

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

CAUSE #360/91

BETWEEN	CHARNGIT GILL	APPLICANT
AND	COMMISSIONER OF POLICE	RESPONDENT

Mr. Alberga with Ms O'Connor Solicitor General	Applicant Respondent
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SOLICITOR GENERAL: With me are Inspector Gibbs and the applicant Const. Khan.

MR. ALBERGA: Application is to set aside a Production Order made on the 13th August 1991. Constable Khan then appeared and made application. After hearing the evidence that was recorded order was made that C. S. Gill give access to:

"all files, documents, accounts and records used in ordinary business, cheques, contract transfer conveying any transaction dealing with Mr. Grovani Garces".

The order was served on C.S.Gill by Const Khan after he had telephoned Mr. Bannon and informed him he wished to see him and discuss the case of Dexter Ebanks and Shaleen Ebanks who have been charged.

On the 14th August Mr. Bannon wrote to Mr. Archie (C.C) Letter exhibited to Bannon's affidavit. Inter alia a stay was asked for and on 22nd August Mr. Archie replied.

On 3rd September Mr. Bannon wrote to Solicitor General and on that day an originating summons was filed with a request for a stay. Gill on my advice, produced his file dealing with a sale of a lot at Brittany Bay to Garces those documents have been sealed.

Misuse of Drugs Law section 16 L (6)

Two aspects for making rules:

- (a) rules dealing with discharge
- (b) rules dealing with the procedure for application.

No rules have been made under this section and this application for a

discharge is the first come to the Courts/ It is hoped that out of it will emerge important guidelines and rules for the making of those applications. It is the first order to be made that is directed to a target. In the past they have been directed to banks.

First question is whether I have jurisdiction to entertain the application. Clearly you have. Reasons are Order made ex parte. Therefore as in England this court has inherent jurisdiction to set it aside - Or 32 r 6 gives power to make an ex parte order

Note 32/1-6/14

A ex parte order cannot be appealed. W.E.A Records Ltd. v Visions (1983) 2 A.E.R. 589. Held inter alia that Court of Appeal will not hear an appeal against an order made ex parte. At p 593 ex parte orders are essentially provisional.

Ninema Maritime (1984) 1 A.E.R. 398. Here an ex parte application was refused. Another ex parte application was granted. Inter partes application discharges the order made.

Misuse of Drugs Law itself imports a power of discharge. Francis v Francis (1988) 1 A.E.R. 677. Held the application should not be inter partes. At pp 679 - 680 Lloyd L.J. deals with the point. A matter for the rules is to decide.

- (1) How an application to set aside should be made
- (2) Within what time it should be made.

Perhaps the documents should be put in a sealed envelope and held by the Clerk of Court. Perhaps also if the person served intends to apply he should tell no one he has been served. If he does he is guilty of contempt. England says he should keep silent.

#### Section 16 L

Note the words "within such period as the order may specify" in 16L (2) should apply to both (a) and (b) of 16L (2).

The last paragraph of the General Note at end of section 27 does not apply here. See 16L (8) (b) which deals with the Confidentiality Law.

Effect of 16L may be summarised in this way

- (a) Application must be made in connection with an investigation into drug trafficking

(b) Application must be in relation particular material or material of particular description.

Application must not be a fishing expedition for general discovery.

(c) Conditions specified in (4) must be fulfilled.

They are:

(i) reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking

(ii) reasonable grounds for suspecting that the particular material to which the application relates is likely to be of substantial value to the investigation for the purposes for which the application is made, does not include criteria subject to legal privilege and reasonable grounds for believing it is in the public interest that the material be provided or access you to it having regard to:

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

(b) circumstances under which the person in possession holds it.

There are two definitions dealt with in the Misuse of Drugs Law when one considers 16L and the evidence put before the Court on the 13th August. They are:

(a) drug trafficking; and

(b) subject to legal privilege

Our section 16 0 is to be traced back to section 24 see also the "General Note" at p 32 - 27.

