

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2016/0372

BETWEEN:

CRESWELL OVERSEAS S.A.

Applicant

-and-

**THE SUPERVISORY AUTHORITY UNDER THE MONEY
LAUNDERING (Prevention) ACT 1996**

-and-

First Respondent

MEINL BANK (ANTIGUA) LIMITED

Second Respondent

Appearances:

Mr. Frank E. Walwyn and Ms. Jacqueline Walwyn for the Applicants
Mr. Anthony Armstrong, Director of Public Prosecutions and with him Mr. Curtis
Bird for the First Respondent
Ms. Monique Francis-Gordon for the Second Respondent

2017; 28 March;
21 April

JUDGMENT

Jurisdiction- Registration of Foreign Restraint Order- Application to set aside order-
Failure to make full and frank disclosure- Reasonable legal fees in defending action

- [1] **THOM J.:** The Claimant, Cresswell is a corporation registered in Panama. Leopoldo Jose Briceno Punceless sole shareholder of Cresswell resides in Caracas, Venezuela.
- [2] The First Respondent is the Supervisory Authority under the **Money Laundering (Prevention) Act 1996**.
- [3] The Second Respondent is Meini Bank (Antigua) Limited of #51 Long Street and Hardcastle Avenue, St John's Antigua.
- [4] In July 2014 Cresswell opened a bank account at Meini Bank, Antigua.
- [5] On 22nd June 2016 Judge Moro of the 13th Federal Court of Brazil issued an order freezing a number of assets and funds in accounts at Meini Antigua including the account held by Cresswell at Meini on the grounds that the accounts were used for or in connection with alleged bribery, fraud, corruption or money laundering offences in Brazil in an alleged "Car Wash" scheme.

The Car Wash Case

- [6] "The Car Wash Case" is an investigation and prosecution of the largest corruption scheme ever discovered in Brazilian history. In a nut shell, high-level employees within the public company Petroleo Brasileiro S/A – Petrobras received bribes in order to benefit certain private companies hired to execute large projects. In addition to that these private companies formed a cartel that increased artificially their prices and profits in detriment of the state company. Petrobras is a huge company whose performance areas comprise, oil gas and energy. Its employees were aware of this cartel formation, and they agreed to receive bribes in order to foster the cartel's interests within the state-owned company. Bribe payment was handled by "financial brokers", who laundered the money and handled it in such a manner that it appeared to stem from legitimate operations. A criminal organisation was formed, constituting of construction companies, financial brokers, and Petrobras employees. It is estimated that the amount paid in bribes is around US\$67 million.

- [7] Vinicius Borin an executive of Meinl Bank entered a plea bargain with Brazilian prosecutors providing them with the names of a number of off-shore companies holding bank accounts used by Odebrecht to make 'surreptitious payments'. Creswell was one such company identified.
- [8] Between July 2014 and 2016 Creswell received approximately US\$50 million in deposits in their account at Meinl. Leopoldo Jose Brinceo Punceles, the sole shareholder of Creswell, in an affidavit stated that these sums represented consultancy fees.
- [9] Judge Moro found there was probable cause to grant access to bank data and to freeze these bank accounts on the basis of Borin's testimony which converge[d] with the evidence collected in the investigation. Such evidence had led to conviction of several Odebrecht executives of bribery, money laundering and criminal association offences in Brazil, in which the use of off-shore accounts for surreptitious payments", including those held with Meinl Bank had been proved.
- [10] Judge Moro at paragraph 32 of his order went on to state that, "While it is necessary the investigations to clarify the reason why the amounts were transferred into these accounts, the fact that Odebrecht used off-shore accounts to perform surreptitious payments, including to transfer kickbacks in order to corrupt and bribe public officials, authorises the disclosure of the information therein and there freezing.
- [11] Judge Moro also went on to state at paragraph 41, "Should the law of Antigua and Barbuda not allow for the freezing of assets through mutual assistance in criminal matters, I hereby inform that the compliance with the remaining requests (granting of access to bank data and sharing of documents) is still in the interests of the Brazilian authorities.
- [12] The Honourable Attorney General received and consented to a letter of Request from the Central Authority of Brazil, the Department of Assets Recovery and International Legal Cooperation requesting Mutual Legal Assistance in a criminal matter pursuant to the United Nations Convention Against Corruption ("UNCAC"), and the United Nations Convention on Transnational Organized Crime ("UNTOC")

