



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 207

**IN THE MATTER OF SECTION 36X OF THE PROCEEDS OF CRIME ACT 1997
AND IN THE MATTER OF ORDER 1115B OF THE RULES OF THE SUPREME
COURT**

BETWEEN:

**ATTORNEY GENERAL AND THE MINISTER OF LEGAL AFFAIRS
(ENFORCEMENT AUTHORITY)**

Applicant

-and-

ESMERALDA DEL ROCIO ESPARZA PATINO

Respondent

Before: Hon. Chief Justice Hargun

Appearances: Ms S. Dill-Francois, Deputy Solicitor General of Attorney-
General's Chambers, for the Applicant

Mr Peter Sanderson of BeesMont Law Limited, for the
Respondent

Dates of Hearing: 2 March 2022

Date of Judgment: 5 April 2022

JUDGMENT

Application for a recovery order; the standard of proof required to establish that the relevant asset was acquired unlawful conduct; whether the evidence establishes unlawful conduct

HARGUN CJ

Introduction

1. This is an application by the Attorney General and Minister of Legal Affairs (“**the Applicant**”) for a recovery order, under section 36X of the Proceeds of Crime Act 1997 (“**POCA**”) in respect of property held by Esmeralda Del Rocio Esparza Patino (“**the Respondent**”) and described as Wealth Account number 2774004843 at Sun Life Financial Investments in Bermuda, with value of US \$448,599.93 (“**the Wealth Account**”).
2. The application is made by Originating Summons dated 5 March 2020. The essential question raised by this application is whether the Court can be satisfied, on a balance of probabilities, that the sum of \$400,000 transferred into the Wealth Account in September 2015 represents property obtained through unlawful conduct and in particular the proceeds of money laundering contrary to section 36C of the POCA.

Background

3. The background facts are taken from the first affidavit of Detective Constable Shannon Trott dated 22 May 2019.
4. On 10 September 2015, the Respondent opened the Wealth Account at Sun Life Financial Investments in Hamilton, Bermuda and deposited in that account the sum of US \$400,000. This amount was paid into the Wealth Account via a wire transfer from a Wells Fargo Advisors bank account (3789-6999) in San Francisco, California held by the Respondent.

5. Three years later, on 20 September 2018, the Respondent submitted a request to close the account stating that she “*would like to change to a more liquid type of investment*” and requested that the funds be transferred to the same account at Wells Fargo. On the same date, the Respondent submitted a Sun Life “*Source of Wealth*” form which stated that the sum of US \$400,000 in the Wealth Account were the proceeds of sale of land which was acquired with “*family income proceeds from our businesses.*”
6. DC Trott exhibits a land conveyancing document which shows that the Respondent and her husband, Mr Marcelo Lopez, purchase a parcel of land in Quito, Ecuador on 17 January 2014 and sold the same parcel of land on 2 July 2015 at a price of US \$350,000.
7. DC Trott states that the enquiries have revealed that a substantial amount of the money was transferred into the Respondent’s Wells Fargo Advisors account from another Wells Fargo account being in the joint name of the Respondent, Mr Lopez and a Ms Jennifer Asuncion. Thus, for example, the sum of \$230,000 was so transferred on 7 July 2015. DC Trott also states that the sum of \$75,000 was deposited in the branch in the Respondent’s account on 29 July 2015.
8. The allegations of unlawful conduct are based upon the activities of Mr Lopez. DC Trott states that Mr Lopez was formerly employed, during 2011 to 2013, as a contracts executive for the Ecuadorian state-owned oil enterprise, PetroEcuador. On 12 October 2017 he was arrested in South Florida on suspicion of money laundering. Prosecutors in the United States have alleged that Mr Lopez was engaged in a scheme which contravened the provisions of the Foreign Corrupt Practices Act 1977 and Ecuadorian law. Prosecutors in the US contend that the scheme involved as much as \$2,100,000.
9. Mr Lopez was indicted on 24 October 2017 and on 11 April 2018 he entered a Plea Agreement with the US Department of Justice concerning the charges of money laundering. In a brief filed by the US Department of Justice dated 18 July 2018, it is contended that between 2013 and 2016, Mr Lopez was involved in a money laundering scheme involving the purchase of real estate. The scheme is described as follows:

“From March 2012 until May 2013, the defendant [Mr Lopez] worked as an in-house attorney and the General Coordinator of Contracts for the Refining Management of PetroEcuador, and a shared responsibility for reviewing and awarding contracts. Abusing his public position and influence within PetroEcuador the defendant demanded and obtained approximately \$2,100,000 in bribes for his own benefit from contract seeking to do business with PetroEcuador. In addition to being one of several PetroEcuador officials who engaged in bribery conspiracy, the defendant also participated in a subsequent conspiracy that lasted until 2016 to launder the proceeds of the corrupt scheme through property through property purchases financed by offshore shell companies that used foreign bank accounts, including in the United States. Being an attorney, the defendant knew that the receipt of bribes and the proceeds was illegal, and he waited to take ownership of several properties, including in Miami, Florida, until he was no longer employed by PetroEcuador.”

