

IN THE CAYMAN ISLANDS COURT OF APPEAL  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
C.I.C.A. (CIVIL) NO. 19 OF 1991.

BEFORE: The Rt. Hon. Mr. Justice Edward Zacca, P.C., OJ, Pres.  
The Rt. Hon. Mr. Justice Telford Georges, P.C., JA.  
The Hon. Mr. Justice Kenneth C. Henry, J.A.

BETWEEN: G. Applicant/APELLANT  
AND: C. Respondent/RESPONDENT

Mr. Ramon ALBERGA QC and Ms. Juliana O'CONNOR CONNOLLY instructed  
by C.S. Gill & Co. for the APPELLANT.

Mr. Michael MARSDEN Acting Solicitor General for the RESPONDENT.  
AUGUST 10th, 11th, 12th, 14th and ~~DECEMBER 3rd~~<sup>2nd</sup> 1992.

GEORGES J.A.

This is an appeal from a judgment of the Chief Justice in which he affirmed, with a variation, an order he had granted on an application by D.C. Khan requiring an attorney (Mr. G) in practice in George Town to produce certain documents in relation to the attorney's dealings with a client (G.G.). The ex parte order had been granted under the authority of section 16L of the Misuse of Drugs Law (Second Revision) (The Law). This section provides that a constable may "for the purpose of an investigation into drug trafficking" apply to the Grand Court for an order in "relation to particular material or to material of a particular description" requiring the person apparently in possession of such material to produce it to the constable or give the constable access to it. The Grand Court will make the order sought if satisfied in terms of section 16L (4) that the following conditions had been fulfilled :-

"(a) there are reasonable grounds for suspecting that a specified person has

carried on or has benefitted from drug trafficking;

(b) There are reasonable grounds for suspecting that the material to which the application relates -

(1) is likely to be of substantial value (whether by itself or together with other material) to the investigations for the purpose of which the application is made; and

(ii) does not consist of or include items subject to legal privilege; and -

(c) there are reasonable grounds for believing that it is in the public interest, having regard to -

(i) the benefit likely to accrue to the investigation if the material is obtained; and -

(ii) the circumstances under which the person in possession of it holds it, that the material should be produced or that access to it should be given".

The ex parte application before the Chief Justice was supported by a printed form headed "Information in support of application for production order". The form provided spaces in the appropriate places for setting out the details which would make it applicable to each case the name of the constable applying for the order, in this case D.C. Khan; the name of the person suspected of having carried on or benefitted from drug trafficking, in this case G.G.; and the name of the person believed to be holding the material and the premises where it was thought to be held, in this case Mr. G and the address at which his firm carried on its practice. Essentially the form set out the conditions itemised in Section 16L (4) of the Law and the applicant swore that he believed that they existed.

Apart from this written application D.C. Khan gave evidence before the Chief Justice. He testified that Mr. G had a client, G.G., a Panamanian, who had purchased two lots of land in a development owned by a company, Dexco, at Brittany Bay. The attorney for Dexco was a Mr. MCF. On a perusal of files at the offices of Mr. MCF, he had seen an agreement between G.G. and Dexco for the purchase of the lots and in the words recorded by the Chief Justice -

"Having seen the agreement between [G.G.]

and Dexco Ltd. and the manner in which they were executed, I concluded that because the parties did not sign the agreement at the same time and at the same place I felt [G.G.] might be another source for the laundering of funds for the Cabrerars into the Caymans".

The Cabrera there referred to was Francisco Cabrera a person who had been convicted of drug trafficking in the United States of America. D.C. Khan had asked a lawyer in Panama working for the Cabrerars whether G.G. was a person working for Cabrerars providing money for the purchase of land at Brittany Bay. The lawyer had replied that G.G. might be such a person. D.C. Khan stated that the reason for applying for the production order was to see -

"if there was an original agreement as if there is not, [G.G.] is likely to be involved in moving money to Cayman".

On this evidence the Chief Justice made the order that Mr. G should give a constable access to and supply copies as may be necessary of the material to which the application related namely -

" all files, documents and accounts and other records used in ordinary business, whether those records are in written form, are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism, paid cheques, inter-account transfers and correspondence concerning any transactions in relations to dealing with [G.G.]".

The production order was served on Mr. G who took immediate steps to secure a stay to permit the hearing of his application for a discharge of the order or alternatively for a variation of its terms.

On the advice of his advocate Mr. G placed in a sealed envelope the documents which he deemed relevant and handed the envelope to the Clerk of the Grand Court in whose custody they now lie.

