



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 215

BETWEEN:

THE ATTORNEY-GENERAL AND MINISTER OF LEGAL AFFAIRS

[ENFORCEMENT AUTHORITY]

Applicant

-v-

YESHAYAHU ZIRKIND

Respondent

REASONS FOR DECISION

(in Court)¹

Civil recovery application-Proceeds of Crime Act 1997 section 36A-Rules of the Supreme Court 1985 Order 115B-legal framework

Date of hearing: November 22, 2016

Date of Judgment: November 28, 2016

Ms. Shakira Dill-Francois, Deputy Solicitor-General, for the Applicant

The Respondent did not appear

¹ The Judgment was circulated without a hearing to hand down judgment.

Introductory

1. On November 22, 2016, I made a civil recovery order in favour of the Applicant in respect of \$826,000 in cash found in a safe in the Respondent's hotel room. The Respondent, an Israeli national believed to reside in China, left Bermuda after being acquitted of criminal charges. Although initially represented by Christopher's, the Respondent, perhaps unsurprisingly, ultimately elected not to contest the present proceedings.
2. I now give reasons for that decision.

Legislative Framework

3. Ms Dill-Francois referred the Court to Order 115B of the Rules of the Supreme Court as providing the procedural basis for her application. Nothing turned on the Rules however. She pointed out that the substantive legal basis for the application lay in the following provisions of the Proceeds of Crime Act 1997:

“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.

(5)...

(6)...

(7)...

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.”*

4. It follows that the Applicant was required to prove that the cash seized from the Respondent’s hotel room safe either was or represented the proceeds of “*unlawful conduct*”. Unlawful conduct means conduct in Bermuda which is a breach of our criminal law or conduct abroad which is (a) a breach of a foreign jurisdiction’s criminal law, and (b) is conduct which, if committed in Bermuda, would be unlawful under Bermudian criminal law. The Deputy Solicitor-General rightly submitted that no specificity was required in this regard, relying upon Moore-Bick LJ’s observations in *Director of Assets Recovery Agency v. Szepietowski* [2007] EWCA Civ 766 at [107]:

“107...it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances, and that the property was obtained by or in return for it ... in order to succeed the Director need not prove the commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion. Nonetheless, I think it is necessary for

her to prove that specific property was obtained by or in return for a criminal offence of an identifiable kind (robbery, theft, fraud or whatever) or, if she relies on section 242(2), by or in return for one or other of a number of offences of an identifiable kind.”

Function of the legislative scheme

5. I accepted the following contentions advanced in the Applicant’s Written Submissions:

“3. The purpose of the legislation was considered in R (on the application of the Director of the Assets Recovery Agency) v Ashton (Paul) [2006] EWHC 1064 (Admin), where Newman J stated at paragraphs 41 & 42:

[41] ...What, in my judgment, Parliament is here doing is indeed seeking to enforce some measure of recovery for the benefit of the state. It is seeking to make a recovery for the state and in the public interest of the state, so that the proceeds of crime should not be at large in society for the benefit of those who happen to be in possession of them at the time.

[42] Crime, when it is committed, is not simply a crime against a victim who may be the individual victim of the crime. Crime, when it occurs, is an offence against the good order of the state and, apart from the victim, it puts the state to enormous expense to resolve questions in connection with crime...

***R (on the application of the Director of the Assets Recovery Agency) v Ashton (Paul)* [2006] EWHC 1064 (Admin)**

4. Therefore, it is our submission that civil recovery is considered key in the fight against organized crime as it disrupts the flow of criminal assets and acts as a deterrent to current and potential criminals.”

The standard of proof

6. I also accepted that the civil standard of proof applied. The statute expressly provides for “*civil recovery proceedings*” and so the starting assumption must obviously be that matters requiring proof must be proven to the civil standard. This finding was significant in the present case where the Crown had been unable to prove that the

Respondent was guilty of unlawful conduct in the criminal courts. Eminent authority for the proposition that the fact that no convictions had been obtained anywhere in connection with the property sought to be recovered was irrelevant, was cited: *Gale and another v Serious Organised Crime Agency* [2011] UKSC 49.

7. In that case, the Crown relied upon evidence used in an unsuccessful criminal prosecution in Portugal to support civil recovery proceedings in England and Wales. Various members of the United Kingdom Supreme Court expressed differing views on one topic. This was whether the presumption of innocence and fair hearing rights of the appellant under the European Convention on Human Rights had been potentially infringed by findings which allegedly impugned his innocence notwithstanding his criminal acquittal. There was apparent unanimity, however, on the proposition that the civil burden of proof applied in the civil recovery proceedings. Lord Phillips concluded his judgment with the following summary of his conclusion on this point which the Applicant's counsel in the present case aptly relied upon as reflecting the Bermudian law position under our own Proceeds of Crime Act:

“[55] The starting point in this case is the possession of property by the Appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned. The judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the Appellants' wrongdoing. For the reasons that I have given I would dismiss the appeal in relation to the first issue.”

Approach to the evidence

8. The above legal principles supported the approach to the evidence which Ms. Dill-Francois commended to the Court:

“11.It is our submission that it is for this Honourable Court to decide on the balance of probabilities whether the matters alleged to constitute unlawful conduct have been proved. Here, the court must consider the totality of the evidence and may take a common sense approach to the inferences which may be drawn from a failure to provide an explanation, the giving of an untruthful explanation, or a failure by a defendant to keep the usual records which an honest man would be expected to keep....

12. In our submission, there are a number of inferences which can be drawn in the present case...For instance, the Respondent has provided no legitimate explanation for the funds, the funds were bundled in such a way that suggested that they could be attributed to drug trafficking...the Respondent was associated with an individual who was believed to move illicit money across borders, and the Respondent has chosen not to defend this action against him.”

9. The facts of the present case were such as to create a strong (and almost irresistible) presumption that the \$826,000 in cash found in Respondent’s hotel room represented the proceeds of criminal conduct. In the absence of any exculpatory explanation, it was easy to be satisfied that the Applicant had proved beyond the civil standard of proof the case for a civil recovery order under section 36A of the Act.

Conclusion

10. For these reasons, on November 22, 2016, I granted the Applicant’s application for a civil recovery order.

Dated this 28th day of November 2016 _____

IAN RC KAWALEY CJ