N-03-05

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
Civil Appeal No. 14/04
Grand Court No. 269/03

IN THE MATTER OF THE GAMBLING LAW (1996 REVISION) AND:
IN THE MATTER OF SECTION 190 OF THE CRIMINAL PROCEDURE CODE (1995 REVISION)

BETWEEN:

THE HON. THE ATTORNEY GENERAL

APPELLANT

AND:

CAYMAN NATIONAL BANK

RESPONDENT

BEFORE: **The Rt. Hon. Mr. Justice E. Zacca, President**
The Hon. Mr. Justice M. Taylor, J.A.
The Hon. Mr. Justice I. Forte, J.A.

Appearances: Mr. Patrick Patterson for the Honourable Attorney-General's Chambers and Alex Horsbrugh Porter of Ritch & Conolly for the Respondent and David McGrath of Quin & Hampson for David Lyons-Watler.

Heard: 25th, 29th & 30th November, 2004. Judgment given: 30th November 2004.
Reasons released: 11th March, 2005.

REASONS FOR JUDGMENT

TAYLOR, J.A.

This is an appeal by the Attorney General from a decision of a judge of the Grand Court setting aside, on the ground that it had been improperly obtained, an earlier *ex parte* order granted under s. 190(1) of the *Criminal Procedure Code* (1995 Revision) to "freeze" certain designated accounts with the respondent bank.

At the conclusion of the sitting we allowed the appeal, restored the *ex parte* order subject to a variation sought by the bank and granted by the order appealed from, and said that we would provide reasons for judgment in writing.

(a) Re *Ex-parte* Order

Section 190(1) of the *Criminal Procedure Code* provides for seizure and potential confiscation of property where there is reason to believe that the property has been obtained by crime, or represents the proceeds of crime. While the statute is described as procedural, s. 190(1) has obvious potential for significant invasion of substantive rights, and contains little in the way of procedural safeguards to protect the interests of those who may be affected by it. The sub-section reads:

> 190. (1) Any court may order the seizure of any property which there is reason to believe has been obtained by or is the proceeds or part of the proceeds of any offence, or into which the proceeds of any offence have been converted, and may direct that the same shall be kept or sold and that the same, or the proceeds thereof if sold, shall be held as such court directs until some person establishes a right thereto to the satisfaction of such court. If no person establishes such a right within twelve months from the date of such seizure, the property or the proceeds thereof, shall vest in the Financial Secretary for the use of the Islands and shall be disposed of accordingly.

Subsection (2) extends the remedy to objects believed intended for use in the commission of offences, and subsection (3) provides for the issuance of search warrants.

In the absence of express direction to the contrary, it is to be presumed that in enacting this terse provision the legislature intended that it be construed and applied by

the Courts in such a manner as to respect common law rights and basic rights identified with the rule of law, including the rights not to be deprived of property without due process and of full access to the Courts for the determination of legal issues arising between the individual and the state. Although s. 193 of the *Code* empowers the Rules Committee established under the *Grand Court Law* to make rules for carrying the *Code* into effect, we were told that none have been made with respect to s. 190. The Courts are thus left to ensure that appropriate measures are taken in dealing with individual cases to ensure that the section is fairly applied.

An *ex parte* order was made by Mr. Justice Henderson on April 17, 2003, on the basis of an affidavit sworn by Chief Inspector Courtney Myles in which the officer describes an investigation into illegal gambling which had resulted in the arrest four days earlier of David Lyons Watler. The officer refers to and exhibits documentary evidence that led him to believe that Mr. Watler had been involved in gambling offences, and lists various credits in bank accounts standing in the name of Mr. Watler, including accounts at the Cayman National Bank. Most significantly, in the final paragraph of his affidavit Chief Inspector Myles says (emphasis added):

> It is my belief based on the enquiries conducted thus far the money and properties listed above are the proceeds of David Watler's gambling enterprise and I am requesting that an order be made to restrain David Watler from disposing of these funds and properties *until the matter has been dealt with in a court of law.*