In his affidavit of September 3, 1991 in support of this application Mr. G confirmed that G.G. was a client of his and that he had acted for him in his proposed purchase of two lots in a

subdevelopment at Brittany Bay. In a subsequent affidavit dated September 13, 1991 he commented on the notes of D.C. Khan's evidence before the Chief Justice which had been properly made available to him, and submitted that that evidence did not support a conclusion that the conditions set out in Section 16L (4) of the Law had been fulfilled.

In reply D.C. Khan filed an affidavit dated October 8, 1991. In this he stated that Francisco Cabrera had been convicted of several drug trafficking offences in the United States of America. As part of a plea bargaining arrangement he had offered to disclose his assets derived from drug trafficking to facilitate forfeiture. Among the assets he had disclosed was the development at Brittany Bay. Sham Companies had been incorporated to handle the sale of lots in that development. Involved in the management of these companies were Dexter Layman Banks and his wife Shaleen Lucille who had been charged with assisting in the laundering of the funds acquired by Francisco Cabrera through drug trafficking. Their trial was pending.

He further stated that in the course of investigating the Ebanks' case he had discovered that Dexter Ebanks had received US\$200,000 from a Panamanian. He had questioned the person from whom these funds were supposed to have come. That person had denied remitting them and had said that there was another Panamanian (apparently not named) who was working for Cabrerass and who might have remitted them. He had been unable to trace the funds in the books of the Cayman front companies. He submitted that production of the documents ordered would help establish whether the sum of \$29,520.00 paid by G.G. as deposit on the lots allegedly purchased was part of the missing US\$200,000.00. He also stated that he did not believe that the sale to G.G. was genuine since the lots he had purchased had since (emphasis supplied) been "sold" by Dexco to a company called Golden Globe Properties Ltd. This transaction formed part of the current charges against the Ebanks. He asserted that the Agreement between Dexco Ltd. and G.G. was

irregular in that it was undated but appeared to have been signed in August 1989.

Paragraph 8 of that affidavit stated -

"That since no mention is made on the records of Dexco Ltd. of the US\$200,000 Dexter Ebanks received in March 1989 in Panama ... I have reason to believe that G.G. on behalf of the Cabrereras is part of the scheme to move funds through these Islands for their benefit".

On this evidence Mr. Alberga, counsel for Mr. G, advanced his submissions concluding on October 28, 1991. At that stage Mr. Smellie for D.C. Khan announced that supplemental affidavits would be prepared that afternoon and would be served shortly. When the matter was resumed on November 25, 1991 an affidavit by D.C. Khan sworn on November 13, 1991 appeared on the file.

Mr. Alberga objected to its admissibility. The purport of the affidavit was to supply evidence to show that though Francisco Cabrera was in prison, parts of his organization were still engaged in trafficking in drugs and it was of concern to the investigation to establish whether this activity continued through the Cayman Islands. This evidence was aimed at establishing that D.C. Khan's investigation was concerned with drug trafficking activity other than money-laundering - an issue which Mr. Alberga had submitted was critical to the legality of the production order. The Chief Justice admitted the affidavit into evidence.

This was the first case in which a court was being asked to consider the application of Section 16L of the Law and its likely impact on the practice of law in the Caymans.

The first issue canvassed was the jurisdiction of the Grand Court to reconsider an ex parte order made under the section. Subsection 6 of Section 16L vests in the Chief Justice the power to make rules governing the procedure in relation to -

- "(a) application for the discharge and variation of orders under this section;
- (b) proceedings relating to such orders".

The clear implication of this subsection is that the court does have the power to discharge and vary orders made under subsection 2. Indeed subsections (1 and 2) do not state in terms that application under them should be made ex parte but that procedure would clearly be appropriate. Applications would be made in the process of an investigation. Notice to any party that such investigations were in progress and that certain material was thought material would afford an opportunity to get rid of the material.

Apart from this implication, the principle is well settled that a court is always empowered to review orders made ex parte. This was recently restated in Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd. and another (1989) 39 W.I.R. 270, an appeal to the Judicial Committee from Jamaica - the immediate source of the procedural law in force in this country. The Board stated at p.281 -

" An ex parte order is, in its nature provisional only and Carey JA was plainly right in following and adopting what was said to this effect by Sir John Donaldson MR. in W.F.A. Records Ltd. v Visions Channel 4 [1983] 2 All E.R. 559 and 593 ... "

The statement in that case reads -

"As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists in his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and arguments advanced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order".