General observations on Sec 16L

They are new provisions in our law which gives rights to the police they had not previously had to obtain access to or production of documents before a charge is made but they have been made subject to certain definite safeguards.

\* 16L (4) sets out conditions that have to be fulfilled

before access is given to the documents. That is the safeguard given to persons who may be affected by any order which is made. The Courts should ensure that these harsh provisions are not abused and that the conditions laid down are strictly complied with. I therefore say that I hope that clear rules will emerge from this application and what supporting evidence is required and what procedure is to be followed and the time limits set. This is a test case for the laying down of guidelines and standards.

#### Grounds for setting aside the Order

The are:

1. No evidence or material was put before Court which could on analysis constitute grounds for concluding
    - (a) there were no reasonable grounds for suspecting that ..... had carried on or benefitted from drug trafficking
    - (b) there were reasonable grounds for suspecting that the material to which the application related was likely to be of substantial use to the application as no particular material or material of a particular description was asked for and the failure of the order to so specify vitiates it.
- The words "particular material" have been used in other statutes.
- (c) there were no reasonable grounds for believing it was in the public interest that the material should be produced because of the benefit likely to accrue to the investigation if it was obtained as the material was not specified in the application and consequently a reasonable belief as to its benefit to the investigation could not be arrived at.
2. Provisions of 16L have not been satisfied sufficient or at all to justify the making of an order thereunder.
  3. The only connection between Garces - the person mentioned in the order - and a drug trafficking

offence is that he is from Panama and is the purchaser of a lot of land in a subdivision being marketed by the Ebanks against whom charges under the Misuse of Drugs Law are pending. Those two factors are a wholly inadequate connection on which to find a reasonable suspicion.

4. As a matter of law the evidence of Khan before the Court is insufficient to found a reasonable suspicion of the matters the law requires that there be a reasonable suspicion of and certainly not of drug trafficking.
5. There was no evidence to show that there were reasonable grounds for suspecting that the material to which the application related did not consist or include items subject to legal privilege.
6. In all the circumstances the said Production Order having been made without the benefit of submissions as to why it should not have been made was wrongly made.

Break

What is the test to come to the conclusion for reasonable grounds to suspect and what is material.

Cedeno v O'Brien (1964) 7 W.I.R. 192 - reasonable cause to suspect. Letter H p 195.

Officer must have reasonable cause - a objective test.

Lunch break

Roodoo v Joseph (1964) 7 W.I.R. 373. Deals with reasonable cause to suspect. As in the other cases it decides that the test is objective.

#### SOLICITOR GENERAL

We accept the test is objective.

R v Spragg (1975) 23 W.I.R. 371.

Darvin McLean (No 15 of 1979).

Was there evidence that could lead to the conclusion that Garces was assisting in drug trafficking or had carried on or benefited from drug trafficking?

Statute does not define material of a particular description or particular material.

Order 70 allows letters rogatory and and forbids  
Note 70/1-6/3 and Note 7/1-6/8

Where a statute lays down a limitation on an order and only particular documents specified a wide ranging application should not be made but should be limited to particular documents specified.

Re Asbestos Insurance (1985) 1 A.E.R. 716 at p 720  
Production of Documents.

**B R E A K**

Statements in the White Book and the Asbestos case is as relevant in criminal proceedings as in civil proceedings and those remarks are not limited to evidence prior to trial.

Section 2 (4) (b) of English Evidence (Proceedings) 1975 is the relevant section and that section is extended to criminal proceedings by section 5 (1). Those sections have been transported into Cayman law by the Evidence (Proceedings in other Jurisdiction) order 1975.

**MR. SMELLIE:**

In criminal proceedings section 5 (1) only applies to proceedings that have been instituted which is not the case here.

**MR. ALBERGA:** Carvers case (1980 - 83) at pp 317 and 319.

Section 16L (1) speaks of particular material or material of a particular description. That is a distinction without a difference. Whatever it is it must be specific.

