IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civil) 18 of 2017
POCL 8 OF 2014

KELVIN LEACH

TITAN INTERNATIONAL SECURITIES INC

PINNACLE FINANCIAL GROUP (Cayman) LTD

Appellants

- and-

THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE CAYMAN ISLANDS

Respondent

Before:	**The Rt. Hon Sir John Goldring, President** **The Rt. Hon Sir Alan Moses JA** **The Hon Sir Richard Field JA**
Appearances:	**Mr. Nicholas Dixey and Mr. Colm Flanagan of Nelson Law for the Appellants** **Mr. Andrew Radcliffe QC instructed by Ms. Toyin Salako of the Office of the Director of Public Prosecutions for the Respondents**
Hearing:	**31 August 2018**
Judgment Delivered:	**6 February 2019**

JUDGMENT

MOSES, JA

1. This is an appeal from an Order of Quin J of 25 May 2017, in which he dismissed an application by the appellants, Kelvin Leach, Titan International Securities Inc, ('Titan') and Pinnacle Financial Group (Cayman Ltd) ('Pinnacle'), for the discharge of an *ex parte* Restraint Order, first made on 18 December 2015. It was made pursuant to a request for assistance and the restraint of certain accounts by the United States Department of Justice on 2 July 2015. For reasons which will become apparent when I turn to their grounds of appeal, it is unnecessary to do more than outline the facts which form the background to the making of the Restraint Order.

2. By a Grand Jury Indictment of the Eastern District Court, New York, it was alleged that the appellants conspired to commit securities fraud, to defraud the United States and to launder the financial proceeds of their crime. Broadly, the IPC companies (collectively referred to as 'IPC') devised an elaborate system of shell companies to conceal large ownership interests in U.S. publicly-traded companies. It enabled clients to manipulate the stock-market illegally and without detection and thereafter launder the fraudulent proceeds of sale. It also enabled their clients to conceal the fruits of the fraud from the US Internal Revenue Service ("IRS").

3. The evidence on which the Respondents relied was accepted by Quin J on 18 December 2015 and again when considering whether to set his order aside on 25 May 2017 as establishing that there was reasonable cause to believe that the appellants had benefitted from criminal conduct. In reaching his conclusion Quin J usefully outlined the underlying factual allegations.

4. The shell entities established by IPC were Titan, an offshore broker-dealer and investment manager company with its principal office in Belize; Legacy Global Markets SA, a similar type of company with its principal place of business in Panama and an

office in Belize and Unicorn International Securities LLC, undertaking similar activities with its principal place of business in Belize. Pinnacle was a financial services firm registered in the Cayman Islands. The judge recorded that it was not disputed that the appellant Mr Leach, who had filed an affidavit in support of the application to set aside was president of Titan, and a director of Pinnacle which shared the same mailing address as Titan. From September 2013 he was also president, manager and secretary of Pinnacle.

5. He also recorded that there was no challenge to the findings of the US Department of Justice that the companies named in the Indictment did not carry out any legitimate business transactions (Judgment para 72). I interpose that Mr Leach had sworn an affidavit, dated 5 January 2017 in which he did no more than deny the allegations and assert that all monies in the restrained accounts came from legitimate business dealings.

6. The judge found that there was evidence that Titan had opened Pinnacle accounts to break up the transfer of illegal funds from IPC to Titan and thence to Pinnacle who would then transfer funds to IPC clients in Canada and the USA (para 73). Mr Leach was the sole signatory of the Pinnacle accounts (para75.)

7. The appellant alleges, by the first ground of appeal that the statutory conditions for the making of an external confiscation order were not satisfied on two bases; first that there was no criminal investigation started in the Cayman Islands and second, on a proper construction of the relevant statutory provisions the quality of the evidence on which the judge relied was inadequate. It is, accordingly, necessary to identify the relevant statutory provisions.