Mr. Alberga restated before us his objection to the admission of D.C. Khan's affidavit of November 13. There is much force in his submission that at that stage of the proceedings the prosecution

should not be allowed to lead evidence intended to neutralize the effect of one of the principal arguments advanced by the applicant. The reality is that the suppression of the drug trade is an important component of legislative policy. A judge considering an application to discharge a production order may well feel impelled to hear everything the prosecution would wish to say, affording if need be, an opportunity to the applicant to rebut the fresh material. There is no reason for interfering with the way in which the Chief Justice exercised his discretion.

The principle enunciated in W.E.A. Records Ltd v Visions Channel 4 Ltd. (supra) emphasises that a judge reviewing an ex parte order does so on the basis of all the evidence placed before him on the inter parties hearing. The validity of the order cannot be considered merely on the evidence led on the application to obtain the ex parte order.

On the substantive issues, one of Mr. Alberga's principal arguments was that D.C. Khan had not established the first prerequisite for the grant of a production order, namely that there should be an investigating into "drug trafficking".

The legislation in the Caymans dealing with the suppression of the drug trade is patterned on the English Act dealing with that subject - The Drug Trafficking Offences Act 1986 (the English Act). For the purposes of this case, however, there is a significant difference between the two Acts.

Section 38 (1) of the English Act in its definition of "Drug Trafficking" -

" (c) includes a person doing the following whether in England and Wales, or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby -  
(i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated;  
(ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's

disposal or are used for the other person's benefit to acquire property by way of investment".

This is the activity colloquially termed "money laundering".

The Law contains no comparable provisions. Money laundering is not included under the Act as drug trafficking.

Drug trafficking is defined in Section 2 (b) of the

Law -

- "Drug trafficking" means doing or being concerned in any of the following, whether in the Islands or elsewhere -
- (a) producing or supplying a controlled drug where the production or supply contravenes paragraphs (c) or (f) of sub-section (1) of section 3,
  - (b) storing a controlled drug where possession of the drug contravenes paragraph (d) of subsection (1) of section 3,
  - (c) importing or exporting a controlled drug where the importation or exportation is prohibited by paragraphs (a) or (b) of subsection (1) of section 3".

It should be noted that the word used in the definition is the word "means" not the word "includes". The definition would in consequence be comprehensive and there would be no room for extending the meaning to cover what could be regarded as its ordinary meaning apart from the statutory definition.

Mr. Alberga contended that save for the affidavit of November 13, 1991, all the evidence given by D.C. Khan in support of the application for the order could only be reasonably interpreted as establishing that G.G. had been engaged in laundering funds for Francisco Cabrera.

In his oral evidence to the Chief Justice he was noted as stating -

and -

"I felt [G.G.] might be another source for laundering of funds for the Cabreras into the Cayman Islands".

"So the reason for the production order is to see if there was an original agreement, as if there is not, G.G. is likely to be involved in moving money to Cayman".

The affidavit of October 8, 1991 reiterated this approach in greater detail. It recited the conviction of Francisco Cabrera and his agreement to hand over the proceeds of his drug trafficking activities. The scheme for laundering money in the Caymans and the companies incorporated to effect this was described, and facts in support of the contention that G.G. played a part in his scheme were set out. Paragraph 16 stated -

"That based on the information which I provided to the Honourable Chief Justice Sir Denis Malone I verily believe the [G.G.] may be connected directly or indirectly with the movements of funds from Panama to the Cayman Islands on behalf of the Cabreras".

There was no allegation that G.G. was in any way connected directly or indirectly with the producing, supplying, sorting, importing or exporting of a controlled drug - The words used in the definition of drug trafficking in the Law.

The affidavit of November 13, 1991, sworn after Mr. Alberga's submission had been completed sought to provide the drug trafficking connection. It recited facts which tended to show that parts of Francisco Cabrera's organization had continued to trade in drugs after his arrest and conviction. The only reference to G.G. was in connection with a possible payment of US\$200,000.00 to Dexter Ebanks on behalf of Francisco Cabrera, an incident that had been mentioned earlier in the proceedings.

In his judgment the Chief Justice concluded, in effect, that although the line of enquiry being pursued by D.C. Khan was money laundering by G.G. on behalf of the Cabreras, it could be said that the ongoing investigation was into the drug trafficking activity of Francisco Cabrera, following his conviction in the United States of America. On that basis he rejected Mr. Alberga's submissions.

In considering this issue it seems to me necessary to look with care at the structure of Section 16. Subsection (1) refers to an

"investigation into drug trafficking" for the purpose of which a constable may apply for an order. The first of the conditions referred to in subsection (4) is that there are "reasonable grounds for suspecting that a specified person has carried on or has benefitted from drug trafficking". The section does not require that the investigation which is mentioned in subsection (1) need be in relation to the specified person in respect of whom reasonable grounds exist. It does not say so in terms and there is no reason why it should be taken as implied.