**MR. SMELLIE:** Section 16 L is in aid of investigations whilst the Overseas Jurisdiction order relates to criminal cases that have been instituted.

**MR. ALBERGA:**

The spirit of 16L is that there must be no fishing. It was introduced to focus the application in and order in a rational way.

Particular material might be a scale.

It cannot be a ranging type of investigation. It is intended to put a restraint.

**MR. SMELLIE:** We ask that Mr. Gill do not discuss the matter with the

client. We are of the view that if the client is told the investigation could be prejudiced.

MR. ALBERGA: Certainly he will abide with that. The documents are in the safe of the Clerk of the Court.

Adjourned to 9:30 on the 28th October

COURT: Brings Mr. Alberga's attention to Jones v German  
(1897) 1 Q.B.  
(1896) 2 Q.B. 148.

28th October 1992

Mr. Alberga with Ms O'Connor  
Solicitor General

Constable Khan is present.

MR. ALBERGA CONTINUES: This was an order for general material. It is violated because it is not for particular material.

Jones v German is a search warrant case where the search warrant was attached on two grounds:

1. It had not alleged as a fact that a larceny had been committed; and
2. It did not specify the particular grounds for which the search was ordered.

Courts hold that both arguments failed as all that had to be alleged was:

1. A suspicion that a larceny had been committed
2. It was not necessary to specify in the information the particular goods.

I concede it is not necessary in this case to allege that Garces was in fact assisting in drug traffic. All that has to be alleged is that there were reasonable grounds for having a suspicion he was doing so.

But on the 2nd point there is no statement in the Jones v German case that requires particular material must be specified whilst in this case there is a statutory requirement. See Lord Russell's judgment at p 204 of Jones v German. That's my submission in this case.

When the meaning of the word "particular" is considered the particular is vital and it must have contrasted

"general". The draftsman was seeking to achieve particularity not a general catch all description of the documents. I have found no case that comments on the words in the statute I submit the dictionary meaning.

What has been asked for or ordered is general. That is why it is a "fishing".

It is rare that it happens but in this instance the words are tautologous.

GROUND 1 (a)

This submission concerns the <sup>definition</sup>~~continuation~~ of "drug trafficking". There are important omissions from the definition of that expression in the local law which are included in the English definition and the absence of which in the Cayman Islands makes it impossible for a production order to be obtained in a case of this nature. It follows that when what is alleged is for money laundering the statute must be amended to a production order.

First proposition is that to obtain a production order under sec 16L there must exist reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking. I ask Court to consider S 16L. Sub section (1) refers to sub section (2) which refers to rule 9 (4) which sets out the conditions for section 5(2). The persons has to be:

"carrying on or benefiting from drug trafficking"  
Definition of "drug trafficking" is in Law 8 of 1988. The English definition is in section 39 of the English Act (a) (b) and (c) of the English definition are to the same effect as our (a), (b) and (c). But what follows in the English Act is not in our Law. The English catch a person who entered into an arrangement to assist the drug trafficker. That comes within the definition of carrying on or benefiting from drug trafficking. That is the distinction between the English and Cayman definitions. It is of utmost importance in a case of this nature. I submit there is no basis for suggesting that Garces has carried on or benefited from drug trafficking as

defined in our Law. There was no evidence before me and there is no evidence to indicate either:

- (a) that Garces produced or supplied a controlled drug.
- (b) that Garces stored a controlled drug; or
- (c) imported or exported a controlled drug.

What is historical in Khan's evidence is that Garces assisted in drug trafficking by participating in a money laundering operation. That is the crux of the allegation.

I do not accept that the evidence Khan put before the Court is capable of giving rise to that suspicion. That is a separate issue but assume it does. Even so there is not a sufficient basis under our Law for obtaining a production order. The reason for that is that the offence of assisting in drug trafficking is a separate offence under section 16 D - which is section 24 of the U.K. Act but that offence has not been included in the definition of drug trafficking as it has been in the U.K. Law.

