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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

IN CHAMBERS

CAUSE # 56/96

IN THE MATTER OF THE GRAND COURT LAW
(1995 REVISION), SECTION 11
AND IN THE MATTER OF THE
MUTUAL LEGAL ASSISTANCE
(UNITED STATES OF AMERICA) LAW, 1986
AND IN THE MATTER OF RYAN S. SHERMAN
MARVIN M. SHERMAN, RITA SHERMAN
MAIA SHERMAN, CRAIG SHERMAN

RULING

The Cayman Mutual Legal Assistance Authority received a request dated 13th December 1995 for assistance relating to the individuals named above from the U.S. Department of Justice. It sought the production of certain bank records. In a letter accompanying the request, the following passage appeared:-

"This request seeks the production of bank records only. However, in accordance with Cayman law, we would like to coordinate with you and the Royal Cayman Islands Police Department, the seizure of the Cayman bank accounts at a date set following the arrest of the defendants."

On the 7th February 1996 the Cayman authority issued a certificate described as being pursuant to Section 6 and the Schedule of the Law, and Articles 1 (paragraphs 2 (g) and (h) and 5 (paragraphs 1, 2 and 3) of the Treaty. It required the Solicitor General to apply to the Grand Court for injunctive orders restraining the persons named from dissipating directly or indirectly the funds in two bank accounts particulars of which had been requested in accordance with the Treaty. It is the application to the Grand Court in compliance with that certificate with which I am now dealing.

The first sentence of Section 6 (1) of the Mutual Legal Assistance (United States of America) Law 1986 reads as follows:-

"Upon receipt of a request, the competent authorities in the Cayman Islands shall execute the request, in accordance with, but subject to, the provisions of the Treaty."

The rest of the section relates to the authority of holders of specific offices to act in reliance upon a Certificate of the Cayman Authority. No issue in that regard arises in this matter, and I now turn to the provisions of the treaty which I regard as relevant.

As well as Article 1, paragraphs 1 and 2 and Article 5, paragraphs 1-3 which are relied on in the application, I need to set out Article 16.

They read as follows:-

Article 1
Scope of Assistance

1. The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the investigation, prosecution, and suppression of criminal offences of the nature and in the circumstances set out in this Treaty, including the civil and administrative proceedings referred to in paragraph 3(c) of Article 19.
2. For the purposes of paragraph 1, assistance shall include:
 - (a) taking the testimony or statement of persons;
 - (b) providing documents, records, and articles of evidence;
 - (c) serving documents;
 - (d) locating persons;
 - (e) transferring persons in custody for testimony;
 - (f) executing requests for searches and seizures;
 - (g) immobilizing criminally obtained assets;
 - (h) assistance in proceedings related to forfeiture, restitution and collection of fines; and
 - (i) any other steps deemed appropriate by both Central Authorities.

Article 5
Execution of Requests

1. The Central Authority of the Requested Party shall promptly execute any request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested Party shall do everything in their power to execute the request. The Courts of the Requested Party shall have jurisdiction to issue subpoenas, search warrants, or other orders necessary to execute the request.
2. When execution of the request requires judicial or administrative action, the request shall be presented to the appropriate authority by the persons designated by the Central Authority of the Requested Party.
3. Requests shall be executed in accordance with the laws of the Requested Party except to the extent that this Treaty provides otherwise. However, the method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested Party.

Article 16
Proceeds of Crime

1. The Central Authority of one Party may notify the Central Authority of the other Party when it has reason to believe that proceeds of a criminal offence are located in the territory of the other Party.
2. The Parties shall assist each other, to the extent permitted by their respective laws in proceedings related to:
 - (a) the forfeiture of the proceeds of criminal offences;
 - (b) restitution of the victims of criminal offences; and
 - (c) the collection of fines imposed as a sentence for a criminal offence.

Items (a) to (i) of paragraph 2 of Article 1 can with one important exception be related directly to specific articles of the Treaty. For example, Items (a) and (b) relate to Articles 8 and 9, (c) to Article 13 and so on. The exception is item (g) - "immobilizing criminally obtained assets." It seems to me that it must be interpreted as being a means to assist in the implementation of other Articles of the treaty by, for example, the imposition of an injunction of the very kind which is now being sought. It is well established that the Court has jurisdiction to impose such an injunction in all cases where it appears to be just and convenient.

