred was US$1,102,496.98 and of that sum, US$810,038.99 was transferred back, leaving a net deficit of US$292, 457.99. As regards VMBS Jamaican dollar General Ledger Account, the net result of the debits and credits was J$465,886.66. There is a difference between the computations of Mr. Burke and Mr. Palmer as it concerns the benefit obtained: Mr. Burke's figures are US$996,169.00; £291,759.86; J$418,573.15, as against Mr. Palmer's, which are, £501,759.86; US$1,102,496.98; J$465,886.66. The difference is explained by the fact that Mr. Burke's figures represents the sums the offender pleaded guilty to in the Resident Magistrate Court, whereas Mr. Palmer's figures are the sums which the audit revealed were transferred to the offender's account. The figures adduced in by Mr. Leslie Burke, I find, constitute the benefit that the offender, Mendez, obtained as a result of the commission of the crimes for which he was convicted.

17. The next determination to be made is the amount that might be realized at the time the order is made. The court is obliged to make an order in the lesser of the two amounts **if**

satisfied that the amount that might be realised at the time the pecuniary penalty order is made is less than the figure the court determines to be the benefit that the offender has obtained, i.e, £291,759.86, US$996,169.00, J$418,573.15. The realizable assets were contained in several bank accounts in the names of the offender and his wife and connected persons, jointly and severally. There were two motor vehicles registered in the name of Mr. Mendez, and real property, situated at Lot 267, Mansfield Heights, Ocho Rios, St. Ann, in the joint names of the offender and his wife. The report of Mr. Burke indicates that Mr. Mendez's total realizable assets amount to £83, 410.66; US$49,359.72 and J$6,639,917.15. I am satisfied, as required by Section 17(2) of The Act and certify that the realisable assets are the lesser of the two amounts. There was no serious challenge or evidence adduced to contradict the DPP's assertion that the funds in the various accounts were properly the subject of a forfeiture order. However, as it concerned the real property and the motor vehicles, the contention was that it was not tainted property.

18. Mr. Johnson argued that the "forfeiture orders" are only maintainable against tainted property, which is defined as (a) property used in, or in connection with the commission of the offence: or, more importantly, on the facts of this case, (b) property derived, obtained or realized directly by the person convicted from the commission of the offence. Was the real estate and the motor vehicles derived, obtained or, realized directly by Mendez as a result of the crime of which he has been convicted? Counsel argument continued that there must be a nexus established between the offence for which the accused has been convicted and the assets which are to be forfeited. In the case of the real estate, the property was transferred into the offender and his wife's joint names on the 30th July 1998. The offences for which the offender pleaded guilty were committed between 1999 and July

2003. The offender had owned, operated and controlled some seventeen bank and investment accounts, these accounts were in the joint names of the couple or in the names of persons connected to them, either relatives or friends. The DPP contended that the size of lodgements made and cheques encashed by the offender and his wife far exceed his legitimate income which, at its highest point, was J$792,804.00 per annum. Devon Watkis of the CIB had alleged that his investigations revealed that the offender had no other legitimate source of income, there is no evidence raised to contradict this evidence. Neither has the offender's wife sought to intervene in these proceedings although served with the requisite notice.

19. Mr. Johnson referred us to the Canadian authority of **Regina v Nayanchandra Shah, Provincial Court of British Columbia,** November 30, 1992. Vancouver No. 40437T3 which, in my respectful view, is of no assistance to him; at pg. 22 of the judgment, Judge W.J. Kitchen stated, in referring to the lower standard of proof that is required in these matters;

> "The objective of the lower standard of proof is to resolve the difficulty proving matters of which only the criminal likely has knowledge. The crown must prove beyond a reasonable doubt the identification of the proceeds of the crime and the quantum of proceeds. But proof of the identification of the proceeds of crime is a different matter. **The disposition of the proceeds by accused will have been a manipulation of property when it was likely beyond control and observation of others**." (Emphasis mine)

All of the accounts identified were recipients of inflows from the proceeds of crime. Was the mortgage paid from one of these accounts, although the date of the acquisition of the property proceeded the date of the offender's proven involvement in the offences? The terms of the provision are sufficiently wide to include property acquired prior to

involvement in the prescribed offences. The term "realize," according to the Concise English Dictionary, New Edition, means "to bring (a plan, ambition, etc.) to fruition." To my mind, to bring a mortgage loan, to fruition in these circumstances, would be to satisfy the debt. It is clear that a heavily mortgaged property, as this was, could only remain in the possession of the purchaser if the payments on the loans are being maintained. The conclusion may be different where the questioned properties' purchase price was fully paid before the offences are committed. Outside of an assertion as to the source of the original loan, there is no evidence to rebut the clear inference that the source of the mortgage payments were derived, obtained or realized directly from one or the other of the tainted accounts in which he had unlawfully lodged funds VMBS.

