

Filing Cabinet

IN THE SUPREME COURT OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2009 HCV 01863

IN THE MATTER OF AN
APPLICATION FOR A DISCLOSURE
ORDER PURSUANT TO SECTION
105 OF THE PROCEEDS OF CRIME
ACT, 2007

BETWEEN	RICARDO HARDLEY	APPLICANT
AND	THE BANK OF NOVA SCOTIA	FIRST RESPONDENT
AND	NATIONAL COMMERCIAL BANK	SECOND RESPONDENT
AND	JAMAICA NATIONAL BUILDING SOCIETY	THIRD RESPONDENT

IN CHAMBERS

Suzanne Watson Bonner for the applicant
Melrose Reid and Kayann Bali for Kevin McGowan

July 8, 16, 23 August 20, 2009

APPLICATION UNDER SECTION 105 OF THE PROCEEDS OF CRIME
ACT - REASONABLE GROUNDS TO BELIEVE THAT PERSON
BENEFITED FROM CRIMINAL ACTIVITY OR COMMITTED A MONEY
LAUNDERING OFFENCE

SYKES J.

1. This is an application by Sergeant Ricardo Hardley of the Jamaica Constabulary Force under section 105 of the Proceeds of Crime Act, 2007 ("POCA"). This statute was enacted by the legislature to give effect to Jamaica's obligations under various international conventions which mandated signatories to the conventions to enact legislation that would enable the state to confiscate property derived from or used in criminal activity.
2. The POCA repealed replaced the Drug Offences (Forfeiture of Proceeds) Act, 1994, which as the name suggests applied only to drug related offences. POCA now applies to crimes other than drug offences.
3. If the state is going to be able to take property under POCA then obviously it must be able to identify such property. Section 105 is directed at achieving this objective. Section 105 (1) authorises a Judge of the Supreme Court to make a disclosure order if he is satisfied that the requirements for making the order are met. A disclosure order compels the person to whom it is directed to produce the information or material to an appropriate officer. The expression appropriate officer includes a police constable. Therefore Sergeant Hardley is authorised to make this application.
4. Section 106 contains requirements that must be met before the court can grant the disclosure order. Under section 106, the Judge must be satisfied that there are reasonable grounds for believing that (a) in the case of a forfeiture investigation the person targeted by the disclosure order has benefited from his criminal conduct; (b) in the case of a civil recovery investigation, the property targeted by the disclosure order is recoverable property or associated property; or (c), in the case of a money laundering investigation, the target of the order has committed a money laundering offence.
5. Additionally, the Judge must be satisfied that there are reasonable grounds for believing that the person who is being asked to produce the information has possession or control of the information or

material. Also, there must be reasonable grounds to believe that the information or material is likely to be of substantial value to the investigation. Finally, the Judge must be satisfied that it is in the public interest for the information or material to be produced.

6. In this particular case, there is no question that the named financial institutions are in possession of the information sought. This disclosure order application comes on the heels of a previous customer information application made under ss119 - 121 of POCA.

The allegations

7. Sergeant Hardley is seeking a disclosure order against Mr. Kevin McGowan. The context of this application is this. The applicant is alleging that Mr. Kevin McGowan was found in possession of JA\$700,000.00 which was in a car in which Mr. McGowan and Miss Stacey-Ann Garvey were. The police are of the view that this money may be the proceeds of an illicit payment received by Miss Stacey-Ann Garvey on October 17, 2008. I should say that it is common ground that Mr. McGowan and Miss Stacey-Ann Garvey had an intimate relationship for sometime before October 18, 2008, when she was taken into custody.
8. According to the police, Miss Garvey, while she was an employee of the National Housing Trust ("the Trust"), engaged in fraudulent activities. The fraud alleged was that Miss Garvey took payment from members of the public under the guise of helping them to secure a home. She is alleged to have told them that she could help them purchase houses that were repossessed by the Trust. The police further allege that Miss Garvey told the alleged victims that they would have to pay ten percent of the sale price and after this payment, they would be contacted by the Trust within a stated period of time for an interview.
9. Miss Garvey would then provide a list of properties from which the intended purchasers would make a selection of the property they wished to purchase. On selection of the property, Miss Garvey would prepare the sale agreement, collect the deposit and then collect the balance of the purchase price in accordance with the agreement

prepared by her. The police further say that after a period of time the purchasers did not receive the house. The alleged fraud came to light when a number of disgruntled purchasers complained to the Trust.