10. DC Trott suggests that based on the conviction of Mr Lopez for money laundering in the US courts and based on his relationship with the Respondent, it is believed that the funds transferred to the Respondent’s Wealth Account *“by Mr Reyez Lopez and the funds contained in the account are due to Money Laundering.”* DC Trott concludes that *“therefore the inference can be drawn that the benefit received from the property transaction in Ecuador is also part of the bribery scheme.”*

Legal framework and relevant principles

11. In *Attorney General and Minister of Legal Affairs v Kenith Clifton Bulford* [2021] Bda LR 27, this Court set out the relevant statutory provisions applicable in applications. The relevant statutory provisions applicable in this case are to be found in sections 36A, 36B and 36C of POCA and they provide:

“Civil recovery proceedings

36A (1) The enforcement authority may recover, in civil proceedings before the Supreme Court, property which is, or represents, property obtained through unlawful conduct.

(2) The powers conferred by this Part are exercisable in relation to any property whether or not any proceedings have been brought for an offence in connection with the property.

(3) Proceedings for a recovery order may be taken by the enforcement authority against any person who the authority is satisfied holds recoverable property.

(4) The enforcement authority shall serve the originating summons—

- (a) on the respondent; and*
- (b) unless the court dispenses with service, on any other person who the enforcement authority thinks holds any associated property which the authority wishes to be subject to a recovery order, wherever domiciled, resident or present.*

...

Unlawful conduct

36B (1) Conduct is unlawful conduct if it is unlawful under the criminal law of Bermuda.

(2) Conduct which—

- (a) occurs in a country outside Bermuda and is unlawful under the criminal law of that country; and*

- *(b) if it occurred in Bermuda, would be unlawful under the criminal law of Bermuda, is also unlawful conduct.*

(3) The court shall decide whether it is proved—

- *(a) that any matters alleged to constitute unlawful conduct have occurred; or*
- *(b) that any person has obtained any property through such unlawful conduct.*

Property obtained through unlawful conduct

36C (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.

(2) In deciding whether any property was obtained through unlawful conduct—

- *(a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct;*
- *(b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.”*

12. These provisions in the POCA were considered in detail in the judgment of Hellman J in *Attorney General (Enforcement Authority) v Tito Jermaine Smith* [2018] Bda LR 50, where the learned Judge considered the guidance given by Lord Dyson JSC in *Serious Organised Crime Agency v Gale* [2011] UKSC 49. At paragraph 123 Lord Dyson held:

“The essential nature of the proceedings is civil. The respondent to the proceedings is not charged with any offence. He does not acquire a criminal conviction if he is required to deliver up property at the conclusion of the Part 5 proceedings. None of the domestic criminal processes are in play. On the contrary, as Kerr LCJ put it in Walsh v Director of the Assets Recovery Agency [2005] NICA 6, [2005] NI 383, at para 23: “all the trappings of the proceedings are those normally associated with a civil claim”. These include the express provision that the standard of proof is on the balance of probabilities. The nature of the proceedings is essentially different from that of criminal proceedings. The claim can be brought whether a respondent has been convicted or acquitted, and irrespective of whether any criminal proceedings have been brought at all. This was a factor which weighed with the ECtHR in Ringvold v Norway at para 38 when the court was considering whether article 6(2) applied to a claim for compensation by the alleged victim of a sexual offence against the alleged perpetrator. The purpose of Part 5 proceedings is not to determine or punish for any particular offence. Rather it is to ensure that property derived from criminal conduct is taken out of circulation. It is also of importance that Part 5 proceedings operate in rem. The governing concept is that of “recoverable property” which represents both property obtained directly by unlawful conduct and also property which represents the original property.”