8. It is not suggested that there was a failure to comply with the Mutual Legal Assistance provisions, pursuant to which the request for assistance by freezing bank accounts was made. They were contained in section 3 and section 6 of the ***Mutual Legal Assistance (United States of America) Law (2015 Revision)***.

9. These provisions are subject to the ***Proceeds of Crime Law ("POCL")***. This has been subject to a number of revisions but, at this stage, it was agreed that the 2016 Revision was most relevant, although had there been a material difference it would have been necessary to consider the revision at the time of the *ex parte* Order to avoid disadvantage to the appellants when seeking to set that Order aside. A subsequent revision of 2018 removed one of the relevant requirements but is only relevant to this appeal should it succeed on its substantive grounds.

Legislation

10. By Section 187 ('External requests and orders')

> *"187. Schedule 5 shall apply to external confiscation orders and to any proceedings which have been, or are to be, instituted and which may result in external confiscation orders being made in foreign countries."*

11. By Section 190 ('Evidence in relation to proceedings and orders in a foreign country')

> *"190. (1) For the purposes of external confiscation, a certificate purporting to be issued by or on behalf of the appropriate authority of a foreign country stating*
> *(a) – (e)* ... [institution of proceedings, external confiscation order is in force, that it remains unpaid, notification etc.]

shall, in any proceedings in the Grand Court, be admissible as evidence of the facts so stated.

(2) In any such proceedings a statement contained in a document, duly authenticated, which purports to have been received in evidence or to be a copy of a document so received, or to set out or summarise evidence given in proceedings in a court of a foreign country, shall be admissible as evidence of any fact stated therein.

(3) A document is duly authenticated for the purposes of subsection (2) if it purports to be certified by any person in his capacity as a judge, magistrate or officer of the court of the foreign country, or by or on behalf of the appropriate authority of the foreign country, to have been received in evidence or to be a copy of a document so received, or, as the case may be, to be the original document containing or summarising the evidence or a true copy of that document

(4) Nothing in this section shall prejudice the admission of any evidence, whether contained in a document or otherwise, which is admissible apart from this section."

12. Schedule 5 sets out modifications to the Law and provides that where the Schedule is at variance with ***POCL***, the terms of the Schedule shall prevail:

"SCHEDULE 5

Modifications to the Law When Applied to External Confiscation Orders and Related Proceedings

section 187

Introductory

1. This Schedule shall apply to external confiscation orders registered under this Law and to any proceedings which have been or are to be

instituted and which may result in such external confiscation orders being made and, to the extent that it is at variance with this Law in relation to the administration and enforcement of external confiscation orders and proceedings which may result in external confiscation orders, the terms of this Schedule shall prevail.

General interpretation

2. *In this Schedule -*

(1) ... [definitions]

(2)Proceedings are instituted in a particular country when -

(a) under the law of the foreign country concerned, one of the steps specified in relation to that country in an order made under this Law has been taken there in respect of alleged conduct by the defendant to which this Law applies; or

(b) an application has been made to a court in a foreign country for a confiscation order,

and where the application of this paragraph would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.

(3) Proceedings are concluded-

(a) when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an external confiscation order being made in the proceedings; or

(b) on the satisfaction of an external confiscation order made in the proceedings (whether by the recovery of all property liable to be recovered, or the payment of any amount due, or otherwise).

Definition of principal terms used

3 (1) In this Schedule -

(a) references to conduct to which this Schedule applies are references to conduct which constitutes an offence to which this Law applies or would constitute such an offence if it had occurred in the Islands; and

(b) a person against whom an external confiscation order has been made, or a person against whom proceedings which may result in an external confiscation order being made have been, or are to be, instituted in a court of a foreign country, is referred to as "the defendant".

(2) – (4) ... ['realisable property' and 'gifts']

4. ... [Pecuniary advantage - equivalence]

Cases in which restraint orders may be made

5. (1) The powers conferred on the Grand Court by paragraph 6(1) are exercisable where

(a) proceedings have been instituted against the defendant in a foreign country;

(b) the proceedings have not been concluded; and

(c) either an external confiscation order has been made in the proceedings or it appears to the Grand Court that there are reasonable grounds for thinking that such an order may be made in them of at least the minimum amount.