In the Originating Summons presented with this affidavit relief is sought in respect of the scheduled bank accounts as follows (emphasis added):

> An Order that the said monies be kept by the said bank in its safekeeping from the date hereof until further Order and that the said monies be held on an interest bearing deposit account but save as aforesaid that the said Bank be restrained whether by themselves, their Directors, officers, agents, or otherwise howsoever from removing, transferring, assigning, paying out or otherwise disposing of the said monies whether to the said David Lyons Watler or to any other person *without the leave of the Court.*

The *ex parte* Order itself follows the same form as the summons, with a handwritten addition made by the judge, as follows:

> That the Originating Summons, Affidavit and this Order are to be served forthwith upon David Lyons Watler, who may apply for a review of this Order upon four clear days notice.

The judge's note of the hearing records that he had been advised by counsel for the Attorney General that the matter was one of urgency and that the order sought was to be an order "freezing the balances in certain specified accounts in the name of Mr. Watler pursuant to s. 190 of the Criminal Procedure Code".

Several orders were thereafter made releasing some of the frozen funds with consent of the Crown. Mr. Watler was charged with a large number of gambling offences. Most of the charges had been dismissed at the time of the hearing before us and the remainder awaited disposition in the Summary Court.

(b) Proceedings Before Sanderson, J.

The application before Mr. Justice Sanderson that led to the present appeal was one filed on December 23, 2003, by the Cayman National Bank that sought further variation of the *ex parte* order so as to enable the bank to "set off", in respect of the amount standing to Mr. Watler's credit in a term deposit account, the amount owing by Mr. Watler on a $175,000 loan that had been advanced to him prior to the making of the order and on which payments had since fallen into arrears.

The loan was repayable on demand and secured by what is described in the loan agreement as a "lien" on Mr. Watler's term deposit account, one of those that was thereafter to be frozen by the *ex parte* order. The bank also had authority from Mr. Watler under its standard-form account opening documentation to apply, at any time and without notice, to the repayment of any indebtedness by him to the bank, any amount standing to his credit in any account with the bank. The Attorney General took the position that the bank ought to have sought repayment of its loan from assets of Mr. Watler's that were not "frozen" -- presumably by bringing action, obtaining judgment and taking execution -- rather than seeking repayment from the now-frozen term deposit account that had been pledged by him as security for it.

It was not suggested that the bank had any reason, at the time that it took the security, to believe that the money placed by Mr. Watler on term deposit represented

proceeds of crime, nor was there anything before the Court to establish that the money in fact represented proceeds of crime other than the statement of belief to that effect made in the original affidavit of Chief Inspector Myles.

In his reasons for judgment of July 7, 2004, granting the bank's application for variation, Mr. Justice Sanderson concluded that, notwithstanding the form of the *ex parte* order, all that it could in fact have "frozen" was the net balance owing to the customer by the bank. There was no money held by the bank for Mr. Watler, their relationship in law being the traditional relationship between bank and customer of debtor and creditor. The only "property" that could have been seized, the judge concluded, was the "chose in action" represented by the net balance due from the bank to Mr. Watler. Relying on the decision in *Re K (Restraint Order)* [1990] 2 All E.R. 562, the judge concluded that the bank had a right to "combine" its accounts, and that only the net overall balance could properly have been "seized" under s. 190(1).

The Crown relied, however, on a more fundamental point that was to become the real issue on the present appeal.

During an adjournment of the hearing before Mr. Justice Sanderson, one that had been requested by the counsel for the Attorney General, the first anniversary of the making of the *ex parte* order came and went. The adjournment had been requested by counsel for the purpose of considering a case cited for the bank but of which counsel did

not have his copy. On resumption of the hearing, counsel for the Attorney General took the position that there had now been forfeiture by operation of law under s. 190(1), so that the amounts as stated in the *ex parte* order to be owing to Mr. Watler on individual accounts now belonged to the Crown and it was no longer possible for the Court to grant the relief that had been sought by the bank. This submission rested on the contention that the *ex parte* order went further than merely restraining dealings with the accounts pending later application by the Crown, and initiated the process which, unless earlier terminated by some further order, would after 12 months result, without more, in title to the property vesting finally and absolutely in the Crown.