13. In relation to the proof of “unlawful conduct”, it is not necessary for the applicant to establish that a specific criminal offence has been committed. As was held by Moore-Bick LJ in *Director of Asset Recovery Agency v Szepietowski* [2007] EWCA Civ 766 at [106–107] it is sufficient to prove that specific property was obtained by or in return for a criminal offence of an identifiable kind.
14. In considering whether an offence of an identifiable kind (robbery, theft, fraud or whatever) has been established on a balance of probabilities, the court is entitled to apply a commonsense approach and draw reasonable inferences. The court may draw all reasonable inferences from the fact that the manner in which the respondent chose to store his accumulated cash and from the failure of the respondent to keep any business records.

This was so held by King J in *Director of the Assets Recovery Agency v Jackson* [2007] EWHC 255 (QB) at [115,118–119]:

“115. I also echo what Langley J said on the emphasis to be put on the qualifying adverb “solely” in the context of proof of obtaining property through unlawful conduct, by reference to a comparison between lifestyle and identifiable sources of income. Such a comparison will not in itself be sufficient but as in Olupitan so in the present case the claimant is entitled to ask the court to look at the totality of the evidence and the whole picture which emerges. As Langley J said at paragraph 23 “it is one thing to point to unexplained lifestyle, it may be another, if an explanation is offered but rejected as untruthful and taken with other evidence”

...

118. I also consider that the court is entitled to take a commonsense approach to the inferences to be drawn from the manner in which the Respondent chose to store his accumulated cash and from the failure of the respondent to keep any business records in the context of the evidence as a whole.

...

119. Equally, as the Receiver said in evidence, one would expect any successful law-abiding businessman to keep some sort of record no matter how simple, of what he was buying, what he was selling and the amounts of his overheads – if only to work out the sort of profit he was making and which were his most profitable items. The criminal dealer in, for example, illicit drugs will of course eschew any record by which his activities might be detectable”.

15. In *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB) Williams J considered the two ways in which it can be proved that the property was derived from crime in money laundering offences at [17]:

“I respectfully agree with and adopt the above cited observations of Sullivan J, Langley J and King J and if support is needed it is to be found in the decision of the Court of Appeal, Criminal Division in R –v- Anwoir & Others [2008] 2 Cr App R

36 at para 21 at page 539 that there are two ways in which the Crown can prove in money laundering offences that property was derived from crime - either by proving it derived from unlawful conduct of a specific kind or kinds or by evidence of the circumstances in which the property was handled, such as to give rise to the irresistible inference that it could only have been derived from crime (although in criminal proceedings the higher standard of proof is required).”

Discussion

16. Ms Dill-Francois, for the Applicant, submits that the Court can decide on a balance of probabilities, whether the matters alleged to constitute unlawful conduct have been proven. Ms Dill-Francois submits that the relevant factors and circumstances the Court to take into account are the following:

- (1) Mr Lopez and the Respondent are married and own a joint bank account.
- (2) The money laundering scheme which Mr Lopez was involved in, took place between 2013 and 2016.
- (3) On 2 July 2015, when Mr Lopez sold his property in Ecuador for \$350,000, during the period he admits he was involved in the money laundering scheme. It can therefore be inferred, Counsel argues, that this property was part of the money laundering scheme, and consequently the funds received from the sale are the proceeds obtained from unlawful conduct.
- (4) On 7 July 2015, five days after the sale of land, \$230,000 was transferred into the Respondent’s Wells Advisors bank account. It can be inferred, Counsel argues, that the funds transferred from Mr Lopez and the Respondent’s joint bank account, to the Respondent’s Wells Fargo Advisors bank account, are the proceeds of the sale of the land.

- (5) On 10 September 2015, the Respondent opened a Wealth Account with Sun Life in Bermuda and the total amount of money deposited was \$400,000. It can be inferred, Counsel argues, that the funds in the Wealth Account are the proceeds of the sale of land, which the Applicant submits was part of the money laundering scheme.
17. Essentially, for the reasons advanced by Mr Sanderson, the Court is unable to be satisfied, on a balance of probabilities, that the Wealth Account does represent property obtained through unlawful conduct and specifically that it represents the proceeds of money laundering. In coming to this conclusion, the Court has taken into account the following facts and circumstances.
18. First, there is credible evidence that the Respondent and her husband, Mr Lopez, did indeed purchase the land in Ecuador in January 2014 and sold it in July 2015 for the sum of \$350,000. This is evidenced by the conveyancing document exhibited to DC Trott's first affidavit. This is consistent with the Respondent's statement to Sun Life that the Wealth Account was ultimately substantially funded by the sale of land in Ecuador.
19. Second, the purchase of this land in January 2014 and its sale in July 2015, did not involve *"property purchases financed by offshore shell companies that used foreign bank accounts, including in the United States."* The land in question was bought in January 2014 directly in the name of the Respondent and her husband, Mr Lopez, and sold in July 2015 by them in their personal capacity. The proceeds of sale were transferred into their own personal names and not hidden using shell companies or other devices. There appears to be no attempt to hide the participation of the Respondent and Mr Lopez in this transaction.
20. Third, the Respondent stated to Sun Life that the proceeds of the sale of land in Ecuador which had been acquired in in January 2014 and her husband *"with the money obtained from family income proceeds from our businesses."* There is no direct evidence which contradicts this statement.

