

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2017/0057

**In the Matter of Sections 31 and 32 of the Proceeds of Crime Act 1993 as amended by Sections 9
and 10 of the Proceeds of Crime (Amendment) Act 2014**

And

In the Matter of an Application for a Restraint Order

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Claimant/ Respondent

and

CRESSWELL OVERSEAS S.A.

Defendant / Applicant

Appearances:

Mr. Frank Walwyn and with him Ms. Jacqueline Walwyn for the Applicant/Defendant
Mr. Curtis Bird for the Respondent/Claimant

2020: March 6th;
March 12th

RULING

[1] **KELSICK, J [Ag.]**: There are four extant applications filed by Cresswell Overseas S.A. in this matter:

- (i) Application filed 5th December 2019 to set aside the Restraint Order made on 25th July, 2017 ("Set Aside Application");
- (ii) Application filed 23rd December 2019 to appoint Jose Carizzo as an expert witness ("Carizzo Application");
- (iii) Application filed 10th February 2020 to appoint Valston Graham and Paulo Buzanelli as expert witnesses ("Graham/Buzanelli Application"); and
- (iv) Application filed 20th February 2020 to strike out portions of the Affidavit of Mr. Akeem Shaw filed on 13th February 2020 ("Shaw Affidavit Application").

- [2] The Set Aside Application will be heard at a later date. The other Applications were dealt with at the hearing before me. The Carizzo Application was not opposed. That left the Graham/Buzanelli Application and the Shaw Affidavit Application.

Preliminary Point

- [3] At the beginning of the hearing Mr. Bird brought to my attention the document exhibited as “AS-4” to Mr. Shaw’s Affidavit. This was a Notice of Assignment dated 19th December, 2018 by which Cresswell assigned 3 accounts at Meind Bank Antigua to Meind Bank AG, Vienna. Mr. Bird suggested that the effect of this assignment is that Cresswell is no longer interested in the said accounts and therefore has no locus standi to pursue the Set Aside Application nor the other applications which were ancillary to it.
- [4] This might have been the case if the effect of the assignment was to transfer the legal and equitable ownership of the accounts to Meind Bank AG such that the latter could bring proceedings in its own name in Antigua to recover them. At common law, this was not the case. Debts could only be assigned in equity which meant the proceedings to recover them still had to be brought by or in the name of the creditor. I asked Mr. Bird whether there was any statute in Antigua and Barbuda which altered the common law but he could not say.
- [5] The Court also raised the issue whether the assignment was in breach of Thom J’s order dated 25th July, 2017. If so, I would have considered declining to hear Cresswell’s applications. However, Mr. Bird could refer me to no evidence which established that the order was served on Cresswell prior to the making of the assignment.
- [6] I therefore determined to hear the applications. However, the final determination of Cresswell’s locus standi will be deferred to the hearing of the Strike Out Application.

Graham/Buzanelli Application

Valston M. Graham

- [7] Mr. Graham is a lawyer of 12 years standing. He is currently the Director of Public Prosecutions in St. Kitts and Nevis, having been appointed in 2016. His curriculum vitae states that prior to that he was the Senior Crown Counsel in the Office of the Director of Public Prosecutions in the British Virgin Islands (2009 – 2016), and Crown Counsel in the same office (2007 to 2009). Before becoming a lawyer, he was a police officer for over 20 years, having attained the rank of inspector.
- [8] The grounds in support of the application to have him appointed as an expert are that Cresswell alleges that the investigation against it is not being pursued diligently and that the DPP has not prosecuted his claim diligently which issues call for expertise on:
- (i) the duties and responsibilities of the ONDCP in relation to investigations regarding restraining orders;