16 D is in Law No.3 of 1989 and is the equivalent of section 24 of the English Act. The two sections are identical and create a separate offence of assisting in drug trafficking. In England that type of activity is included in the offence of drug trafficking. But not here.

The omission is important. It was left out in our law when the draftsman defined drug trafficking.

The upshot is that there is no basis on which a production order can be made in this case because at the most there is some slight suspicion of Garces assisting a drug trafficker with money laundering under sec 16 D but that is not a basis for getting a production order under 16 L as there is no evidence either of carrying on or benefiting from drug trafficking as defined in our Law which is a necessary pre-condition to be satisfied before a particular order can be obtained under 16L. Our Law should be amended.

So I submit:

1. No evidence to show Garcés carried on and benefited from drug trafficking.
2. The evidence, if even it could give rise to a reasonable suspicion of assisting a drug trafficker (which is not admitted) it cannot amount to carrying on or benefiting from drug trafficking as defined in our Law.
3. There is no basis on which a production order can be made without amendment.

What Khan was saying -

Khan suspects Garcés of money laundering. It is not alleged that Garcés produced, stored, or imported or controlled drug.

#### Assistance in Constructing Rules.

Ex parte Taylor (1988) 1 W.L.R. 705.

p 709 at letter B - "These were .....

p 715 at letter E

p 715 at letter G

It involved a case where there should have been an inter partes application which is not the this. Reg v Adsebasan (1986) 1 W.L.R. 1292 (This is the case that risks destruction of material)

Ex parte Carr Co - 958/86 (Special procedure material) R v

B.C.C.I. (1989) 3 A.E.R. L.R. p 673.

Headnote Ex parte Baines (1987) 3 A.E.R. 1025

#### LUNCH BREAK

Sec 16L 4 (b) (ii) On whom is the onus to show that the items do not comprise items of legal privilege. Since the application is ex parte presumably the applicant must show they are not privileged. They must specify the items. So this is further support for the argument that the items must be particularised.

#### Summary

1. Roll together grounds 2 & 3 overleaf.
2. Ground 1 overleaf.
3. There are no particular material or material of a particular description as asked for or specified in the order itself. That failure vitiates the

order.

4. In view of 3 above there are:
  - (a) no reasonable grounds for suspecting that the material was likely to be of substantial value to the investigation
  - (b) no reasonable grounds for believing the material should be produced because it would be of benefit.
5. No evidence to show there were reasonable grounds for suspecting that the material did not include or consist of items subject to legal privilege.
6. The provisions of sec 16L have not been satisfied sufficiently or at all and a production order made under that section cannot be justified and should be set aside having regard to the above in particular 3 and 4.

**MR. SMELLIE:**

Supplemental Affidavits will be prepared this afternoon and served shortly.

Court: Adjourned to the 25th and 26th November at 9:30 a.m.

**MR. ALBERGA:** I object to the receipt in evidence of Khan's affidavit sworn the 13th November. Order was made 13th August 1991. Originating summons was filed 3rd Sept. 1991 after certain correspondence had taken place with the Crown. Application of 3rd September was supported by Gill's affidavit. Mr. Bannon filed an affidavit on 5th September exhibiting certain correspondence. On 5th September a notice was filed indicating the grounds of the application was filed. My notes of the hearing were obtained on the 11th September. Gill filed Affidavit on the 12th September. Khan filed a lengthy affidavit in reply on the 8th October. Its purpose was an attempt to establish that Garcies was assisting in money laundering.

On the basis of that affidavit evidence the matter came on for hearing on the 9th October 1991. The assumption was that was the end of the affidavit evidence.

Matter was part-heard on the 9th October and adjourned to 28th October for completion. On 28th October 1991 I concluded my submissions both on the facts and the principles of law. It was then adjourned for the Solicitor General to reply today. Solicitor General then indicated he would be including draft affidavits with Mr. Khan. We received these affidavits on the 14th November. I submit the parties had ample time to file and serve any affidavits necessary for the inter parties hearing. Nothing has arisen ex improviso or which was not prescribed or set out either in the notice of the grounds on which my application would be based and which I had set out.