The essence of the Crown's position was that whatever may have been intended, the *ex parte* order was *not* a temporary restraint order only, having effect pending further application by the Crown, that is to say an interim preservation order such as might have been made under s. 10 of the *Proceeds of Criminal Conduct Law*. There was nothing, however, to suggest that at the *ex parte* hearing Mr. Justice Henderson was told by counsel that, unless vacated, his order would result in the monies recorded in the prescribed accounts being forfeited to the Crown. Nor was this suggested during subsequent hearings at which the order was varied or during the hearing before Mr. Justice Sanderson until mentioned when the anniversary had already passed.

Mr. Justice Sanderson held that the *ex parte* order had been made *per incuriam*, and on the basis of breach by the Crown of its obligation of disclosure in an *ex parte*

proceeding, and also that the Crown had by its conduct waived any right to rely on the 12-month limitation and was estopped from relying on it.

After granting the bank's application for a declaration that the order attached only the net balance owing to Mr. Watler, and not the specific sums in the listed accounts, the judge then proceeded, for these reasons, to set the order aside.

(c) Proceedings on Appeal

Only before us, and in answer to questions from the Court, did counsel for the Attorney General take the alternative position that the *ex parte* order, if it did not exercise the full jurisdiction under s. 190(1), was still valid as a temporary restraining or interim preservation order, and should be upheld as such.

Counsel accepted that the consequence in such case would be that the order could be varied so as to attach only the net balance owing to Mr. Watler. But the order as varied would then remain in effect to attach the net balance, probably in excess of $1,000,000, as well as any other property attached. We have said that, absent clear words to the contrary, s. 190(1) is to be construed and applied so as to ensure that those affected by it are not submitted to arbitrary confiscation, or denied due process of law. There is nothing in its wording to oust the ordinary jurisdiction of the Court to make an interim *ex parte* order for the preservation of assets pending an *inter partes* application by the Crown for the granting of relief available under it.

That the Court is not obliged when making an initial order to invoke the full jurisdiction is apparent also from the terms of the sub-section. It provides: (i) that the Court may order the "seizure" of property believed to be, or to represent, proceeds of crime; and also (ii) that the Court may order such property, or the proceeds of its sale, held "until some person establishes a right thereto to the satisfaction of the court". It is only when the Court exercises its jurisdiction to direct the property held "until some person establishes a right thereto to the satisfaction of the court" that the seizure becomes one in respect of which the period leading to forfeiture starts to run.

In the absence of any reference to the exercise of the second branch of the jurisdiction granted by the sub-section, a Judge ought not readily to be taken to have intended to exercise that authority. This is particularly so where the order is one made *ex parte*. In the present case it appears from the very wording of the originating summons and affidavit before the judge that the order sought was an interim order only, and not an order that could without more result in forfeiture. The direction that the frozen amounts not be paid out "without leave of the Court", appearing both in the summons and in the order, are inconsistent with the exercise of a jurisdiction that could result in such funds becoming payable to the Crown without further order. It is apparent on its face and from the summons, and most particularly from affidavit on which it was granted, that the order was intended to exercise only the jurisdiction under s. 190(1) to seize and preserve designated property, and that a further application would be required before there could be the possibility of any forfeiture to the Crown.

In circumstances such as the present, in which the property to be seized is a debt thought to be owed by one known party to another, and where it is expected that there will be criminal charges against the latter that may well not be disposed of for some time, it would obviously be inappropriate that the full jurisdiction granted under s. 190(1) be invoked *ex parte* on an initial application. The result of so doing might be that issues raised by the sub-section would have to be resolved before the criminal charges had been dealt with and -- as the Crown contended that it had -- the 12-month period might expire before the Court was able to adjudicate on any claim to the funds, and certainly before any appeal from any such a decision could be heard.