(2) ... [where proceedings will be instituted]

(3) ... [notification requirements where they have not been instituted]

Restraint orders

6. (1) The Grand Court may, by order (referred to in this Schedule as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) Without prejudice to subparagraph (1), a restraint order shall be subject to section 45."

13. s.45 ***POCL*** provides –

"45(1) Where any of the conditions set out in section 44 is satisfied the court may make a restraint order prohibiting any specified person from dealing with any realisable property held by him subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may provide that it applies –

(a) to all realisable property held by the specified person whether or not the property is described in the order; or

(b) to realisable property transferred to the specified person after the order is made.

(3) – (7) ..." [legal expenses, living expenses, property subject to a charge]

14. Section 44 ***POCL*** sets out the conditions for the exercise of the court's power upon application for a restraint order:

"44(1) The court may grant a restraint order in accordance with section 45 if any one of the following conditions is satisfied –

(a) A criminal investigation has been started in the Islands with regard to an offence and there is reasonable cause to believe that the alleged offender has benefitted from his criminal conduct

(b) – *(e)* [other circumstances irrelevant to the present appeal]..

(2) – (3) ...."

15. It is the requirement to satisfy the s.44 condition for investigation that is no longer needed on an application for an external order under the recent ***POCL (2018 Rev).*** It follows that, should this appeal be allowed on any ground, but the court were to go on to consider whether to re-impose a restraint order, that condition would not apply.

16. The essential provisions of Schedule 5 continue:

"*6(4) A restraint order -*

(a) may be made only on an application by the Director of Public Prosecutions on behalf of the government of a foreign country or, in a case where an external confiscation order has been registered under section 187, by a receiver appointed under paragraph 9;

(b) may be made on an ex parte application to a judge in chambers; and

(c) notwithstanding anything in Order 11 of the Grand Court Rules, 1995, may provide for service on, or the provision of notice to, persons affected by the order in such manner as the Grand Court may direct.

(5) A restraint order

(a) may be discharged or varied in relation to any property; and

(b) shall be discharged when the proceedings in relation to which the order was made are concluded.

(6) An application for the discharge or variation of a restraint order may be made by any person affected by it.

(7) – (11) ...." [Appointment of receiver, seizure of property, land]

"*Applications for restraint and orders*

7 *An application under paragraph 6(5) shall be accompanied by an affidavit, a declaration or any other written statement by the appropriate authority of the foreign country deposing to or specifying -*

(a) where proceedings have been instituted, the conduct in which the defendant is alleged to have engaged (exhibiting a copy of the indictment, information or charge), and the grounds for believing that the defendant engaged in that conduct;

(b) – (c) ... [other circumstances]

(d) where an external confiscation order has not been made -

(i) the grounds for the belief that the defendant derived a benefit of a stated amount as a result of the conduct;

(ii) the grounds for the belief that the amount that might be realised is at least the stated amount;

(iii) where the defendant proceedings have been instituted, the grounds for believing that an external confiscation order may be made and the amount likely to be payable under such a confiscation order; or

(iv) ... [where proceedings are to be instituted]

(e) a description of the property in respect of which the order is sought;

(f) the grounds for the belief that the property is realisable property;

(g) the name and address of the person who is believed to be in the possession of the property; and

(h) the names and addresses of any parties who may have an interest in that property, and the nature of their interest."

Section 44(1)(a) Investigation

17. The appellants contend that the requirement of an investigation under Section 44(1)(a) has not been satisfied. They assert that while an investigation may have started in the Cayman Islands it had finished before the application for an *ex parte* Restraint Order was made on 18 December 2015, and, accordingly, there was no extant investigation in the Cayman Islands at that time. To understand this submission it is necessary to set out some of the chronology leading to that application.