- (ii) how the investigation by the ONDCP into Cresswell has been conducted in this particular case;
 - (iii) the duties and responsibilities of the Office of Director of Public Prosecutions in relation to proceedings for restraining orders; and
 - (iv) how the DPP's claim has been prosecuted in this particular case.
- [9] At first blush, (i) and (iii) raise issues of the law of Antigua and Barbuda, which, not being issues of foreign law, are of course not appropriate for expert evidence; and (ii) and (iv) are questions of fact on which it is unclear what evidence Mr. Graham could possibly give.
- [10] The expert evidence which Mr. Graham proposes to give was filed on 14th February, 2020. In it he states that four questions were posited for his opinion:
- (i) Whether the ONDCP has diligently carried out its investigation in relation to Cresswell's alleged commission of a scheduled offence, which investigation was the basis of the DPP's application for the July Restraint Order;¹
 - (ii) Whether the DPP had sufficient information to commence his application for the July Restraint Order;
 - (iii) Whether the DPP has diligently prosecuted Claim No. ANUHCV2017/0057 (i.e. the present matter); and
 - (iv) Whether the DPP has prosecuted this Claim in accordance with the duties and responsibilities of his office, in light of the fact that the Proceeds of Crime Act allows the Court to make restraining orders that do not automatically expire after a certain period of time.
- [11] In section 2, Mr. Graham sets out the background of the matter as he understood it. This included, at paragraph 2.08, a statement that "[t]o date the DPP has not served any documents issued or filed in [the Claim] on Cresswell, Further, the DPP has not filed any evidence about (i) the progress of ONDCP's purported investigation into Cresswell in Antigua, (ii) any findings made as a result of the purported investigation, or (iii) any explanations as to why the ONDCP has yet to make any findings."
- [12] In Section 3, Mr. Graham refers to Appendix 4 which listed the documents he relied upon. These were:
- (i) Documents filed in the present claim;
 - (ii) Orders and rulings made in Claims Nos. ANUHCV2016/0372 and ANUHCVAP2017/0003;
 - (iii) Various Acts and Statutory Orders in Antigua and Barbuda.

Issue 1

¹ i.e. the Order the subject of the Set Aside Application

[13] At the close of the hearing I asked Mr. Walwyn to provide references to the parts of Mr. Graham's report which are claimed to amount to expert evidence. Cresswell filed supplemental submissions on 10th March 2020 attached to which was a copy of Mr. Graham's report with paragraphs (or parts thereof) are highlighted in yellow to indicate the relevant parts. All or parts of the following paragraphs were highlighted:

"5.06, 5.07, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, 5.16, 5.17, 5.18, 6.07, 7.03, 7.04, 7.05, 7.06, 7.07, 7.09, 8.05, 8.06, 8.09, 8.10, 8.11, 8.12, 8.14"

[14] I do not propose to synopsise all of these paragraphs, but the following will give a sufficient sense of their effect.

[15] In relation to Issue 1, Mr. Graham set out several duties which he said were owed by the DPP and the ONDCP. These included:

- (i) Once proceedings were instituted, the ONDCP as an investigative body in the discharge of its public duties is "expected"² to conduct the investigation with due diligence;³
- (ii) Where the rights of others are affected, there is an obligation to complete an investigation within a reasonable time;⁴
- (iii) The onus rests with the ONDCP and the DPP to satisfy the court that they have diligently carried out the investigation. This can be done by presenting evidence of their investigative efforts in Antigua and any requests and responses between the ONDCP, Brazil and other jurisdictions. This evidence will allow for an informed assessment;⁵
- (iv) Once the restraint order was granted, a greater burden was placed on the ONDCP to carry out the investigation expeditiously.⁶

[16] He also makes what amount to findings of fact. These include:

- (i) He opines when the investigation against Cresswell was commenced;⁷
- (ii) He states that he would have expected to see more evidence of investigative efforts in the Affidavit of Ashlee Christian the absence of which gives rise to a "reasonable inference...that there was not additional, or new material available";⁸
- (iii) He would have expected that Ms. Christian's affidavit would have referenced new lines of investigation that were carried out between 22 June 2016 and 25th July 2017;⁹