It is neither right nor fair for the respondent to introduce further evidence after the conclusion of my arguments. All the facts in the possession of the Crown were there and could have been produced earlier. There must be an end to the filing of affidavits. There had been a great deal of time between the 8th and 28th October for time to have been sought for further affidavit evidence. There was no exceptional circumstances to warrant or justify a like affidavit with numerous exhibits. A further consideration is that I cannot discuss the matter with anyone.

**SOLICITOR GENERAL:** Exceptional circumstances.

This matter, although inter partes, is not like a civil matter as it involves important matters of public policy and the administration of justice. It is a test case. The first application for the discharge of a production order of this sort. The authorities suggest that the court even at this late stage can order that the production order can be varied, discharged or upheld on evidence beyond that originally submitted.

Gill, in his affidavit of 12th September, took issue with the entire premise on which the application was made e.g. "it is ridiculous etc." In his first affidavit in reply Khan seeks to explain why it was the investigation took the approach it did. At para 19 he stated

"investigation into the Caberas drug  
trafficking activities are still

continuing".

It is important that Court is provided with as much information as can be provided about the Caberas group as a whole. Garces we believe is an instrument of the Caberas organisation. The latest affidavit seeks to show that connection and to demonstrate why the police believe drug trafficking is still going on and why it is believed facilities in the Cayman Islands are being used to facilitate that activity. If the applicant had a proprietary interest so it was a matter between party and party. Alberga would have greater justification for his position. Any question of prejudice arising from the late service of the affidavit must be viewed in the context of what the entire application is about. It does not prejudice any interest of Alberga's client. I don't understand Alberga to be saying that any relevance in the affidavit requires research nor does it affect whom it was served on or the taking of instructions from Garces. It matters not when the affidavit was served as instructions could not because of if the statutory undertaking have been taken.

The premise was from the outset that Garces was a money launderer. That is still the premise. What the affidavit seeks to show is that by his involvement drug trafficking continues. Those are matters very relevant to the determination of the application.

MR. ALBERGA.

The affidavit is totally irrelevant because of my submissions that a production order cannot be obtained here though it can be in England. Be that as it may there must be order and ..... to proceedings.

S.G. Have not to be against Garces.

COURT: I am prepared to give you time to answer the affidavit otherwise I think I should allow it as the court should have all the information it can have and these proceedings are novel and not like ordinary civil proceedings.

MR. ALBERGA: That is a matter for the Court.

COURT: The affidavit will be allowed.

ADDRESS OF SOLICITOR GENERAL: This is an important case. It is the first of its kind. Court will have to make pronouncements on section 16L on:

1. extent to which it might be taken as vesting in the police new powers of investigation in the effort against drug trafficking. I might add money laundering.
2. the rights of persons who hold the information to be divulged.
3. rights of those to whom the information related of might relate.
4. it will require the court to establish what procedural steps must be followed before the court grants orders for their divulgence.
5. It has become apparent from examination of the provisions of the order relating to the Court's power to discharge the order that these powers are not expressed as clearly as they could have been.
6. the matter of jurisdiction also arises.

JURISDICTION:

Court's power to discharge what appear to be an ex parte order. Alberga suggested it was a provisional order and Court has an inherent power of discharge. The real reason for this issue is that the Court's order appears to be final order. It is an <sup>order</sup> ~~case~~ made to the applicant to produce documents within a specified section. Section 16L(2) is expressed in final terms. There are no provisions expressly in the law that make the order subject to the right in the person affected to apply for a discharge. The right to apply for a discharge or variation is only implied by 16L(6).