18. On 17 October 2014 the Cayman Islands Financial Crimes Unit ("FCU") obtained a domestic restraint order pursuant to s.45 ***POCL*** in respect of a number of specific accounts for a limited period until 14 January 2015. It was only served on the appellants in December 2014. It was extended until 28 May 2015 on the making of a number of applications by the FCU for variation. Mr de Wit, named in the US indictment of 5 September 2014 succeeded in his application to discharge for the reasons set out in the judgment of Williams J on 8 June 2015. Williams J expressed concerns as to extending the domestic restraint order against the other defendants but agreed to do so for just under one month to 6 July 2015.

19. On learning of the imminent expiry of the domestic order the USDOJ requested assistance on 2 July 2015, seeking restraint of the accounts to which I have already referred. The domestic order did expire on 6 July 2015. The reaction of the authorities in

the Cayman Islands is explained by DC Keith Taylor of the FCU in his affidavit dated 16 December 2015:

> *"The Order (that is the domestic restraint order) remained in force until July 6th 2015 when it expired. No further application was made after that date as it was believed that the prosecution of the subjects named within this application and the forfeiture of assets would be better placed in the authorities in the U.S"*

20. There is no evidence of any investigation after the decision was made not to apply for any further extension of the domestic restraint order and no appeal was launched against the decision of Williams J. As DC Taylor puts it:

> *"This application is based on the premise that a criminal investigation has been started in the USA which would constitute an offence if it occurred within the Cayman Islands".* (Para 6). (See also Paragraph 3(1)(a) Schedule 5)

21. There had, however, been an earlier investigation in the Cayman Islands, as DC Taylor affirms. He says that his knowledge of the facts "*derive (sic) from my investigation of the matter to date*" (para 3). At paragraph 37 he avers:

> *"The investigation by the U.S and the Cayman Islands revealed that Titan, Legacy and Unicorn did not conduct any legitimate business activities;"*

22. The judge was satisfied that on the evidence before him at the time of the *ex parte* hearing on 18 December 2015:

"Officer Taylor has started a criminal investigation in the Cayman Islands with regard to offences"

and that accordingly s.44(1)(a) of ***POCL*** was satisfied. (Judgment para 53)

23. In my view the judge was correct and that condition in s.44(1)(a) was fulfilled. It must be recalled that that provision applied both to domestic restraint orders and by virtue of Schedule 5 Paragraph 6 to external restraint orders. Where an investigation has taken place in the Cayman Islands with a view to obtaining a domestic restraint order there is no warrant for depriving that investigation of effect once it has achieved all that is regarded by the FCU as necessary for the purposes of the domestic restraint order. That investigation may be deployed for the purposes of the external request for Mutual Assistance, and in that sense is still continuing.

24. Still less is there any justification for reading into S.44(1)(a) a requirement that an investigation must be started afresh for the purposes of an external confiscation order, ignoring that which has been done already. The statutory question posed by s.44(1)(a) is whether an investigation has started in the Cayman Islands? The only answer to that question was in the affirmative. In those circumstances, the judge was correct to rule that that requirement of that section was satisfied.

Section 44(1)(a) Adequacy of Evidence

25. The second aspect in which it is said that the application failed to comply with S.44(1)(a) is that there was insufficient evidence for the judge to be satisfied that there was reasonable cause to believe the alleged offenders had benefitted from their criminal conduct. The Crown's application was based on the content of the US indictment and an affidavit from the Assistant District Attorney Brian Morris. The judge also relied on the

Letter of Request, and a covering letter which triggered further information amplifying that Request. I shall deal later with non-disclosure to the appellants of the Request. For the time being it is only necessary to focus of the indictment and affidavit because they contained no less than was in the Request and its amplification. The Indictment was in the customary long form, pleading in full the allegations and the material on which reliance was placed. It was not contended that, if they were admissible as evidence on the basis of which the judge could consider whether there was reasonable cause to believe, that evidence was inadequate. The challenge was as to their admissibility as evidence.