Indeed it could be said that there is reason why it should not be implied since the specified person need not be only a person engaged in drug trafficking but also a person who has benefitted from drug trafficking. Such a person may never have engaged in drug trafficking as defined in the Act, that is the production, supply, storage, importation or export of drugs but yet may be the target in respect of whom the production order is being sought. The enquiry in relation to the target could be aimed not at establishing participation in drug trafficking but at establishing having obtained a benefit from drug trafficking.

The evidence given by D.C. Khan on the ex parte hearing of the ex parte order made clear that the investigation into G.G. and the reasonable suspicion which he had in relation to him arose in the course of an investigation into drug trafficking activities by the Cabrereras. In his notes the Chief Justice emphasised that he knew as he granted the order that Francisco Cabrera had been convicted of drug trafficking in the United States.

Quite apart, therefore, from any participation by the Francisco organization in the drug trafficking enterprise of the Cowboy III recited in the affidavit of November 13, 1991 it appears to me that the investigation of drug trafficking activity by Francisco Cabrera could legitimately continue in order to trace individuals who may have benefitted from it.

Accordingly this ground of appeal must fail. The second major argument advanced by Mr. Alberga centered on the absence of sufficient evidence to raise reasonable grounds for suspecting that G.G. had carried on or had benefitted from drug trafficking.

There was no difference between the appellant and the respondent on the proper approach to a decision as to whether or not there were reasonable grounds for suspecting. It will suffice to quote from the case of Cedeno v O'Brien (1964) 7 W.I.R. 192, a decision of the Court of Appeal of Trinidad and Tobago.

The Immigration (Restriction) Ordinance of Trinidad and Tobago authorised "any immigration officer or constable who shall have reason to suspect that any person is a prohibited immigrant" to question such person as to his identity and as to matters relevant as to whether he was or was not a prohibited immigrant and to require the person to accompany him to an immigration office or police station and there submit to the taking of fingerprints.

The phrase "reason to suspect" in the Immigration (Restriction) Ordinance and the phrase "reasonable suspicion" plainly mean the same thing. Wooding CJ stated at pp. 195 - 196 -

"it was contended that the procedure is in essence inquisitorial. So it is. And from that it was next contended that by its provision of an inquisitorial procedure the legislature must be presumed to have intended to grant the right to invoke it upon the bona fide suspicion of any immigration officer or constable. But the subsection does not so provide. By its terms he should have reason to suspect, which is very different from saying that he should suspect without more. It is notorious, I am sure that some people's suspicions are easily aroused. Any hint or conjecture, however tenuous, will move the credulous to suspect although it be utterly devoid of reason to find a suspicion. Any attempt to alter the character of this statutory stipulation must be firmly rejected".

In the course of his oral evidence and in his affidavits D.C. Khan identified the circumstances on which he based his suspicion that G.G. had been involved in drug trafficking or had benefitted from it. They all revolved around his purchase of the two lots of land

in the Brittany Bay Development.

(1) A Panamanian lawyer working for the Cabrereras had told him that there was another man in Panama working for the Cabrereras. The lawyer had apparently called no name.

(2) In searching files at the office of Mr. MCF he had seen G.G.'s name. He had contacted the Panamanian lawyer who had said that G.G. "might be the man providing money from the Cabrereras to 'purchase' land at Brittany Bay".

(3) He had seen the agreement between G.G. and Dexco and because the parties had not signed the agreement at the same time and the same place he felt G.G. might be another source for laundering of funds by Cabrera.

(4) The Cabrereras had set up an elaborate scheme using straw companies and front men in the Caymans. Among these companies was Dexco which marketed lots in the development at Brittany Bay.

(5) Dexter Ebanks, a principal at Dexco had received US\$200,000.00 from a Panamanian. The purported source of these funds had denied handing them to Ebanks and had stated that there was another Panamanian working for the Cabrereras. No trace of the US\$200,000.00 could be found. The fact that no mention was made in the books of Dexco of this sum of US\$200,000 was reason for believing that G.G. was acting on behalf of the Cabrereras in moving funds through the Caymans for their

benefit.

(6) The lots sold to G.G. had subsequently been sold by Dexco to another company which was one of the Cabrereras controlled sham companies.

(7) The agreement between Dexco Ltd. and G.G. was irregular in that it was undated but appears to have been executed in August 1989.