² A word used in numerous instances by Mr. Graham

³ Cl. 5.06

⁴ Cl. 5.07

⁵ Cl. 5.10

⁶ Cl. 5.18

⁷ Cl. 5.04 and 5.05

⁸ Cl. 5.11

⁹ Cl. 5.12

- (iv) It is essential that law enforcement agencies like the ONDCP have in place a system for handling and investigating cases of suspected benefits of proceeds of crime that is fair, transparent and accountable and he has not seen this to be the case;¹⁰
 - (v) It appears to him that the ONDCP proceeded on the basis that the granting of the restraint order was a mere formality;¹¹
 - (vi) In the absence of evidence of recent investigative reports, the only reasonable inference that he can draw is that there were no such efforts;¹²
 - (vii) The ONDCP has not diligently carried out its investigation in relation to Cresswell's alleged commission of a scheduled offence.¹³
- [17] The determination of the legal duties and obligations of the DPP and the ONDCP is solely for the court. An "expert" cannot be relied upon to guide the court on this issue. The use of words such as "expected" do not convert a finding of law or fact into an expert opinion.
- [18] With respect to the findings of fact by Mr. Graham, there is no peculiar expertise which has been stated to be required, and none can be inferred, for the Court to make these findings.
- [19] His opinion on this issue is therefore no more than a normal legal opinion containing no element of expertise to justify his appointment as an expert.

Issue 2

- [20] This issue only needs to be stated to be rejected as the subject of expert evidence.
- [21] On this issue Mr. Graham boldly states in paragraph 6.08 that in his view the evidence placed before Thom J in its current state was insufficient. This is a direct challenge to an order made by this Court under the guise of expert evidence.

Issues 3 and 4

- [22] Mr. Graham dealt with these issues together.
- [23] Mr. Graham set out several duties which he said were owed by the DPP. These included:
- (i) The DPP's rule is to assist the court to arrive at the truth, not to push for a conviction at all costs, citing **Randall v. R** [2002] UKPC 19 (Cayman Islands);¹⁴

¹⁰ Cl 5.13

¹¹ Cl. 5.14

¹² Cl. 5.17

¹³ Cl. 5.18

- (ii) The question whether to direct a prosecution in an individual case is a matter for the DPP's discretion, in the exercise of which he enjoys a partial immunity from judicial review;¹⁵
- (iii) As part of the DPP's policy directive, public prosecutors must take all reasonable steps to avoid undue delay in prosecution of matters, where the jurisdiction of the court has been engaged;¹⁶
- (iv) Where a DPP succeeds in obtaining a restraint order, he or she is under an obligation to exercise all due diligence to ensure prosecution or discontinuance of the matter.

[24] He also made the following findings:

- (i) Once a restraint order has been granted ex parte, disclosure is made to the affected party or parties;¹⁷
- (ii) While the DPP is not compelled legislatively to do more than required by the legislation, he is so compelled by the responsibilities of his office. The benefit of full and frank disclosure of all material facts is a constituent part of a DPP's responsibilities;¹⁸
- (iii) A prosecutor is expected to proceed within a reasonable time once the restraint order has been obtained;¹⁹
- (iv) In the absence of an automatic expiration of a restraint order there lies no legislative obligations on the DPP to bring the matter before the court. The court imposing no condition to do so in the order, the question whether the DPP should have taken the initiative and placed the matter before the court arose. It can therefore be argued that he should have done so not because it was required but because he was a Minister of Justice;²⁰
- (v) The DPP failed to meet his obligation of full and frank disclosure which can be considered a material breach;²¹

[25] What I have said in relation to issue 1 applies completely to the treatment by Mr. Graham of these issues. These are all statements of law or findings of fact for which the Court require no expert evidence.

[26] My conclusion, then, is that Mr. Graham's report is not an expert report on matters outside the Court's competence to determine. In fact, it is nothing more than a legal opinion.

[27] This application is dismissed.

¹⁴ Cl. 7.01

¹⁵ Cl. 7.02

¹⁶ Cl. 7.04

¹⁷ Cl. 8.05

¹⁸ Cl. 8.06

¹⁹ Cl. 8.09

²⁰ Cl. 8.11

²¹ CII. 8.12 and 8.14

Paulo Buzanelli

[28] The grounds of this application are that Cresswell intends to plead and prove Brazilian law.