Because the power to make the order is statutory the power to vary or discharge one would expect to be statutory. But it is only implied by the statute so it is a matter of the Parliamentary intent. There is a strong indication the Legislature so intended. This aspect of the matter has caused concern in the United Kingdom

where as here, there is no express power to vary or discharge. United Kingdom Courts have taken the view the power is implied. See the O.B. in Francis v. Francis (1988) 1 A.E.R. at p. 677 at p. 679 letter C & D.

Report of the Home Office Working Group on the drug trafficking Act suggests the law be amended to make it clear the order made just granted is ex parte.

So Alberga and myself agree it is a provisional ex parte order subject to discharge and variation.

#### MANNER IN WHICH JURISDICTION IS TO BE EXERCISED

I agree with Alberga it should be in the manner that the Court exercises its inherent jurisdiction. So this order will not be a final order until after the determination of the inter parties proceedings.

I share Alberga's views of 032 1 6 so the case that have developed around that rule are applicable. These cases established inter alia the following important principles.

1. Court has an inherent jurisdiction. It is a statutory jurisdiction by implication to vary an ex parte order if it feels the original order was made under a misapprehension in the light of new matters drawn to its attention per Denning M.R. in Becker v. Noel Note 32/1-6/16.
2. No way inhibited from discharging or varying original order.
3. Duty of applicant to make a full and frank disclosure. C. S. Gill relevant facts Hogen (1980) P 189 at 20). The principle applies subject I suggest to certain restriction such as the identifying of informants. All disclosure may not go so far as to disclose identity of the informants to the parties though it may be necessary

to disclose it to the Court. This shows the novelty of these proceedings.

4. By following the grant of an ex parte order the evidence shows the order was justified. The fact that the evidence in the ex parte application was not as strong as it ultimately became does not in the absence of mala fides or some other material non-disclosure afford as ground for challenging the order. See *Ounn CJ in W.E.A. Records* (1983) A.E.R. 589.

#### KHAN'S AFFIDAVITS & GILL'S AFFIDAVIT

We seek to provide as much information as possible.

##### Gill's Affidavit

We regard his 3(2) as an important admission. It is important to the investigation to have those records produced.

3(b) is a matter of record

3(d) What the Panamanian lawyer informed has gone further than Gill has summarised here. More importantly he is challenging Mr. Khan's suspicions.

3(f) The whole system of money laundering and how it operates is made an issue by Gill's question. It became important that to the extent that Khan failed to produce the relevant information to the Court that he should do so for these proceedings.

3(h) has 2 admissions not known to the investigators

(i) to secured permission to pay certain funds

(ii) he has the agreement.

DEXCO is the Company through which the development of Brittany Bay was undertaken. It is owned by Dexter Ebanks and his wife but the true beneficial ownership was the Cabreras. It managed the land at Brittany Bay <sup>which</sup> was declared by the Cabreras to US authorities to have been acquired with the proceeds of drug trafficking. So declared ostensibly for the purpose of sentencing in that one of the Cabreras would voluntarily surrender it as having admittedly been acquired by those unlawful means. Instead it has been shown there has been a

number of sham transactions by which parcels of land at Brittany Bay are being ~~is~~ sold to third parties who appear to be without notice either of the Caberas involvement or by the surrender of the property to US Courts. On the face of it Gerces is such a person. We will show in relation to Gerces that he has purported to enter agreements to buy parcels of land at Brittany Bay already ostensibly sold to other parties. The money ostensibly used by Gerces came from the Cabrerass. Having found Garces' file the police contacted their contact in Panama who said Gerces might be the person. Khan should establish that.

3(l) Gill is of the impression that Gerces is under investigation for an offence committed here. We say it is not essential. At this stage the thrust of the investigation is the role he played or might have played in assisting the Cabrerass organization in drug trafficking through money laundering.

It will be a question whether this was a fishing <sup>expedient</sup> expectation or action taken is good reason for suspecting Gerces.

3(k) We do not say there are reasonable grounds for suspecting Garces of drug trafficking we say there are reasonable grounds for suspecting him of having benefited <sup>from</sup> ~~ing~~ form it and having assisted in drug trafficking.