With respect to the Chief Justice all these matters taken cumulatively appear to me quite inadequate to raise a reasonable suspicion that G.G. was part of the money laundering scheme set up by the Cabrereras. The only significant factor is the information given by the Panamanian lawyer. On examination it is transparently thin. Discounting for the moment the fact that the lawyer would plainly be a person who had an interest of his own in diverting attention from himself, he did not directly identify G.G. as a participant in the scheme. He merely stated that there was another Panamanian working for Cabrereras. When G.G.'s name was later mentioned he said that "might be" the man. It is not even plain on the record that the Panamanian lawyer knew G.G. He merely accepted gratuitously a name which had been put to him.

The fact that an agreement for sale was not signed by both parties at the same time and place cannot be a reason for suspicion. It is to be expected where vendor and purchaser live and work in different places. The fact that a date is not entered in the appropriate blank left for it can only be an oversight on the part of the attorney responsible for the proper execution of the document. The nature of these grounds gives an insight into D.C. Khan's approach. He was in the language of Wooding C.J. cited above one of those people "whose suspicions are easily aroused. Any hint or conjecture, however tenuous" would move him "to suspect although it be utterly devoid of reason to form a suspicion".

Again the fact that one of the lots originally agreed to be sold to G.G. was subsequently sold to a company controlled by the Cabrereras seems hardly a reason for suspecting that the original agreement was a sham. Once it is conceded, as it can be, that the companies were all sham the likelihood of such behaviour on their part cannot be discounted and should be no reason for suspecting the original purchaser.

In the final analysis the only basis for suspicion is the identification of G.G. by the Panamanian lawyer. The manner in which the identification took place has already been discussed. No independent evidence supports it in any way. Rather it is used as a reason for casting doubt on matters which would otherwise seem quite normal. For example D.C. Khan states that the absence of any records in Dexter Ebanks' book of the US\$200,000.00 he had received from the Panamanian in Panama is evidence that G.G. was part of the Cabrereras' money laundering scheme. This statement can only be accepted if there is reason to suspect that Dexter Ebanks received the money from G.G.

The suppression of the drug trade in these Islands is a matter of priority and the powers granted under section 16L permit a necessary intrusion into the privacy of homes and offices of persons who may well be innocent of any wrong doing. They also permit prying into confidential relations which would normally be shielded from scrutiny. There must be awareness of the importance of achieving a balance and this can best be achieved by ensuring that the suspicions on which the exercise of these powers are based are plainly shown to be reasonable. In this case my view is that they were not and that on this basis the appeal should be allowed.

One other matter remains for discussion. The material which was to be the subject matter of the production order was described in D.C. Khan's written application as -

"All files documents and accounts and other records used in ordinary businesses,

whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism, paid cheques, inter-account transfers, telegraphic transfers and correspondence concerning transactions in relation to the dealings with the above named (name of person) [G.G.]."

All of this appeared as printed matter on the form save for the name G.G. which was typed in.

This clearly did not comply with the language of section 16L (1) which empowers a constable to apply for an order in relation to "particular material". The description is of such breadth that it cannot be fitted either into the category of "material of a particular kind".

At the close of the inter parties hearing the order was varied by deleting the words after "relation" and substituting the words -

"to dealings between [G.G.] and any of the following persons or entities, D.F. S.E. B.G. the C.s R.E. C.Co., H.P. Co.Ltd., and G.E. Inc."

The variation does bring the order in line with the language of section 16L (1) of the Law. It can be said to fit into the category "material of a particular kind".

The words of the Law are simple and cannot further be elucidated, save by illustration. A request for a cheque of a stated date issued by a named individual would clearly be "particular material". A request for documents relating to inter-account transfer over a stated period between two named accounts could more easily be described as "material of a particular description". Every effort should be made to specify as precisely as is reasonably possible the material with regard to which the production order is sought. The section is not intended to supply cover for a fishing expedition.

The fact that the application as originally sought was too wide in its terms and did not comply with the Law would not affect the validity of an order made after an inter parties hearing. As has been mentioned the ex parte order was provisional and subject to review. The order as originally made was duly served but was not enforced, a stay having been obtained to permit the inter parties hearing. The order eventually made after the inter parties hearing did not suffer from that defect.

For reasons set out above I concurred in the decision announced shortly after the closing of the arguments that the appeal be allowed and that the production order be vacated.

On 3rd December 1992 the Cayman Islands Court of Appeal made the following order:

Costs of the hearing below and costs of the Appeal to be agreed or taxed

*Per Jaraman*  
*Registrar*