[29] Reference is made to:

- (i) the reliance by Ashlee Christian in her affidavit sworn on 25th July 2017, in support of the July Restraint Order, on certain laws of Brazil;
- (ii) information allegedly obtained by the ONDCP from Brazilian Federal Prosecutors in relation to the DPP's claim;
- (iii) Cresswell's intention to adduce expert evidence on whether there are ongoing criminal investigations or court proceedings against Cresswell in Brazil, the law of Brazil as it relates to plea bargaining or plea agreements and their use in criminal prosecutions and the law in Brazil as it relates to the length of time that criminal investigations are legally permitted to last.

[30] There was some debate at the hearing whether it is a requirement that Mr. Buzanelli be impartial. Reference was made to an extract from Chapter 20 of **Commonwealth Caribbean Civil Procedure, Kodilinye and Kodilinye**. The relevant discussion there appears to me to refer to cases where Part 32 (or its equivalent) was applicable. Mr. Walwyn also addressed this in his supplemental submissions earlier referred to.

[31] Whether Part 32 is applicable to applications for freezing orders under **POCA** was not argued before me. However, it was common ground between the parties that the requirement for impartiality was applicable. The DPP raised the issue in light of Mr. Buzanelli having stated in his report that he had represented Defendants in Brazil connected to the Car Wash scheme. Cresswell's response was that Mr. Buzanelli was not shown to be partial and his oath indicates he has understood his obligation to the Court in this respect.

[32] I find that Mr. Buzanelli has not been shown to be partial. There is no indication that he acted for Cresswell in any capacity and, if anything, his involvement in the Car Wash case makes him well placed to provide evidence on issues arising in connection to it.

[33] However, it remains to determine whether Mr. Buzanelli's proposed evidence is relevant or otherwise admissible.

[34] It might be useful to set out the legislative framework in relation to freezing, forfeiture and confiscation proceedings, if only briefly. Restraining orders may be applied for by the DPP under s. 31 of the **Proceeds of Crime Act 1993** where, inter alia, the defendant is being investigated by a member of the Police Force or an officer of the ONDCP²² with regard to a scheduled offence. The affidavit in support must include statements of the scheduled offence for which the defendant is being

²² Added by section 9 of the Proceeds of Crime (Amendment) Act, 2014

investigated,²³ and the grounds for the belief that a forfeiture order or a confiscation order may be or is likely to be made under the Act in respect of the property.²⁴

[35] Part II of **POCA** deals with forfeiture and confiscation orders. Section 5(1) provides:

“Where a person is convicted of a scheduled offence committed after the coming into force of this Act, the Director of Public Prosecutions may apply to the Court for one or both of the order on following orders - (a) a forfeiture order against property that is tainted property in respect of the scheduled offence; (b) a confiscation order against the person in respect of benefits derived by the person from the commission of the scheduled offence.”

[36] Section 8(1) provides:

“Where an application is made to the Court for a forfeiture order or a confiscation order in respect of a person's conviction of a scheduled offence whether in the magistrate's court or in the court, the Court may, in determining the application, have regard to the transcript of any proceedings against the person for the offence.”

[37] The scheduled offences include money laundering contrary to section 61(3) of **POCA**. This section states:

“A person shall be taken to engage in money laundering where (a) the person engages, directly or indirectly, in a transaction that involves money or other property, that is proceeds of crime; or (b) the person receives, possesses, conceals, disposes of, or brings into Antigua and Barbuda, any money or other property that is proceeds of crime, and the person knows or ought reasonably to know, that the money or other property is derived, obtained or realised, directly or indirectly from some form of unlawful activity.”

[38] In section 3 of **POCA**, “proceeds of crime” is defined as follows:

“proceeds of crime” means -

- (a) proceeds of a scheduled offence; or
- (b) any property or benefits derived, obtained or realised, directly or indirectly, by any person from any act or omission that occurred outside Antigua and Barbuda, and would, if it had occurred in Antigua and Barbuda, have constituted a scheduled offence”

[39] There is therefore no requirement, in order to establish the offence of money laundering in Antigua and Barbuda, that the conduct amount to a crime under the law of Brazil, which for these purposes is entirely irrelevant. Whilst the alleged activities with respect to the Car Wash scheme in Brazil might have been the impetus for the initiation of the investigation in Antigua and Barbuda, thereafter proceedings here are governed solely by our laws, both substantive and procedural.