10. The police commenced investigation. On October 18, 2008, Miss Garvey was arrested at the corner of Burry Road and King Street in the parish of Kingston. According to Sergeant Hardley, when she was arrested she was standing beside a Honda Civic motor car in which Mr. Kevin McGowan was seated.
11. The car was driven to Fraud Squad headquarters by Mr. McGowan while Miss Garvey was taken to the headquarters by the police. The car was searched and the police found J\$700,000.00.
12. At the time of her arrest there was a brown bag near the car in which Miss Garvey and Mr. McGowan were. The police were about to take the bag in to their possession while they were at the corner of Barry and King Streets when it was claimed by a Mrs. Bennett. It is not clear whether Mrs. Bennett is related to either Miss Garvey or Mr. McGowan. The police did not search that bag at that time.
13. The police say that at the headquarters, Miss Garvey denied ownership of the money. Mr. McGowan said, initially, that the money belonged to Miss Garvey but later said that the money was his and it was to be used to pay bills incurred by his security company.
14. At the time the police were taking Miss Garvey into custody, a brown hand bag was seen on the ground near to the car. The police attempted to search the bag when it was claimed by a Mrs. Bennett. The police allowed Mrs. Bennett to take the bag. It was not searched.
15. The police later decided to retrieve this brown hand bag. Fortunately for them, Mrs. Bennett was seen outside the headquarters. She was questioned about the bag by the police and she denied ownership of the bag and said that it was Miss Garvey's bag. She further said that the bag was with a relative.

16. Mrs. Bennett took the police to 4 Kingston Lane, Fletchers Land, Kingston, where the bag was retrieved from the house of Miss Kadia Shepherd. When the bag was searched, no money was found but the found a receipt bearing hand writing said to be that of Miss Garvey. It appeared to be a receipt acknowledging receipt of \$1.2m from Mr. Benclay Hibbert which represented the down payment for a house in the Norbrook area valued on J\$8m. A business card in the name of Mr. Hibbert was found in the bag. The number on the card was called and Mr. Hibbert confirmed that he paid over the J\$1.2m.
17. Mr. McGowan's conduct may amount to a money laundering offence under section 92 (2) of POCA, that is to say, being concerned in an arrangement that facilitates the retention of criminal property by or on behalf of another person. By saying that the money was to pay the bills of his security company, it may be said that Mr. McGowan was facilitating the retention by Miss Garvey of money received from Mr. Hibbert.
18. Mr. McGowan is resisting this application. He says that he is a legitimate business man providing security services for his many and varied clients. He says that the police are not speaking the truth about what took place on October 18. He alleges that the \$700,000.00 is his and it was acquired in this way. On October 17, 2008, he withdrew \$470,000.00 from National Commercial Bank, Cross Roads which he kept with him and took to Santa Cruz the same evening. Later that night, one of his managers gave him, \$200,000.00 which the manager had collected from Mr. McGowan's clients. He also collected an additional \$180,000.00 from an event that was held at a club operated by Mr. McGowan.
19. On October 18, 2008, he came back to Kingston with all this cash. He gave some of the money to a Miss Kerry-Ann Smith; some to his mother; some to his wife and he had some in his pockets.
20. He added that it was he who told the police that the money was in the car after the police searched the car but did not find the money. He denies that Miss Garvey was near the car. What he does say about Miss Garvey is that on the day in question he was in the Fletcher's

Land community, Upper King Street, waiting, as a dutiful husband, on his wife whom he had taken to shop at Coronation Market. When he got to Fletcher's Land, he saw Miss Garvey and some men on the other side of the road from him. He parked his car. Miss Garvey was not in his car and there was no one else with him. This was the context, said he, in which he was taken into custody by the police.