The language of Articles 14 and 15 relates to the seizure and return of "articles." It is clearly not applicable to balances in bank accounts. For Article 16 to come into play, there must be proceedings relating to forfeiture, restitution or the collection of fines in which assistance is to be given to the extent permitted by Cayman law (my emphasis). There is no evidence of any such proceedings being in place, or of any legal basis under Cayman law under which they could be put in place at the present time. Certainly no injunction of the kind sought is needed to facilitate implementation of the request for production of records which has already been made. In my view, to go further by making an injunction against the bank accounts, without any evidence of the prospect of proceedings whereby those accounts could be seized under Cayman law, would be at best premature.

I regard Article 16 as limiting the more general words of the other provisions on which counsel exclusively relied and indicating that assistance relating to seizures of the proceeds of crime are to be carried out only in accordance with the respective domestic laws of the Parties. That is reflected in the letter from the U.S. Justice Department to which I referred.

The Attorney General sought nevertheless to support the submissions of counsel with a document of which the substantive part was this:-

"ATTORNEY GENERAL'S CERTIFICATE"

1. That it is in the public interest to fulfil the responsibilities and obligations imposed by the Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands relating to Mutual Legal Assistance and Criminal Matters ("The MLAT Treaty");

2. That it is in the public interest and an obligation under the MLAT Treaty to facilitate the immobilization of criminally obtained assets pursuant to the said requests for assistance notwithstanding the fact that the Court of the Cayman Islands may have no powers to order the forfeiture of the said assets;
3. That I do affirm as the aforesaid, not withstanding the common law principles enunciated in the Government of India, Ministry of Finance (Revenue Division) the Taylor and Another (1955 AC 491)."

Paragraph 1 is a self evident proposition. It will be apparent from what I have already said that paragraphs 2 and 3 are submissions of law with which I disagree. That these should have been put in the form of such as a certificate as this, in an apparent attempt to lend authority to submissions of counsel made in the normal way is unfortunate. It smacks of political interference with the Courts.

I can now turn to a second submission which was made on grounds independent of the Treaty. It was that on the basis of the opening of the accounts in Cayman banks and in particular a visit by an alleged conspirator to the Cayman Islands in that connection a conspiracy took place here as well as in the United States. I think that is probably right, on the basis of Director of Public Prosecutions v. Doot and Others (1973) AC 807, though I do not have to determine that question now. I will simply adopt it as a hypothesis, on which I will deal with the argument put in reliance on Chief Constable of Kent v. V. and Another (1983) 1 QB 34.

That case established that although the English Court (and consequently the Grand Court) has power to grant an injunction in all cases in which it appears to be just and convenient an applicant has to show that he has a legal or equitable right or interest the enforcement or protection of which requires the making of an injunction (per Donaldson and Slade L.J.J.) or (per Lord Denning M.R.) has sufficient interest to apply for an injunction.

Lord Denning M.R. put the matter thus:-

"Have the police a sufficient interest?"

I turn therefore to the crucial question in this case: has the Chief Constable a sufficient interest to apply for an injunction? We considered the position of the police in Reg. V. Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118, 136, where I said: "I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace.

To this I would now add that it is his duty, once he knows or has reason to believe that goods have been stolen or unlawfully obtained, to do his best to discover and apprehend the thief and to recover the goods. Corresponding to that duty he has a right - or at any rate an interest - on behalf of the public to seize the goods and detain them pending the trial of the offender and to restore them in due course to the true owner. In pursuance of that duty - and of that right and interest - he can apply to the magistrate for a search warrant and to a High Court judge for an injunction. So I hold that the Chief Constable here has a sufficient right and interest to warrant his applying to the court."

Lord Denning then went on to apply the principle to a bank account.

"On an application by the police setting out their reasonable grounds, the High Court can grant an injunction to prevent the thief drawing on his bank account and the bank from honouring his cheques so that in due course the monies can be restored to the true owner. Such an injunction is vital as an ancillary support to an order for restitution under Section 28 of the Theft Act 1968."

What I am now asked to do in this part of the application is consider whether, absent the Treaty, this principle should be extended to entitle the Attorney General to act in aid of foreign criminal proceedings by freezing the alleged proceeds of the crime in a Cayman bank account even though the courts of the Cayman Islands might have no powers to order the forfeiture of the assets. That in itself is a fundamental distinction from the Chief Constable of Kent case where the reasoning of Lord Denning was based on the clear power of the English court to make a Restitution Order. To extend this to a situation where no legal basis is shown for a restitution order and where the injunction is sought in aid of the penal law of a foreign power would clearly be wrong.

It was for these reasons that I was constrained, though with some regret, to dismiss the application made on behalf of the Solicitor General. It is known that wider statutory provisions relating to the forfeiture of criminally obtained assets are already at the drafting stage. When they are in place the result of such an application as this may well be different.

Dated 9th February 1996



G.E. Harre

Chief Justice