21. It is submitted on behalf of the Applicant that as the land in Ecuador was purchased during the period when Mr Lopez accepts in his Plea Agreement that he was involved in the concealment of the proceeds of the bribery scheme involving shell companies, the Court can infer and be satisfied, on a balance of probabilities, that the land in question was also purchased by the use of funds which were the proceeds of the bribery scheme.
22. The Court has come to the view that it cannot be satisfied, on the balance of probabilities, that the land in Ecuador was purchased using funds obtained through unlawful conduct merely because the land was purchased during the period in which Mr Lopez had engaged in unlawful conduct. The Applicant's case appears to be based on the proposition that all assets acquired by the Respondent and Mr Lopez during the period 2013 to 2016 are tainted with Mr Lopez's unlawful conduct and are to be considered as assets acquired by the proceeds of unlawful conduct. In the Court's view that proposition goes too far and cannot by itself discharge the burden of establishing, on a balance of probabilities, that a particular asset acquired during the period 2013 to 2016 was acquired by the funds obtained through unlawful conduct. This is particularly so where, as is the case here, there are factors which point in the opposite direction (see paragraphs 18 to 20 above).
23. In addition, as Mr Sanderson points out, the Respondent and Mr Lopez are a professional couple in their 50s and there is no evidence that they could not have purchased the land in January 2014 from their own resources which were not the proceeds of unlawful conduct.
24. The Court wishes to add that had it been satisfied on the civil standard that the land was acquired by the funds through unlawful conduct, the Court would not have dismissed the Applicant's application on the ground that the alleged crime is extra-territorial. In this regard, Mr Sanderson argues that section 13 of the Bermuda Constitution, providing for protection from deprivation of property, is engaged in this case. He argues that whilst section 13(2) (a) (ii) allows the taking of possession or acquisition of property *by way a penalty for breach of any law or forfeiture in consequence of the breach of any law*, the reference to "law" must refer exclusively to the laws of Bermuda, rather than all legal systems in the world.

25. It is clear to the Court that POCA, a statute passed by the Bermuda legislature, is intended to be extra-territorial in its application. In this regard it is to be noted that section 2(2) of POCA provides that *“This Act shall apply to any property, whether or not situated in Bermuda.”*
26. As set out in paragraph 11 above, section 36B defines unlawful conduct which is **either** unlawful under the criminal law Bermuda **or** unlawful under the law of a country outside Bermuda provided that if it had occurred in Bermuda, it would have been unlawful under the criminal law of Bermuda. Mr Sanderson submits that section 36B(2) is void as it is repugnant to section 13(2)(a)(ii) of the Bermuda Constitution, in that it purports to allow civil recovery in circumstances where there has not been any actual breach of the law of Bermuda.
27. The Court is unable to accept this submission. As noted by the English Court of Appeal in *R v Rogers* [2014] EWCA Crim 1680 at [52] *“The offence of money laundering is par excellence an offence which is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extra-territorial effect (as we found it did).”*
28. Bermuda, as a leading international business jurisdiction, has a compelling interest in ensuring that companies incorporated in this jurisdiction are not used for the purposes of depositing proceeds of unlawful conduct even if the unlawful conduct took place outside the jurisdiction. This is precisely what sections 2(2) and 36(B)(2) of POCA seek to achieve and the Court is not persuaded that the provisions are repugnant to section 13(2)(a)(ii) of the Bermuda Constitution.

Conclusion

29. For the reasons set out in paragraphs 18 to 23 above, the Court has concluded that it is not satisfied, on a balance of probabilities, that the monies deposited by the Respondent in the Wealth Account at Sun Life in Bermuda are the proceeds of unlawful conduct. Accordingly, the Applicants application for a recovery order is hereby dismissed.

30. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 5th day of April 2022

NARINDER K HARGUN
CHIEF JUSTICE