**B R E A K**

KHAN'S AFFIDAVIT OF 8th OCTOBER

It concerns primarily the benefit that Garces derives from the drug trafficking. As it shows he is working for the Cabrerass he must be getting a benefit. He is thereby involved in the fictitious sales of lots 11 and 16 which are "sold" and to him and then "sold" to Golden Globe. Whether Garces is connected with Golden Globe is not known.

AFFIDAVIT OF 13TH NOVEMBER

As the organisation is still trafficking in narcotics any one involved in laundering drug funds of the organization may in part be assisting in the trafficking as the laundered funds are being ploughed back into the drug trafficking. It is like any other business. Some funds used for the benefit by the people involved. Some ploughed back

into the business. The concern of the C.I. is the extent to which the C.I. have been used and are being used for these purposes. Not only have the Cayman Islands been used they are still being used for drug trafficking by the Cabrerias' organisation.

For the purposes of section 16L any person who is shown to be connected to the organization shall be treated as a specified person within section 16L4(2) Garces is such a person. Not that he has carried on drug trafficking but that he has benefitted from it.

As a separate but related aspect in section 16L(1) This application is for the purposes of an investigation into drug trafficking. Not an investigation into whether Garces is knowingly engaged in or has benefitted from drug trafficking. That aspect is only necessary for the allowing of an order. Not that he is the target of the investigation. So it has not to be shown that the person who satisfies the condition of 4 (a) is merely a "cog in the wheel". That is a safeguard built in the law.

Break.

MR. SMELLIE CONT'D:

The affidavits satisfy the statutory requirements and put before Court the relevant information.

Khan's failure to disclose all of the facts in the first instance was not instrumental nor done with malafides. It should operate to provide a stronger basis for the order and not be taken as a breach of the responsibilities.

Notwithstanding that the definition of money laundering is not included as in the U.K. as a part of the definition of drug trafficking we will say that the investigation into drug trafficking even though Garces activity might be limited to money laundering. We consider that had the investigation been nothing more than an investigation into money laundering then on those facts Alberga would be correct.

Scope of the power to discharge and vary:

1. It is advisable the application should come back before the same judge. The Niedersachsen (1983) 1 W.L.R 1425.
  2. Production orders normally take effect within such
- \* period as the Court specifies - Francis. Only in an

*Continues*

exceptional case would the order require immediate compliance. Because it is an ex parte order the time specified should give the other party time to apply for discharge or variation.

Mr. Alberga's General Grounds for setting aside the order.

1. No evidence before the Court that Garces as the person specified in the order has carried on or benefitted from drug trafficking.

I submit Garces is the person specified in the order as the law requires and the evidence of Khan shows there are reasonable grounds for suspecting he might have benefitted from drug trafficking although it does not go so far as to show he carried on drug trafficking. Garces has not to be the target of the drug trafficking investigation.

We say the information obtained about Garces will assist in an ongoing investigation into drug trafficking.

No reasonable grounds for suspecting the information will be or is likely to be of substantial value to the investigation. I take that "investigation" means the investigation into drug trafficking. We say the condition is satisfied because:

- (a) the money involved is likely to be drug money.
- (b) the money facilitates and assists the ongoing drug trafficking.

Alberga says there are no reasonable grounds for believing that it is in the public interest.

2. What is the test as to reasonable suspicion.

What is meant by particular material or material of a particular description?

Reasonable suspicion:

Agree with principle cited by Alberga and the cases on which he relies. There are four cases:

- \* Liversidge v Anderson

Reg v O'Brien

Reg v Spraggs

Reg v McLean

Principles extracted for those cases are:

1. Constable had reasonable grounds to suspect and
2. Test is an objective one.

Even from 9th September Court has grounds for the belief that Khan had reasonable grounds for suspecting and there were no more grounds.

1. He had positive grounds on which to base his reasonable suspicion. Not mere conjecture.

That was:

- (a) information from Arsemeno
- (b) documents received from earlier investigators e.g. McField
- (c) information from banks in the Cayman Islands
- (d) information provided by overseas drug enforcement agencies.

