

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2010/0298
BETWEEN:

THE SUPERVISORY AUTHORITY
(Under the Money Laundering (Prevention) Act 1996) Claimant

And

THE LIQUIDATORS OF EUROPE^{FED} BANK
(IN LIQUIDATION) Respondent

Appearances:

Mr. Curtis Bird for the Claimant

Mr. Nicholas A Fuller for the Respondent

2010:

2010: 12, October

DECISION

INTRODUCTION¹

1. **Harris, J.:** This is an application to restrain the proceeds of crime. The Court is being asked to give effect to a restraint order made in the jurisdiction of the USA in order to facilitate confiscation proceedings in that jurisdiction.
2. The Court granted the application on the 21st of September 2010 and now provides its reasons for doing so.

¹ This is a substantial reproduction of the claimant's written submissions in this matter.

3. Registration of foreign orders in criminal matters is provided for by section 27 of the Mutual Assistance in Criminal Matters Act 1993 which applies to requests under the Treaty on mutual legal assistance between the United States and Antigua and Barbuda²
4. The Mutual Legal Assistance in Criminal Matters Act explicitly provides for registration in conditions where:
 - (a) An Order is made in a Country restraining the property;
 - (b) The property to which the Order applies is suspected to be in Antigua and Barbuda;
 - (c) The request is made that the order be enforced in Antigua and Barbuda; and
 - (d) The Attorney General causes an application to be made to register the Order.

The claimant contends that all of the conditions (a) to (d) have been fulfilled in the present case.

5. Further, Antigua and Barbuda and the U.S. are also obligated to assist each other as States that have ratified international convention: Article 18 of the United Nations Convention Against Transnational Organized Crime 2000 (the Palermo Convention)³

Article 18

1. *States Parties shall afford one another the widest measures of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance when the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1(a)⁴ or (b)⁵, is transnational in nature, including that victims, witnesses, proceedings, instrumentalities or evidence of such offences are located in the requested State Party and the offence involves an organized criminal group.*

² See sections 4 and 2 of the Mutual Assistance in Criminal matters(The Government of Antigua and the Government of the United States of America) Ratification Act 2000))

³ The schedule to the Affidavit no.2 of Dale Hamblin in support of this application sets out the relevant content of the Article.

⁴ Article 3(1) (a): "The Offences established in accordance with article.....6 (Criminalization of the laundering of proceeds of crime.

⁵ Serious crime shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

2. *Mutual legal assistance shall be afforded to the fullest extent under relevant laws, treaties, agreements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10⁶ of this Convention in the requesting State Party.*

6. The purpose of the present application is to obtain the permission of the High Court of Antigua and Barbuda, to allow funds located in Antigua to be lawfully affected by the Court of a foreign jurisdiction as far as restraint of those assets are concerned. The claimant submits that In Jose Santacruz-Londono v The Drug Trafficking Offences Act 1986 (Wednesday, 5th July, 1995) The Court of Appeal in England allowed the registration of a U.S. restraint order related to a confiscation case.

CASE FOR THE LIQUIDATORS⁷

Lack of Jurisdiction (In Personam and In Rem)

7. The respondents claim that the claimants have no jurisdiction to freeze the funds in Antigua and Barbuda for the following reasons;

8. At the date that the United States District Court pronounced and issued the Restraining Order, the funds the subject of the Order were not within the United States of America but rather were in the Bank of Nova Scotia, St. John's, Antigua.

9. At the date that the Restraining Order was made the Joint Liquidators were residents of Antigua and Barbuda and were not subjected to the jurisdiction of the United States District Court .The respondent relies on the following dicta in support of this proposition; *"The same principle will, we believe, be found to lie at the bottom of those cases in which our Court have historically refused to enforce Judgment/Orders obtained in a foreign Country against a person not resident in that Country and who had no notice of the suit. It may very well be held that the foreign Country had no*

⁶ Article 10: Liability of legal persons

⁷ This is a substantial reproduction of the written submissions of counsel for the respondent.