[13] On 22nd July 2016 the First Respondent the Supervisory Authority moved to the Court to have the Moro Order registered. At this hearing the Supervisory Authority were represented by Director of Public Prosecutions Mr. Anthony Armstrong and Mr. Curtis Bird. At the hearing the Director of Public Prosecutions indicated to the court the Authority's reliance also on the Inter-American Convention on Mutual Legal Assistance and presented to the court Statutory Instrument, 2003 No. 15 Resolution of the House of Representatives ratifying the Inter-American Convention on Mutual Assistance in Criminal Matters (the OAS Convention) submitting that this made the Convention law in Antigua and Barbuda.

[14] Both Brazil and Antigua had ratified the convention.

[15] It's upon this basis the Court granted the application

[15] The Supervisory Authority's application was also brought under:-

(i) Section 23 of the Money Laundering (Prevention) Act 1996. Section 23 provides that:

- (1) The court of the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty shall cooperate with the court or other competent authority of another State, taking the appropriate measures to provide assistance in matters concerning money laundering offences, in accordance with this Act, and within the limits of their respective legal systems.
- (2) The court of the Supervisory Authority in consultation with the central authority in consultation with the central authority for Antigua & Barbuda under any mutual legal assistance treaty may receive a request form the court or other competent authority of another State to identify, trace, freeze, seize or forfeit the property proceeds, or instrumentalities connected to money laundering offences, and may take appropriate actions, including those contained in Part IVA or IVB of this Act.

- (3) A final judicial order of judgement that provides for the forfeiture of property, proceeds or instrumentalities connected to money laundering offences, issued by a court or other competent authority of another State, may be recognized as evidence that property, proceeds or instrumentalities referred to by such order or judgement may be subjected to forfeiture in accordance with the law.
- (4) The court or the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty may receive and take appropriate measures with respect to a request from a court or other competent authority from another State for assistance related to civil, criminal, or administrative investigation prosecutions or proceedings, as the case may be involving money laundering offences, or violations of any provisions of this Act.
- (5) Assistance referred to in this section may include providing original or certified copies of relevant documents and records, including those of financial institutions and government agencies, save that no information relating to a client account held by a financial institution and government agencies, save that no information relating to a client account held by a financial institution shall be disclosed unless the client is the subject of a criminal investigation involving the offences of money laundering and the court has, on application by the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty ordered the disclosure of the information.

- (5a) The Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty shall cooperate with the component authority of another State in obtaining testimony or facilitating the voluntary presence or availability in the required state of persons, including those in custody, to give testimony locating or identifying persons, service of documents, examining objects and places, executing searches and seizures, providing information and evidentiary items, and provisional measures.
- (5b) Information pertaining to any investigation, prosecution or other proceeding relating to the imposition, assessment or collection of taxes of any kind shall only be disclosed to any other competent authority where a mutual assistance treaty on a bilateral or multilateral basis exists between the requesting State and Antigua and Barbuda in accordance with the terms of the treaty.
- (6) Any provision referring to secrecy or confidentiality shall not be an impediment to compliance with this section this section, when the information is requested by or shared with the court.
- (7) Assistance referred to in this section shall be provided only to those countries with whom Antigua and Barbuda has entered into mutual assistance treaties or bilateral or multilateral basis, and all such assistance shall be subjected to the terms of such treaties."

(ii) Section 27(1) and 27(2) of the Mutual Assistance in Criminal Matters Act 1993 (MACMA).

27. (1) This section applies where –

- (a) An order is made in a Commonwealth country-
- (i) Confiscating property derived or obtained, directly or indirectly, from the commission of a specified serious offence;

- (ii) Imposing on the person against whom the order is made pecuniary penalty calculated by reference to the value of property so derived or obtained.
 - (iii) Restraining deals with property which is, or is suspected on reasonable grounds of being property so derived or obtained.
 - (b) Property available for the satisfaction of the order or the pecuniary penalty under the order, or which the order would apply, as the case may be, is suspected on reasonable grounds, to be in Antigua and Barbuda.
 - (c) A request is transmitted requesting that the order concerned be enforced in accordance with the law of Antigua and Barbuda.
 - (d) The request is accepted.
- (2) Where this section applies, the Attorney General shall cause an application to be made to the High Court in accordance with the rules of the Supreme Court for the foreign concerned.