For all of these reasons we concluded that the *ex parte* order could only be regarded as an interim preservation or restraining order, and not one that commenced the running of the 12-month period leading to forfeiture.

It is not necessary for us to consider whether, if a claim were made after the 12-month claim period had commenced to run and before it expired, the court might be able to vacate its previous order, so as to suspend the running of time pending its adjudication. Nor are we called on to decide what must be shown by Crown and the claimant respectively where such a claim is advanced. These are matters not explored in argument before us, that must remain for another day.

Counsel for the Attorney General conceded before us that, if the order had not resulted in forfeiture, he did not expect to succeed on any argument that the bank could no longer claim the benefit of combination or set-off. His position was that the bank could not combine or set-off the accounts without variation of the *ex parte* order, and that there could be no variation after forfeiture.

In light of the conclusion we have reached with respect to the scope of the *ex parte* order, the bank is in our view clearly entitled to the variation granted below.

(d) Costs

Each party was ordered by Mr. Justice Sanderson to bear its own costs and Mr. Watler has appealed that disposition; with respect to that appeal, and also as to the disposition of costs of the appeal, we reserved our decision.

It is not the normal practice to make an order for costs in proceedings of this sort, involving discharge by the Crown of responsibilities ancillary to its duty to enforce the criminal law. But the Crown did not in the proceedings below take the alternative position that the *ex parte* order might in fact be an interim preservation order only; had the Crown taken that position below, the order would surely not have been set aside. All that would in that case have happened is that the bank would have obtained the variation order that it sought and did in fact obtain, and in those circumstances there would have been no basis for departure from the normal rule on such applications, that each party

bear its own costs. The additional relief granted below -- the setting aside of the order as a whole -- was a benefit to Mr. Watler to which, we have found, he was not entitled, one obtained because the Crown did not advance its alternative ground.

The Attorney General was thus unsuccessful on the appeal so far as the bank is concerned; the bank continues to have the right of combination or set-off that it sought and obtained below. The principal position that counsel for the Attorney General was instructed to maintain as against the bank and Mr. Watler on appeal was in our view one that plainly could not succeed. It was only on the "fall-back" position adopted by counsel during the course of the hearing before us that the Attorney General succeeded, a position on which the appeal was not opposed by the bank or Mr. Watler. The Attorney General has been unsuccessful on the contested grounds of appeal and successful only on a new, uncontested ground that could have been raised below.

In these unusual circumstances there is a basis, in our view, for departure from the normal rule applied in cases of this sort, to the extent only that the bank and Mr. Watler should have their costs of the appeal.

(e) Conclusion

For the above reasons: (i) we dismissed the appeal of the Attorney General from the July 7, 2004, order of Mr. Justice Sanderson varying the April 17, 2003, *ex parte* order of Mr. Justice Henderson so as to permit the bank to set-off the amount owing on its

loan in reduction of the credit in Mr. Watler's term deposit account; (ii) we allowed the appeal of the Attorney General against the order of Mr. Justice Sanderson setting aside the *ex parte* order of Mr. Justice Henderson in its entirety; (iii) we declared the *ex parte* order of Mr. Justice Henderson to be an interim preservation order only, and not an order that invoked the full jurisdiction of the Court under s. 190(1) of the *Criminal Procedure Code*; (iv) we declared that the *ex parte* order of Mr. Justice Henderson, as varied, remains in force and effect as a valid interim protective order, pending further application by the Crown *inter partes*; and we now (v) dismiss the appeal of Mr. Watler against the refusal of Mr. Justice Sanderson to award costs below and (vi) direct that the bank and Mr. Watler have their costs of appeal, to be taxed if not agreed.

E. Zacca, P.

M.R. Taylor, J.A.

I. Forte, J.A.