*jurisdiction to pronounce judgment against a person behind his back who is not subject to its jurisdiction". – **Castrique v. Imrie (1870) L.R. 4 H.L. 414.***

Breach of Natural Justice

10. Citing the following authorities set out below, the respondent contends that a foreign judgment or order may be impeached if the proceedings in which the judgment or order were obtained were contrary to natural justice.

Buchanan v. Rucker (1808) 9 East 192:

Langer v. International Transport and Earthmoving BM (1983) CA 12

11. In support of this contention the respondent alleges that the Joint Liquidators were not given notice of or served with the Application for the Restraining Order in advance of the hearing (presumably in the USA) despite the fact that the said order is directed specifically at the Joint Liquidators and names them at paragraph (j) of page 6 of the Order as being subject to and restrained by the terms of the Order.
12. Further contends the respondents, the Restraining Order seeks to ensure that the Applicant, United States of America, is afforded due notice and a proper opportunity to be heard in the event that the Joint Liquidators apply to the United States District Court to take any action that would affect the funds the subject of the Restraining Order. These are the very same right contends the respondent, that the United States District Court and the Applicant United States of America denied to the Joint Liquidators when the Restraining Order was made.

Interest on the proceeds

13. The respondent alleges that the Bank is insolvent and unable to pay 100% of its proven creditors.
14. The Restraining Order seeks to freeze all of the funds regardless of whether the said funds constitute principal or interest and the said Order specifically applies to "any interest accrued".

15. The Restraining Order at page 7 specifically states *"They shall continue to credit to the account in which the Defendants in Rem may be found any deposits, interest, dividends or other credits in the normal course of business and such deposits, interest, dividends and credits shall be subject to this Order"*.
16. The respondents submit the law thus: When a Company in Liquidation is insolvent and unable to pay its debts in full; creditors are not entitled to prove for interest accruing or to accrue after the commencement of the winding up. Thereafter, any right to interest is nullified.
17. Further they contend; any interest that accrues is for the benefit of the liquidation proceedings as a whole cannot by law be credited to any specific creditor.
- **Humber Ironworks Co. (1869) 4 Ch. App. 643**
 - **Re Amalgamated Investment & Property Co. Ltd. [1985] Ch. D. 349**
 - **Re Agricultural Wholesale Society [1929] 2 Ch. 261**
 - **Re parent Trust & Finance Co. Ltd. [1936] 1 All E.R. 641**
18. And the respondent's submissions continue; that if a creditor is not entitled to claim interest accrued after the commencement of the winding up proceedings then it is unlawful for their accounts to be credited with interest as required by the Restraining Order.
19. Further, it is contended that as interest that may accrue on the funds cannot by law be credited or attributed to any specific creditor including Lazarenko/Milchenko, it is not lawful for the Restraining Order to attempt to freeze any such interest as being due to Lazarenko/ Milchenko.

CASE FOR THE SUPERVISOR AUTHORITY

Natural Justice And The Right To Be Heard

20. In this matter (this application in Antigua), the Liquidators of Eurofed Bank Limited (In Liquidation) are nominal Defendants, named as such for no other reason than that the Civil Procedure Rules 2000 eliminated the originating summons procedure and has thus forced an applicant to name a Defendant whether or not it is appropriate or logical in the circumstances to introduce such an entity. This is an in Rem matter in the United States where the Defendants and the funds in

question are legally under U.S. law, and as such the Liquidators are merely the holders of certain funds of concern in U.S. forfeiture proceedings.

21. In the U.S. proceedings to which the restraint order applies: Case No. 1:04-cv-00798-PFL- U.S. v All Assets Held at Bank Julius Baer & Company Ltd. et al., the Liquidators have submitted to the jurisdiction of the U.S. Court, are actively engaged in the matter in the U.S. District Court of Colombia. The Liquidators have already responded to interrogatories of the U.S. prosecutor. Counsel for the claimant refers the court to Exhibit DH-1 of Affidavit No. 2 of Dale Hamblin, which they submit is the Liquidators' Second Supplemental Response in the U.S. case.