26. The appellants contended that absent any statements from those involved in an undercover operation in which an FBI agent posed as a stock promoter, and absent the disclosure of the records and the wire taps, the evidence was inadequate. It was no more than hearsay or hearsay of hearsay.

27. The answer lies in analysis of the statutory provisions governing external confiscation orders. Section 190(2) provides that statements in a document duly authenticated under s.190(3) setting out or summarising evidence given in in proceedings in the court of a foreign country are admissible as evidence of any of the facts stated therein. The US Indictment clearly fulfils that requirement and was evidence of ample facts to support the commission of the crimes alleged and that the appellants had benefitted from those crimes.

28. Section 190 is within the congeries of sections within Part VIII of the ***POCL*** headed Co-Operation. Mr Flanagan on behalf of the appellants said that it had no application. He relied on S.187 ***POCL***:

"Schedule 5 shall apply to external confiscation orders and to any proceedings which have been, or are to be, instituted and which may result in external confiscation orders being made in foreign countries."

29. He says that the application for an external confiscation order, the subject of the instant appeal, came within the category of "*proceedings which have been, or are to be, instituted and which may result in external confiscation orders being made in foreign countries*" and not the first mentioned category of external confiscation orders. He draws attention to the opening of Section 190(1) "*For the purposes of external confiscation...*" and the closing full-out words "*shall in any such proceedings in the Grand Court*". The opening of Section 190(2) refers back to such proceedings. The rules as to admissibility contained in Section 190(2) must therefore be confined to the first mentioned category in section 187 and not to the proceedings in the second category.

30. This ingenious if tortured argument is based on a false dichotomy. It is true that a distinction is made in section 187 but that is only because the following sections cover both co-operation in relation to external confiscation orders which have been made and in relation to those which may result from proceedings. Provisions, such as Section 190(1) and (2) are for the *purpose of external confiscation* whether an order has been made or whether proceedings have been instituted or are to be instituted for the purpose of obtaining external confiscation orders.

31. Section 190(2) marches with the provisions of Schedule 5 Paragraph 7 which is part of the Schedule introduced by Section 187. To rule out the application of Section 190(2) is wholly inconsistent with the requirements set out in Paragraph 7(a)-(d). Paragraph 7 sets out the requirements for the making of a restraint order under paragraph 6(4)(a). Its reference to 6(5) was agreed to be in error. If an affidavit or written statement covering the matters set out in 7 (a)-(h) is a sufficient requirement it is absurd that s 190(2) which

provides for the admissibility of a summary has no application when considering the requirements of Section 44(1)(a).

32. The important feature of ***POCL*** is that it covers domestic and external confiscation orders. In the case of domestic orders, the provisions of Part VIII and Schedule 5 have no application. Their application is confined to external orders. This was graphically illustrated in the judgment of Williams J on 8 June 2015, which concerned only Mr de Wit. As he observed, there are no rules as to evidence in relation to an application for a domestic restraint order and he had to determine the type evidence to be placed before the court, capable of satisfying the test of "*reasonable cause to believe*" (paragraph 23). In the absence of any provisions such as Section 187, 190 and Schedule 5 he was not satisfied by what he regarded as no more than a "r*egurgitation*" of the US Indictment.

33. Williams J based himself on the ruling of Hooper LJ in ***Windsor v CPS*** [2011] EWCA 143 in which Hooper LJ emphasised the need for more than suspicion in a case where the defendant was able to show that 95% of his trading was legitimate and where a restraint order had been made before the hearing of a busy list at the Central Criminal Court during a forty minute hearing before HHJ Hawkins. He also referred to the judgment of Benjamin CJ in an application under the laws of Belize for the extension of a freezing order in Belize which related to the same conspiracy and to respondents which included the appellants in the instant appeal. Benjamin CJ ruled that the time period could not be extended under the relevant legislation in Belize. He also ruled that the evidential requirements were not satisfied since they were based only on intelligence and had fallen "*woefully*" short of the domestic legislative requirements.