[16] Section 27(1) relates to orders made in a Commonwealth country and 27(2) registration of the said order.

[17] By Order dated 22nd July 2016 the Court ordered that the Moro Order be registered and given full force to all accounts and funds frozen thereunder. The Court ordered that the frozen accounts subject to the Order are those accounts at Meinel Bank Antigua set out in the Moro Order and that Meinel is prohibited from dealing with the frozen accounts, and the assets and funds are not to be disposed of or otherwise with by any person until further Order of the Court.

[18] An application to set aside the Order of this Court on the ground that it did not have jurisdiction to make the order was originally returned before the Honourable Justice

Darshan Ramdhani on 21st November 2016 and was adjourned at the Respondents request.

[19] On 12th December 2016 the Honourable Attorney-General in exercise of the powers contained in section 27(7) of MACMA, by S.I. 2016, No. 55 made regulations to enable the enforcement of the Moro Order. Those regulations which were gazetted on 13th December, 2016 provided as follows:

"Sec 1(2): These regulations are made to enable the enforcement of the Order of a Court in Brazil made by Judge Sergio Fernando Moro, which is the subject of a mutual legal assistance request from Brazil to Antigua and Barbuda, which was registered under section 27 of the Act in the High Court in Claim ANUHCv2016/372 by Order dated the 22nd day of July, 2016,

Sec 3(1): For purposes of the enforcement of the Brazil Order:-

- (a) The Inter American Convention On Mutual Legal Assistance, S.I. No. 15 of 2003 shall apply in relation to the Brazil Order,
- (b) The provisions of the Money Laundering (Prevention) Act 1996 shall apply as if the original order had been validly obtained under section 19(4) of that Act. However, sections 19A and 20 of the Money Laundering (Prevention) Act 1996 shall not apply."

[20] It must be noted that these regulations to enforce were made some five months after the Court's Order. The Applicants contended that the Regulations were retrospective in respect and violated the principle of the separation of powers and the rule of law and are invalid.

Issues

[21] The issues to be determined on the application are:

"(a) Did this Honourable Court have the jurisdiction to register the Moro Order in Antigua and Barbuda on the statutory authorities relied on by the Supervisory Authority?

(b) In the alternative, should the Thom Order be set aside on the ground that the Supervisory Authority failed to make full and frank disclosure of material facts and applicable law?

(c) If the Thom Order stands, is it just and equitable to prevent Cresswell from using its funds in the Cresswell Account at Meini Antigua to pay its legal fees and expenses in this application, and in order to intervene and defend the action commenced by Supervisory Authority?

Did the Court have jurisdiction to make the Order

The Applicant's submissions

The OAS Convention

[22] The applicant submitted that while the OAS Convention was ratified pursuant to the **Ratification of Treaties Act**, Cap 364 it is a multilateral than a bilateral convention and does not meet the requirements of Section 30 of MACMA which applies. Section 30 which applies to countries other than Commonwealth countries provides for regulations to be made which may make provision to give effect to a treaty(convention)... for bilateral mutual assistance in criminal matters between Antigua and Barbuda and a country specified in the regulations.

Further the OAS Convention expressly provides that the execution of requests for assistance shall be in accordance with the law of the domestic state.

[23] Section 30 of MACMA applies to non-Commonwealth countries and it is the sole statute that sets out the legal framework for the registration of a foreign restraint order. The

procedure is first the presence of a bilateral treaty, secondly ratification by an Act of Parliament, and thirdly regulations incorporating it into the domestic law of the land.

[24] The Supervisory Authorities application to register the Moro Order was brought under Section 27 and not Section 30 of MACMA. Section 30 applies to Commonwealth countries. Brazil is not a Commonwealth country.

[25] There is no bilateral mutual legal assistance treaty between Antigua and Barbuda and Brazil a non-Commonwealth country.

[26] The Moro Order could not be registered pursuant to International Treaties in Antigua and Barbuda.