Analysis

21. Section 106 requires the Judge to have reasonable grounds to believe the things set out in the provision. I should say at this point that the application is fully compliant with section 105 (2).
22. It is my view that Lord Atkin's dissenting speech in the case of *Liversage v Anderson* [1942] A.C. 206 points the way for interpretation of provisions of this nature. His Lordship stated at pages 227 - 228:

If it is a condition to a right (including a power) granted to A, whenever the right comes into dispute the tribunal whatever it may be that is charged with determining the dispute must ascertain whether the condition is fulfilled. In some cases the issue is one of fact, in others of both fact and law, but in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean "if A thinks that he has." "If A has a broken ankle" does not mean and cannot mean "if A thinks that he has a broken ankle." "If A has a right of way" does not mean and cannot mean "if A thinks that he has a right of way." "Reasonable cause" for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause is in our law to be determined by the judge and not by the tribunal

of fact if the functions deciding law and fact are divided. Thus ... the plain and natural meaning of the words "has reasonable cause" imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed ...

23. What this means is that if I have a belief under section 106 it must be based on reasonable grounds. Mere belief that the conditions are met is not sufficient. The purpose of requiring the Judge to have reasonable grounds for his belief is to a safeguard against arbitrariness and the unduly suspicious. Thus the Judge, in these applications, is a gate keeper who is to see that applications that do not meet the statutory standard are turned away.
24. Having said this, it must also be appreciated that this is an investigative power. Thus the Judge has to be careful that he does not make the standard so high that it defeats the purpose of the provision. The Judge is not required to be satisfied to the criminal standard of proof. Neither is the standard that of a prima facie case, that is to say, it is not the standard of a balance of probability. It is lower than that. This is an interim application and so the police are permitted to state matters in the evidence which they would not be able to give in a criminal trial.
25. The disclosure application is in a statute that expressly states that the standard to be met when considering confiscating property is the civil standard of proof (see section 5 (7)). It would seem to me that if the civil standard of proof is what is required for final applications under POCA where property is being taken then it is extremely unlikely that the balance of probability is the standard for disclosure applications.
26. Therefore, when the court is deciding whether there are reasonable grounds for the belief, it may turn out after full investigation that the person has not committed or benefited from any criminal offence but that possibility has nothing to do with the threshold requirement for a disclosure order. Also reasonable grounds for belief is a higher

standard that reasonable grounds to suspect (see section 126 (2) (a) of POCA). Section 106 means that I have to have more than suspicion but I do not need to be satisfied on a balance of probability.

27. Let me now state the objective grounds for the belief that I have formed that Mr. McGowan may have committed a money laundering offence under section 92 (2).

28. First, it does seem odd that Mr. McGowan who professes to be a provider of security services would himself engage in the unsafe practice of driving from Kingston to Santa Cruz and back with nearly half of one million dollars in his car. Further, he acquires a further \$380,000.00 after his alleged withdrawal of \$470,000.00 which he also keeps in his car. On the face of it having this large sum of money is quite inconsistent with sound security practices and calls into question the veracity of Mr. McGowan.

29. Second, Mr. McGowan is quite precise when he is receiving money but when he is giving money to his mother and other persons he is quite vague.

30. Third, Mr. McGowan and Miss Garvey had an intimate relationship until the day she was arrested. He admitted this in his affidavit. There is no affidavit evidence refuting or challenging the police evidence regarding the finding of the receipt in the brown bag recovered from Miss Kadia Shepherd. Neither is there evidence challenging or refuting the police evidence that the receipt, on the face of it, purports to be in respect of \$1.2m received from Mr. Hibbert.

31. Fourth, the police version of events leading up to the arrest of Miss Garvey and Mr. McGowan including the bag is more logical and persuasive than that advanced by Mr. McGowan. The police have laid out in clear and coherent fashion their step by step investigation in this matter. The sequence of events set out by the police is more cogent and explains with a high degree of specificity each step they took and why they did it.

32.Fifth, the evidence disclosed by the police show that the money found in the car may have come from Mr. Hibbert's down payment allegedly made on October 17, 2008.

33.I have noted that this application has taken the form as if it is a claim against the financial institutions. This heading is not appropriate. There is no issue joined between the financial institutions and the applicant. The financial institutions have the information being sought but that is not a reason to name them as parties to the claim.

Conclusion

34.In my view, the evidence provided by the police and Mr. McGowan have caused me to have reasonable grounds for the belief that Mr. McGowan has committed a money laundering offence. The disclosure order is granted.