34. Neither of those decisions identifies the statutory provisions in S.190 and Schedule 5 Paragraph 7 relevant to the admissibility of the material before Quin J as evidence and its adequacy if it was evidence. Quin J identified the relevant provisions correctly. They

demonstrate a proper basis for the admissibility of the Indictment and the contents of Mr Morris's affidavit. There was ample evidence to satisfy the requirements of Section 44(1)(a) and I would reject this ground of appeal.

Non-Disclosure

35. Since the appellants, rightly, did not pursue their contention that Mr Morris was not an "*appropriate authority*" for the purposes of Schedule 5 paragraph 7, it is only necessary to consider their third ground. The appellants allege that on the *ex parte* application on 18 December 2015 the Crown was guilty of material non-disclosure so that the restraint order should be set aside. The appellants contend that the Crown failed to provide Quin J with the two judgments to which I have already referred: the judgment of Benjamin CJ in Belize and the judgment Williams J. In addition they failed to draw attention to the judgment of Hooper LJ in ***Windsor***. There is no dispute but that the Crown did fail to make any such references.

36. As the Memorandum of Grounds (3.2) had foreshadowed, it appeared that although Quin J had seen and read the Letter of Request, it had not been shown to the appellants at the *inter parte* hearing, although they had seen the answers to a later request for amplification. It should have been plain that to show this document to the judge without disclosing it to the appellants was wrong. Either the Crown should have kept it to themselves or sought to persuade the USDOJ to waive confidentiality. (It is not clear why it was wanted). In any event, during the hearing of this appeal, confidentiality was waived, the appellants were shown the document and we also read it. It was clear that there was nothing in it other than that which had been disclosed. The ground was not pursued but it is to be hoped that this will not happen again in other applications.

37. The correct approach to questions of non-disclosure in an application for a restraint order was explained by Hughes LJ in ***Re Stanford International Bank*** [2010] EWCA Civ 137. It was not disputed that those principles apply in the Grand Court. Hughes LJ explained that the duty is not limited to an obligation not to misrepresent but:

> *"It consists in a duty to consider what any other interested party would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge ... In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."* (Para 191).

38. The correct test and the principal question a judge must ask himself upon an application to discharge

> *"... is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms... Once that question is answered in the affirmative, one comes to the consequential question whether the order made ought to be discharged."* (Para 193) (***Re Stanford***, per Hughes LJ at Para. 193).

39. In this case it seems to me clear that the judgments in Belize and in the Cayman Islands of Benjamin CJ and Williams J ought to have been disclosed. They concerned the same subject-matter and the same fraud and money-laundering activities. Mr Radcliffe QC, who did not appear below, appearing for the Crown, did not argue to the contrary. But he did contend that the failures were not material because Quin J reached the right conclusion for the right reasons. Quin J concluded that in neither the judgment of

Benjamin CJ nor in the judgment of Williams J were there material facts which would have undermined the Crown's case or advanced the case for the appellants (Judgment Paras 95 and 99). In those circumstances he did not go onto consider the consequential question whether the order should be discharged.

40. In my view, the two judgments in Belize and in the Grand Court were material to be taken into account in considering the order sought. In that respect I differ from the judge and disagree with the submissions of Mr Radcliffe QC. Part of the difficulty lies in the use of the adjective 'material'. Hughes LJ uses it as a noun in the passage I have cited above so as to emphasise he is not confining the test to facts but to information which might include an approach or a line which the defence might wish to pursue. But the phrase "*material non-disclosure*" covers a range of information which ought to be taken into account, the significance of which varies and is a matter of degree. When Mr Radcliffe QC submitted that the judgments were not material he placed the Crown in some quandary: were they submitting that the information about the two judgments need not have been disclosed at all or were they accepting they should have been but lacked significance? I am of the view that the Crown were right to accept that the judgments ought to have been disclosed and the real issue, before consideration of consequence, was evaluation of the extent to which those judgments were significant.