20. Where, as in this case, opposition is being made to property which appears to be directly realized, derived or obtained from the proceeds of crime. Parties raising such opposition are obliged to demonstrate an interest to blunt the sweep of the legislation. In **Regina v Neuberg (2007) EWCA CRIM 1994,** Mr. Justice Elias, in examining whether the offender acts materially contributed to the obtaining of the property, quoted Laws LJ judgment in **Jennings v Crown Prosecution Services (2005) EWCA CIV 744**, where the learned judge said;

> "What remains to be said about the meaning of the word "obtain" in section 71(4) clearly it does not mean retain or keep. But no less clearly, in my judgment, it contemplates that the defendant in question should have been instrumental in getting the property out of crime. His acts must have been the cause of that being done. Not necessarily the only cause, there may plainly be other factors playing their parts. All that is required is that the defendants' acts should have contributed to a non-trival that is not de minimis extent to the getting of the property. This is no more than in instance of the common laws conventional approach to questions of causation "Justice Elias also referred to Lord Steyn's observations in **May**, where monies had been received in a business jointly controlled by a number of defendants. It was held that it was

> appropriate that the court find that each defendant be treated as having received the total sum received by the company. Justice Elias quoted with approval Lord Steyn observation, "It is not necessarily any more unjust for the whole of that property jointly to be treated as the individual defendant's benefit, than for the money which has passed through a defendant's hand to be treated as his benefit, even though that money is a greater amount than his personal profit."

21. I find that the offender's contribution to the acquisition of the real property and the motor vehicles was not trivial, that it was directly realized from the funds created by his commission of these offences, and are properly assessed as a part of the realizable benefits in this application. I find that the constitutional arguments raised were without merit. The Judicial Committee of the Privy Council considered the validity of section 3 of the Proceeds of Crime Act which are in pari matera to Section 3 of The Act, in **HM Advocate and Another v McIntosh, the Times, Thursday 8th February 2001, and held that confiscation Orders do not breach rights.**

22. In **Gary Thompson v The Director of Public Prosecutions and the Attorney General**, suit M23 of 1999, the applicant had been convicted under the Dangerous Drugs Act. The Crown sought forfeiture orders against him. Mr. Thompson sought declarations that the Drugs Offences (Forfeiture of Proceeds) Act 1994, contravened section 18 of the Constitution, which provides for the preservation of the right not to be deprived of property and that such forfeiture amounts to a convicted person being punished twice. The Full Court refused to grant both declarations. Wolf CJ said;

> "Section 18 (2) of the Constitution unequivocally permits the legislature to promulgate laws for the taking of possession of or the acquisition of property by way of penalty for breach of the law whether by civil processor after conviction of a criminal offence in respect of the application for a declaration, that Mr. Thompson was being punished twice, the court found that . . . 'the forfeiture procedure is not a criminal trial and is not a continuation of the previous trial.'"

It is hereby ordered that:

i. Roxroy Mendez has benefited from the offences of money laundering in the sums of £291,759.86; US$996,169.00 and J$418,573.15 being sums derived from the offences of money laundering for which he was convicted on the 14th day of June 2005;

ii. Roxroy Mendez pay the Crown the sums of US$49,359.72, £83,410.66, J$6,639,917.15 as a pecuniary penalty order;

iii. That the restraint orders presently in place in respect of accounts numbered 585232858, 581752296, 584026103, 584122412 held at National Commercial Bank Jamaica Limited, accounts numbered 23597089, 22595060, 25090433 held at Jamaica Money Market Brokers Limited and accounts numbered 9883729, 96092721, 96013339, 97022446, 21398094 held at the Victoria Mutual Building Society be revoked consequent upon the issue of this pecuniary penalty order.

iv. Cost to the applicant to be agreed or taxed to be taken from the assets realised.