[40] The fact that evidence and other information might be provided by Brazilian authorities makes no difference, nor does it matter what Brazilian law is on plea bargains, and evidence procured pursuant to them, or whether there are ongoing criminal proceedings in Brazil.

²³ *ibid*

²⁴ POCA, s.31(2)(h)

[41] Brazilian law is therefore of no relevance whatsoever to whether the restraint order should be discharged.

[42] In the event I am wrong as to the relevance of Brazilian law in general, I will consider the proposed evidence itself. Mr. Buzanelli's proposed evidence was filed on 18th February, 2020.

[43] It was divided into sections.

- (i) Section 1 – Background. This is introductory on contains no relevant evidence.
- (ii) Section 2 – Court Proceedings in Brazil. This section concludes that there are no criminal proceedings against Cresswell in Brazil. This is entirely irrelevant to proceedings in Antigua.
- (iii) Section 3 – Evidence Against Cresswell in Antigua. Mr. Buzanelli points out that the evidence of Ashlee Christian sworn on 25th July 2017 refers to evidence discovered through plea agreements with three named persons. He then summarises the evidence of these three persons and opines, in substance, that it disclosed no wrongdoing by Cresswell.

The report then mentions the affidavit of Mr. Orlando Martello attached to Ms. Christian's aforesaid affidavit which mentioned evidence from a Mr. Soares and Mr. Rodrigues. Mr. Buzanelli states that he saw the recorded depositions which had been posted online and that neither person mentioned or identified Cresswell in his deposition.

The relevance of this evidence is not readily apparent. To the extent that it is directed to the registration of the order of Judge Moro which was subsequently discharged, it is of no relevance presently. To the extent that it is directed to the freezing order made by Thom J granted in July 2017 it is not for this court to determine whether that order was properly made.

- (iv) Section 4 – [Brazilian Law] related to Collaboration Agreements: Mr. Buzanelli describes legislative developments in Brazil since the commencement of the Car Wash investigation. The last he mentioned was Art. 16 of Law 13.964 as amended and expanded by article 4 §16 Law 12.850/13 "with the effect that statements made in the course of plea bargaining by a whistleblower cannot, on their own, found (i) a preliminary order restraining property..." He concludes that Judge Moro's restraining order would not be made if the application was made today.

This is entirely irrelevant to the present claim. Brazilian law cannot dictate the evidence required to grant freezing orders under POCA.

- (v) Section 5 - [Brazilian Law] related to Criminal Investigations: Mr. Buzanelli here describes judicial control over criminal investigations and the court's power to refuse to grant extensions for investigations to continue. The Court, in Antigua and Barbuda, has no equivalent or approximate power to control and stop investigations. This evidence is therefore irrelevant.

- (vi) Section 6 – The Integrity of the entire Lava Jato Investigation: This section contains a summary on news reports in Brazil and alleged public statements by certain judges. This is not expert evidence.

- [44] Therefore, apart from the relevance of the proposed evidence from the general perspective the law of Antigua and Barbuda, a detailed examination of the proposed evidence shows that it is also irrelevant in its particulars.
- [45] This application is accordingly dismissed.