[27] The court lacked jurisdiction to make the Order.

The Supervisory Authority's Submissions

Jurisdiction

[28] Mr. Bird submitted that the reference in Section 30(1) of MACMA to "bilateral mutual assistance in criminal matters" is a description of the bilateral nature of any assistance given to a foreign country. It modifies the nature of the assistance not the nature of the treaty. It does not describe or necessitate the relevant treaty to be bilateral as opposed to being multilateral such as the OAS Convention. Of, necessity the implementation of any multilateral treaty between any two of its parties automatically creates bilateral relations between them, and where mutual legal assistance is contemplated it involves giving of bilateral mutual legal assistance.

[29] In my opinion though the treaty may be multilateral in that it is an agreement involving more than two parties and may impliedly create bilateral relations between the major contracting party and any of the other parties on an individual basis that by itself does not make it a bilateral treaty. The treaty negotiated was a multilateral treaty and not a bilateral treaty. The term "multilateral" is defined in (i) Black's Law Dictionary, 10th ed (ii) The Dictionary of Canadian Law 4 ed. and (iii) Shorter Oxford English Dictionary 6ed. as "involving more than two parties", "concerning more than two nations" and "made or

entered on by two or more parties" respectively. The language of Section 30 is quite clear, "bilateral treaty" and makes no reference to multilateral treaties. What is clear is that the application to register the Moro Order could not have been brought under Section 27 of MACMA. Section 27 applies only to Commonwealth countries.

[30] As stated supra Brazil is not a Commonwealth country. Further Article 10 of The Inter-American Convention on Mutual Assistance in Criminal Matters requires that the Request for assistance...

"Shall be executed in accordance with the domestic law of the requested state". As submitted by Mr. Walwyn the Supervisory Authority proceeded under Section 27 of MACMA as if it applied to a request from a non-Commonwealth country. It did this despite the express and repeated references to "Commonwealth country" throughout the act, and specifically throughout Part IV, which deals exclusively with the application of the **Act** to countries other than Commonwealth countries. With this submission I do agree. The Court had no jurisdiction to register the Moro Order Brazil under Section 27 and that the registration of the Order did not comply with Section 30 of MACMA Brazil not being a Commonwealth country. Further, there were no regulations in place at the time the Order was made to give effect to the request for the Registration of the Moro Order as it applies specifically between Antigua and Brazil. The Court did not have jurisdiction to make the Order.

Retrospective application of S.I. 2016, No. 55

[31] In **Ferguson v Attorney General of Trinidad and Tobago**, [(2016) UKPC 2] the Privy Council held that:

[1] Legislation which alters the law applicable in current legal proceedings is capable of violating the principle of the separation of powers and the rule of law by interfering with the administration of justice, but something more is required before it can be said to do so. The "something more" is that the legislation must not simply affect the resolution of current litigation but should be *ad hominem*, i.e. targeted at identifiable persons or cases. Legislation may be framed in general terms as an alteration of the law and yet be targeted this way."

[32] The applicant contended that the regulations were passed as a direct response to Cresswell application, which remains before the Court and affect and target Cresswell to its detriment. The adhominem regulations therefore violate not only the constitutionally-entrenched separation of powers, but also the rule of law.

[33] The applicant concluding submitted that this Court should find the remedial regulations invalid and of no force and effect.

[34] Mr. Bird submitted that the Regulations were not retrospective but rather brought clarity to the proceedings. There was no authority cited for this proposition.

[35] I wish to return to the Mutual Assistance in Criminal Matters (Brazil) Order Regulations 2016 hereinbefore cited at paragraph 19 and wish to make some observations about the Regulations.

[36] First, the Regulations are made under sections 27(7) of the Mutual Assistance in **Criminal Matters Act**. Section 27(7) states as follows:

"Sec 27(7) The regulations may make provision for and with to the enforcement in Antigua and Barbuda an order registered in accordance with this section and may, for that purpose, direct that any Act shall apply in relation to any such order, subject to such limitations, exceptions or restrictions (if any) as may be prescribed and the Act shall apply accordingly."