41. They were neither, in my view, of great significance for the reasons I have identified before in relation to the adequacy of the evidence for the purposes of Section 44(1)(a). Benjamin CJ was considering the adequacy of evidence which would form the ground for extending a restraint order under the laws of Belize in relation to criminal allegations in Belize. Williams J was considering whether to extend a restraint order in the Cayman Islands where there were no provisions as to the adequacy of evidence needed to form the basis of "*reasonable grounds for belief*".

42. But both decisions should nonetheless have been disclosed because they were of assistance in enabling the defence, on the one hand, to attempt to align the approach for which they were contending in the application for the discharge of an external restraint order and the Crown to draw the contrast for which it contended. The approaches of those judges were plainly relevant even if, in the end, they could be distinguished.

43. Moreover, the decision of Hooper LJ in ***Windsor*** ought to have been drawn to the judge's attention. It provided vital guidance as to the approach he should take, even if the factual context differed.

44. The next question is whether, in consequence of those failures, Quin J ought to have discharged the restraint order. Where there has been a failure to disclose the Court has a power not a duty to discharge (***Jennings v CPS*** [2005] EWCA Civ 746 at para 46, citing ***AJ &DJ***). There are two signposts as to the approach to be taken in the exercise of the power which point in different directions:

> *"Here is the first factor: the court should be more concerned to fulfil this public interest (in that case the power to make a restraint order pending a criminal trial), if that is what on the facts the restraint order would do than to discipline...the Crown—for delay or failure of disclosure. But, secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the State, and so should particularly insist on compliance with its rules and standards, not least the duty of disclosure."* (Laws LJ para 56).

45. It is necessary to look both at the nature and quality of the Crown's failure and the significance of the information it failed to disclose, remembering always that the question

is not confined to one of causation. Of course where the information might have led to a different result that would be a powerful factor in considering whether to discharge, although not determinative. If the Crown's failure was deliberate or showed a wholesale disregard to its obligations that too would be a powerful reason for discharge but, again, not determinative. All these factors are matters for evaluative judgment. I would emphasise that the power to discharge for non-disclosure in such cases is not limited to those in which the failures of Crown may be described as "*appalling*". This was a description used by Longmore LJ in ***Jennings*** and adopted by Edis J in his first instance decision in ***Malabu Oil and Gas v DPP*** [2016] Lloyds FC 108. But Longmore LJ was merely suggesting the paradigm of a case justifying a discharge not prescribing a test:

> "*The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order, if, after consideration of all the evidence the court thinks that an order is appropriate. That is not to say that there can never be a case where the Crown's failure might be so appalling that the ultimate sanction would be justified*" (para 64).

46. In my view the Crown's approach to disclosure, while accepted not to be deliberate, was serious. The case in Belize concerned the same subject-matter and had been decided less than a year before the request for assistance from the USA (7 November 2014). The failure to disclose the Williams J judgment is even less explicable. It had been handed down on 8 June 2015 and was the trigger for the USA request. These failures, coupled with the failure to disclose a highly relevant authority were of importance; they speak of an inadequate approach to disclosure which is to be deprecated particularly in the Crown which should be setting an example, and bearing in mind it was an *ex parte* application on 18 December 2015.

47. On the other hand, those failures were of limited significance in Quin J's consideration. Their absence had little bearing on the approach as to the evidence required under section

44(1)(a) he in fact took, an approach which was correct for the reasons I have given. The inaction of the Crown coupled with the insignificance of the information lead me to the conclusion that it would be wrong to interfere with the judge's decision. The Order, which was powerfully in the public interest, ought not to be discharged. I would dismiss the appeal.

FIELD JA

I agree.

GOLDRING, President

I also agree.