The Akeem Shaw Affidavit

- [46] Mr. Shaw swore to an affidavit which was filed on 13th February, 2020. It contained 69 paragraphs. Cresswell has applied to strike out 42 of them because, it is argued, they contain law, unattributed hearsay and/or are unsupported by evidence.
- [47] Mr. Shaw's affidavit was in response to the First Affidavit of Ron Murrain filed on 5th December, 2019. Mr. Murrain is a law clerk employed by Cresswell's legal practitioner of record. He states in paragraph 1 that as such, he has knowledge of the matters therein deposed.
- [48] He states in paragraph 6 that "Cresswell opened a bank account at Meini Antigua in July 2014. That account was established in order to receive payments for lawful consulting services provided by Cresswell. Between July 2014 when the account was opened and April 2016, the account received approximately US\$50 million in deposits, which constituted compensation for consulting services". Mr. Murrain does not explain how he has direct knowledge of these facts or, if he does not, from whom he received the information.
- [49] The remainder of Mr. Murrain's affidavit simply summarises the procedural history of this claim, a prior claim in which the order of Judge Sergio Moro was registered and subsequently deregistered, and the claim in which a receiver was appointed of Meini Antigua, by reference to various documents. These documents were exhibited to Mr. Murrain's affidavit. His summary was therefore unnecessary and irrelevant. Further, the normal way to prove copies of court documents is not to exhibit them to an affidavit but to produce office copies.
- [50] The DPP has made no application to strike out any part of Mr. Murrain's affidavit but I point out the foregoing out to show that the affidavit evidence on both sides is less than satisfactory.
- [51] With respect to the use of hearsay in application for freezing orders under **POCA**, section 67J (1) provides that evidence shall not be excluded in restraint proceedings on the ground that it is hearsay evidence. The **Act** does not provide any constraints for the giving of hearsay evidence. To hold that CPR 30.3, which allows an affidavit to contain hearsay evidence only where the source of that information is identified, is applicable requires a finding that there is an implied provision in the **Act** that hearsay evidence is only admissible if the conditions in the CPR are satisfied. There is simply no basis for such an implication. There is no doubt that the provision of such information will assist in assessing its credibility but this goes to weight and not admissibility.

[52] Having reviewed the Shaw Affidavit Application and the Affidavit of Mr. Shaw, I will strike out paragraphs 13 to 19, 22, 23, 24, 25, 27 (first 2 sentences only), 28, 33 (first sentence only), 37, 38,39, 40, 41, 42, 45 (first sentence only), 48, 49, 54, 61 and 69. These contain nothing more than statements by Mr. Shaw of what the law is or inferences which are for the court to determine.

[53] I will briefly explain why I have not struck out the other challenged paragraphs:

- (i) Paras 10 – 12: the evidence states the decision taken by the DPP and why.
- (ii) Para 26: this speaks to a practice which is said to have existed and not law.
- (iii) Para 27: (last sentence) This refers to a letter which is exhibited. Attribution does not arise.
- (iv) Para 29: This contains statement of facts.
- (v) Para 33: (second sentence) This is a statement of fact.
- (vi) Paras 34 – 35: These contain statement of facts. The challenge that they are unsupported by evidence suggests that corroboration is required which it is not.
- (vii) Para 45: (second sentence) This contains statement of facts.
- (viii) Para 52: This contains substantially statement of facts.
- (ix) Para 56: This contains statement of facts. The challenge that they are unsupported by evidence suggests that corroboration is required which it is not.
- (x) Para 57: This contains substantially statement of facts.
- (xi) Para 58 - 60: (second sentence) This contains substantially a statement of facts.
- (xii) Para 64: This contains a denial and not a statement of law.
- (xiii) Para 65: This contains statement of fact (or perhaps mixed fact and law).
- (xiv) Para 66: This contains substantially a statement of facts.

Orders

[54] As a result, it is ordered as follows:

- (i) With respect to the Application filed on 10th February, 2020, the application to appoint Mr. Valston Graham and Mr. Paulo Buzanelli as expert witnesses is dismissed.
- (ii) With respect to the Application filed on 20th February, 2020 paragraphs 13 to 19, 22, 23, 24, 25, 27 (first 2 sentences only), 28, 33 (first sentence only), 37, 38,39, 40, 41, 42, 45 (first sentence only), 48, 49, 54, 61 and 69 of the Affidavit of Akeem Shaw filed on 13th February, 2020 are struck out.
- (iii) The issue of costs is deferred to the hearing of the substantive application.

Damian Kelsick
High Court Judge (Ag.)

By the Court

Registrar