ACCRUED INTEREST

22. The claimant submits that the payment of interest to accounts of Eurofed Bank (In Liquidation) is not an issue whose resolution is critically or unavoidably relevant to determine of this application. The real focus and concern of this application is and should be the **Restraint of property alleged with good reason to be the proceeds of Crime.**
23. The claimant submits that the earlier Order of Justice Mitchell of 5 November 2003 in Case No. ANU HCV 204 OF 1999- Donald Ward & Charles Walwyn v Pavlo Lazarenko et al. a case filed in this court's jurisdiction separated the Lazarenko funds from the funds which the Court gave to the local Liquidators to conduct the Liquidation. (See paragraph 2, Exhibit DH-2, Affidavit No. 2 of Dale Hamblin). The claimant submits that based on the Order of Justice Mitchell, the Liquidators were given no authorization to use the interest accrued on the Lazarenko funds to run the Liquidation in Antigua and Barbuda or pay third parties. In fact, they assert that until the *ex parte* order of the Court of 13 February 2009 (See Exhibit 3, Affidavit No. 1 of Dale Hamblin) the Liquidators had no access to such accrued interest, as it remained in an account in the name of the Registrar of the High Court of Antigua and Barbuda. The Liquidators need be concerned only that such interest is ultimately disbursed in accordance with the law and the directions of the Court. A dispute about accrued Lazarenko interest can therefore be effectively dealt with by the Court after the outcome of restraint proceedings. For the present, **ensuring that the Lazarenko/ Milchenko-related money is restrained supersedes any issue of payment of interest that could result in the funds remaining ineffectively restrained for purposes of U.S. confiscation proceedings.** The issue

of interest will also affect other forfeiture proceedings and for that reason should also not be dealt with in these proceedings.

24. The U.S. restraint order asks for the restraint of all accrued interest on the funds of Pavlo Lazarenko and Alexander Milchenko. This must be read to mean all "Lawfully" accrued interest, as Article 16(2) OF THE Treaty states:

*"The Contracting Parties shall assist each other to the extent **permitted by their respective laws** in proceedings relating to forfeiture of the proceeds and instrumentalities of offences, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities **pending further proceedings.**"*

25. What matters, contends the claimant, is not the restraint of interest but that the interest not be unlawfully disbursed. This counsel says, is a matter of accounting. Ultimately disbursement can be controlled by the Court and in any event the interest of the Lazarenko money does not impact the conduct of the rest of the Liquidation under Justice Mitchell's Order of 5 November 2003 (see paragraph 2 and 3, Exhibit DH-2, Affidavit No. 2 of Dale Hamblin).

Severance

26. The claimant contends that in any event the offending part (if that is what it is) of the US Order can be severed from the applicable part of the said Order. The reasoning behind this proposition as submitted by the claimant is as follows;

27. In Statutory Interpretation, 1984, Benions, p.144 the learned author states:

"Severance Where possible, the Court will sever the provision which is ultra vires, from the rest of the instrument..... If the instrument consists of a collection of separate units, each of which is say a rule, a regulation or a byelaw, severance is likely to be easier.

The question of severance does not depend on a "blue-pencil test". The Court will sever the invalid provision from the valid notwithstanding that this cannot be done neatly by textual amendment".

28. In R v Secretary of State for Transport, ex parte Greater London Council, [1985] 3 ALL ER 3000, the Court held:

"In principle the Court could in appropriate proceedings hold to be unlawful part of an administrative order or decision while holding valid the remainder of the order or decision.....However, the Court would not rewrite such an order or decision, and the striking down or striking out of part of the decision or Order could not be done if the Order or the decision was one and indivisible or if the excess was so intertwined with the valid part as to be separable from it only with difficulty. It followed that, if the necessary matters were established, there was no bar to the grant of a declaration that a divisible part of an order or decision was unlawful, and that the balance was valid and effective".

OTHER ARGUMENTS

29. The Liquidators have repeatedly asked for the application to be dismissed without giving due regard to the serious nature of the proceedings involved and the necessity to deprive criminals of the proceeds of their crimes, which has now become an international legal obligation of States.