[37] As stated earlier the Moro Order could not have been registered in accordance with Section 27 since Section 27 applies only to Requests from countries who are Commonwealth countries. Any regulation made must be in accordance with the Requested state being a Commonwealth state. This section means just that. There can be no other interpretation put to the words "this section". The state must be a Commonwealth state. Further Section 27 falls under that part of MACMA described as Division 3 – Assistance in connection with serious offences in "Commonwealth countries". The Hon. Attorney-General had no power to make regulations under 27(7) to make it to apply to a non-Commonwealth

country. Any regulation made must be in accordance with the requesting state being a Commonwealth country. For this reason the Regulations in my view could be struck down but the Applicants have also raised the issue of retrospectivity.

[38] The Regulations which were made on 12th day of December, 2016 and gazetted on 13th December, 2016 were made almost 5 months after to enable the enforcement of the Moro Order dated the 22nd July, 2016. The question posed to Mr. Bird by the court was whether if the Court was seized with jurisdiction the introduction of SI No. 55 of 2016 would have been necessary. Is it after recognizing through the submissions of the Claimants that the question of jurisdiction was a live issue the first Respondents sought to remedy the situation by the introduction of SI. No. 55 of 2016. There was no definitive answer to this save and except that the regulations were made to "bring clarity" to the Moro Order. In my view the legislation is ad hominem and offends violates the separation of powers and the rule of law Ferguson applied. The Regulations are struck down.

Full and frank disclosure

[39] In **Brink's Mat Ltd v Elcombe and Others** [(1988) 1 WLR 1350] the Court held that on an ex parte application it was imperative that the applicant should make full and frank disclosure of all known to him had he made all such inquiries as were reasonable and proper in the circumstances. In its application the Supervisory authority submitted that Section 27 applies where "(a) an order is made in a Commonwealth country [or a country with which Antigua and Barbuda has a treaty].

[40] It is the Applicant's submission that the Supervisory Authority did not disclose to the Court that:

- (a) "There is no bilateral mutual legal assistance treaty between Antigua and Barbuda and Brazil;
- (b) In accordance with S. 30 of MACMA, regulations must be made to extend the application of the Act to Brazil as if it were a Commonwealth country;
- (c) No such regulations have been made; and

(d) The Moro Order, as an Order, from a court in Brazil, could not be registered pursuant to MACMA."

[41] First, Brazil is not a Commonwealth country and secondly, "or a country with which Antigua and Barbuda has a treaty" is more or less Mr. Bird's own insertion. There is no such wording in Section 27(1).

[42] Secondly, there were no regulations extending the application of the Act to Brazil as if it were a Commonwealth country.

[43] These are matters which should have been known to Mr. Bird.

[44] Counsel for Cresswell canvassed that these are matters which are known to Mr. Bird since matters of a similar nature were discussed and accepted by all parties in the case of **The Supervisory Authority (Under the Money Laundering (Prevention) Act 1996 v The Liquidators of Eurofed Bank (in Liquidation) [2010] ECSCJ No. 267 ANUHCv2010/0298** and **The Liquidators of Eurofed Bank Limited (In Liquidation) v The Supervisory Authority (Under the Money Laundering (Prevention) Act 1996) [2011]ECSCJ No. 251, HCVAP2010/051** that MACMA applies to registration of Foreign Restraint Orders. Mr Bird was counsel in the case.

[45] Indeed the Court's attention was not drawn to Section 30 of MACMA nor was it disclosed that Brazil was not a Commonwealth country. There was not full and frank disclosure.

[46] Mr. Bird submitted that even If the Court came to the conclusion that there had not been full and frank disclosure that was not a sufficient basis for discharging the order. This has been rendered academic since the Court has already ruled that there is not jurisdiction to issue the Order and further that the regulations were ad hominem. The Moro Order is set aside.

Access of Frozen Funds to Pay Legal Fees

[47] Since the regulations are struck down the issue of fees are rendered otiose:

Costs

[48] Cresswell is granted its costs of the set aside application against The Supervisory Authority under the **Money Laundering (Prevention) Act, 1996**, such costs to be agreed by the parties or assessed by the Court of Appeal.

[49] The Order to Set Aside the Thom Order be stayed pending the determination of the application to appeal.



KEITH THOM
HIGH COURT JUDGE

BY THE COURT

A handwritten signature in cursive script, likely belonging to the Registrar.

REGISTRAR