

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 14 OF 2000

BETWEEN:

1. PAVLO LAZARENKO aka PAVEL LAZARENKO
2. FIRSTAR SECURITIES LTD.
3. NEMURO INDUSTRIAL GROUP LTD.
4. GUARDIAN INVESTMENT GROUP LTD.
5. ORBY INTERNATIONAL LTD.
6. LADY LAKE INVESTMENTS CORPORATION
7. FAIRMONT GROUP LTD.

Appellants

and

THE OFFICE OF NATIONAL DRUG AND MONEY LAUNDERING CONTROL POLICY

Respondent

Before:

THE HON. MR. SATROHAN SINGH
[IN CHAMBERS]

JUSTICE OF APPEAL

Appearances:

Miss Joyce Kentish for the Appellants.

Mr Curtis Bird for the Respondent.

Mr Nicholas Fuller for the Joint Liquidators of Eurofed Bank. Ms Stacy Richards
Anjo with him.

Mr Harold Lovell, for Barclays Bank, the stakeholder of the Funds.

2000: July 14

JUDGMENT

- [1] SINGH, J.A.: On June 28, 2000, Pavlo Lazarenko, the first named appellant, pleaded guilty in Switzerland to two charges of Money Laundering.

- [2] On July, 2000, Moe J, on an ex parte application of the respondent, ordered that \$114,000,000. US belonging to Pavlo Lazarenko and his associates or such amount thereof as remains in the Liquidator's hands, together with any interest as has accrued there into account number 373 214 at the Bank of Nova Scotia, High Street, Antigua, be forfeited to the forfeiture fund of the Government of Antigua and Barbuda. These funds were already subjected to a freeze order made by the High Court.
- [3] Moe J made the above forfeiture order without hearing the appellants or the Liquidators.
- [4] The appellants are dissatisfied and have appealed, challenging the jurisdiction of the judge to make such an order without an inter partes hearing after a full trial on the merits in Originating proceedings. They also challenge the judge's Order on the ground that the convictions of the first appellant, at the date of the forfeiture, had not become final. Reference was made to Sections 20(3) and 20(d) of the Money Laundering Act 1996 of Antigua and Barbuda [The Act] in support of these two challenges.
- [5] The appellants also challenge Moe J's forfeiture Order, on the ground that bona fide third parties were not given notice of the respondent's forfeiture application, allegedly in breach of S 21 of the Act.
- [6] Finally, they challenge the judge's Order on the ground that there was no evidence before the judge that could have established the nexus between the aforementioned assets and the offences to which the first named appellant pleaded guilty.

THE APPLICATION

- [7] This is an application by the appellants (the applicants) for an order that the Ex parte Forfeiture Order of Moe J dated July 7, 2000 and confirmed with an amendment on July 14, 2000, be stayed pending the final determination of their appeal. The Liquidators have filed a similar application and it was heard together with this application.
- [8] In their Solicitor's affidavit in support of the application, the applicants believe that unless there was a stay of the Forfeiture Order, they will suffer irreparable loss as "under the law of Antigua as it presently stands, even were the applicants or any of the interested third parties successful on appeal in having the Forfeiture Order set aside, there is little or no likelihood of their being able to recoup the money from the Government of Antigua and Barbuda since there are no procedures in our law for enforcing judgment against the Crown."
- [9] The applicants applied to the Court to treat the matter as one of urgency and asked for an immediate hearing.

THE URGENCY

- [10] The issue whether an application is one of urgency, necessitating an urgent hearing, is not an administrative issue but an issue that needed judicial determination.
- [11] The applicants, having filed their application, represented to this Court that it was a matter of urgency and requested an almost immediate hearing.
- [12] I considered their request, and, having regard to the enormous sum of money involved and the applicants' fear of a successful appeal being rendered nugatory if there was no stay of the forfeiture order, I concluded that there was urgency in the application and proceeded to hear it.

[13] At the hearing, Mr. Bird for the respondent, in my opinion also recognized the urgency. He quite properly, merely referred to short notice without making a big issue of it.

[14] At the end of the arguments, he then, more as an afterthought than anything else, requested of the Court an adjournment so that his senior Mr. John Fuller could be present.

[15] Having heard the very able manner in which Mr. Bird dealt with the issues, I considered Mr Fuller's presence unnecessary. I did not think that Mr Fuller could have further assisted the Court.

[16] The law on an application for a stay is settled and Mr Bird was of the greatest assistance to the Court on the factual issues that troubled the Court. He answered the Court's queries most ably. I accordingly refused the application for the adjournment.

MERITS

[17] The two main considerations for the Court were (1) that the appeal was not frivolous and merely a time seeking exercise by the appellants, but that there were in fact arguable grounds of appeal; (2) the hardship or prejudice to either side should the stay be granted or refused.

[18] Addressing the merits of the applications, both Mr Nicholas Fuller for the Liquidators and Mr Harold Lovell for the stakeholder Barclays Bank, submitted that the stay should be granted. Mr Bird unequivocally opposed the applications.

[19] All except Mr Bird accepted without demur that the notice of appeal disclosed arguable grounds of appeal.

- [20] Mr Bird's reaction to that question from the Court was an attempt on his part to evade the answer. He however, accepted, that Moe J having given the appellants leave to appeal, must have been satisfied that there were arguable grounds of appeal. Mr Bird's attempted evasive answer was that the proceedings under appeal were new to the jurisdiction and as such, a decision from the Court of Appeal on the issues raised would assist. I presume, he meant in the development of this new law.
- [21] In my judgment, the instant application disclosed arguable grounds of appeal.
- [22] On the issue of prejudice, I discern none to the respondents if the stay were to be granted. The assets to be forfeited are all frozen in an account at Barclays Bank.
- [23] However, having regard to the content of the affidavit of one of the attorneys for the applicants, and the fear expressed therein if there was no stay and the appeal was successful, already mentioned, *prima facie*, there would appear to be severe prejudice to the applicants should the appeal be successful and the stay not granted.
- [24] In my considered opinion, given these circumstances, and especially the amount of money involved, a proper exercise of my judicial discretion would be to grant the stay.
- [25] Having arrived at that state of mind, I discussed with the lawyers, the form of order that would best meet the justice of the situation.
- [26] Mr Bird thought that the money should not remain with Barclays. He was of the view that Barclays was already in contempt of the order of the Court below.
- [27] All the lawyers (including Mr Bird) were agreed that the money be kept frozen at the Bank of Nova Scotia.

[28] All the lawyers (except Mr Bird) also agreed that at Scotia Bank, the money should remain frozen but in the name of the Registrar of the Supreme Court. Mr Bird wanted it there, but in the name of the respondent.

CONCLUSION

[29] In the exercise of my judicial discretion, after a careful consideration of all that transpired I make the following orders:

1. The application for the stay is granted. The Order of Forfeiture of Moe J is stayed pending the determination of the appeal.
2. The Liquidators in whose name the funds are frozen at Barclays Bank are ordered to transfer the subject funds from Barclays Bank to the Bank of Nova Scotia in Antigua, into an interest bearing account, in the name of the Registrar of the High Court. This aspect of the Order to be complied with on or before Tuesday July 18, 2000.
3. The said subject funds and all future interests accruing therefrom shall remain in a frozen state in the said Nova Scotia Bank until the determination of the appeal and directions are given in a further order from this Court.
4. The costs of this application to be costs in the appeal.

SATROHAN SINGH
Justice of Appeal