30. The fiduciary responsibilities of the Liquidators give them no interest in the Lazarenko case other than to await the outcome of any confiscation or forfeiture proceedings and the others made therein. The Liquidators' request for dismissal of the application constitutes a disruption to confiscation proceedings that cannot be justified by any argument about lack of notice or issue about payment of interest.

31. The Order of the U.S. Court does not concern the distribution of the funds in question, and this is not an issue in the present application.

32. In any event, distribution of confiscated funds would be subject to Article 16 of the Treaty which states:

"The party that has custody over proceeds or instrumentalities of offences shall dispose of them in accordance with its laws. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the transferring party's Laws and upon such terms as it deems appropriate".

33. The registration of the restraint order in these proceedings does not preclude forfeiture proceedings in Antigua and Barbuda.

CONCLUSION

34. The Legal frame work for the registration of a U.S. Court Order is in existence through the Mutual Assistance in Criminal Matters Act 1993 (the Act). The subject Court Order falls within the ambit of the Act.

35. The Court accepts that the Liquidators of Eurofed Bank Ltd. (In Liquidation) are nominal Defendants. I accept that the Liquidators in the substantive matter in the USA are actively engaged in the matter in the USA as alleged by the Applicant herein⁸. The Liquidators have not been precluded from contesting any aspect of the proceeding including the ensuing Court order now the subject of this Application. In the Court's view there has not been any breach of natural Justice, more specifically, there has not been any breach of the right to be heard as alleged by the respondent herein.

36. I accept the submission by the Respondent Liquidator with respect to the Law governing the Status of the accrued interest after the commencement of the Liquidation. The question is however, whether that precluded the restraining of the assets, the subject of the said order.

37. Quite simply a restraining Order seeks to conserve the assets until it can be further dealt with accordingly to Law. Ultimately, in dealing with the restrained asset in accordance with the law, all the various considerations raised by the Respondent in this application will be entered into. At the forfeiture proceedings all relevant issues can be ventilated including the issue of the legal status of the interest referred to by the respondent in this application.

38. The Respondent has raised the issue that the U.S. Order in its existing form purports to attach to the interest accruing after the commencement of the Liquidation as funds, the subject of the creditor interest and is such the order is not enforceable in its present form. The Applicant/claimant

⁸ See para 8 of the Applicants submissions, see also para 4,5,6, 7 of the Affidavit of Dale Hamblin filed July 12 2010.

contends that the offending part of the U.S. Order can be severed leaving the enforceable part intact. Several authorities were cited by the claimant. The Court is not convinced by any of the cited authorities; they dealing with legislative provisions and administrative decisions and Orders.

39. The United States of America Order in the usual course of things cannot in the court's view, be severed in the manner as suggested by the claimant or otherwise modified by the local Court. The local Court does not first, have the statutory authority to do so and secondly, in any event, does not have the evidence before it to enter into such an endeavor. However, the non-severability of the Order does not preclude the Court at the enforcement stage from enforcing against that part of the funds that are permissible by the domestic laws of Antigua.

40. The Treaty on mutual legal assistance between the U.S. and the Antigua and Barbuda⁹ Government, upon proper construction, appear to provide for severability of U.S. Court Order, where doing so is necessary to give effect to the intent and objectives of the Act. The domestic enforcement procedures, if it were not amenable to severability in its application, may in any event be brought into conformity with the international treaty obligation of Antigua and Barbuda.¹⁰

ORDER

41. In the Circumstances the Court granted the Order as per the draft Order filed on May 14, 2010 in its entirety¹¹.



.....
DAVID C HARRIS
HIGH COURT JUDGE
ANTIGUA and BARBUDA

⁹ And it appears, the ratified United Nations convention against Transnational Organized Crime 2000

¹⁰ For a discourse on the application and effect of international treaty obligations on domestic law see; Hon. Mr. Justice Michael Kirby, A.C, CMG in the Commonwealth Law Bulletin, Vol. 18 No. 4, Oct. 1992 at pp 1306; see also Justice Lallah of the Supreme Court of Mauritius, Commonwealth Law Bulletin Vol. 17 No. 2, April 1991.

¹¹ The draft order provided by the applicant is settled and on the file.