Distinction between belief and suspicion. It has to be borne in mind that this is at the investigatory stage. That is why the word is "suspicion" rather than "belief".

Particular material or material of a particular description:

I agree the law must intend some degree of particularity. Whether it requires the degree of precision in the letters rogatory type of case I doubt. An analogy should not be drawn with pre-trial discovery in civil proceedings. Nor should the degree of particularity be as demanding as is required for letters rogatory applications by the U.K. Act 1975 as applied to Cayman Islands by the 1978 Order by the 1978 Order in criminal.

Such an order can only require the production of documents. No other material - Sec 2 (2) (b). A further restriction is that there is an in-built provision against fishing 2(4) (a) and (b) as that section requires the applicant to state the documents he wants. Further under the act a charge must be the kind

in criminal proceedings - See Sec 5.

Letters rogatory procedure does not assist criminal investigations. Charges must have been laid. For that reason the standard of particularity is demanding. It assumes the party has already a case in the foreign country. The tests to be applied in those proceedings are too narrow and strict for these proceedings.

A spontaneous fishing expedition is not to be allowed in proceedings of this kind.

#### Re Asbestos Insurance

#### U.S.A. v Carver

These decisions condemn requests that are too widely framed on the basis that the reliance of that evidence is not clearly established and in the context where there is a case already in progress. The same is true of Re Westinghouse Vianium Contract.

The dictum in those cases should be strictly applied to these proceedings.

Sec 16 N shows a degree of particularity is however required.

Sec. 16 N (4) contemplates a situation where the material cannot be particularised that assists in understanding what is wanted for the purpose of 16 L. It marks the difference between what is required for the production order and what is required for the production of a search warrant. It strengthens the point made by Alberga on Jones case. Here within the one law that a distinction is drawn.

Francis shows that the Court was concerned there must be some particularisation.

What degree of particularity is required for a production order?

1. Not a stringent as in O 70 type discovery
2. Nor so <sup>broad</sup> borne as to encourage spurious fishing expeditions

Some assistance may be obtained from other legislation in materia in the Cayman Islands. Narco law 1984. M.L.A.T. <sup>pari</sup>  
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Narco Law renders assistance to U.S.A. Authority when the U.S.A.\*A.G. certifies to the C.I. A.G. that document<sup>ing</sup>

information in relation to an investigation is located in the C.I.

Sec. 2 widely charges "documentary information" M.L.A.T. continues to render assistance on a wide basis.

See Article 3.

"reasonable grounds for believing"

Article 4.2 (e).

All the treaty requires is a description of the evidence in a time frame. If assistance can be that wide for foreign investigations why should it be less wide for local investigations. Both Narco and M.L.A.T. give assistance to investigations.

The officer cannot always be very specific especially in the early stages of an investigation. In each case it shall be a matter for the court's discretion and depending on the circumstances what degree of particularity will be required.

"material of a particular description" could relate to material within a class.

In each case there must be some particularity. So a standard form type of order is inappropriate as you cannot then meet any standard of particularity but a safeguard built into the legislation is that persons who are to become specified persons and persons who like Mr. Gill are to hand over documents must have the protection of knowing there is some limitation. The terms of the standard form orders are too wide. In each case the limitation must be imposed by the Court.

It must then be conceded that the terms of the order must be varied.

It could be narrowed by cutting micro films etc and limiting it to transactions Garces had with Dexter, H..... At the same time any objection on the ground of fishing will be met.

26th November 1991.

Solicitor General continues: I accept that the words "particular material....." requires in each case an attempt by the constable to particularise the material he seeks to obtain. However, this should not be of the degree of particularity required by a litigant in a case before the Court and for that reason we submit it is inappropriate to apply the strict test of letters rogatory. The words "particular

documents" in the 1978 Order have been held to mean individual documents separately described. That sort of approach to describing the material to be obtained is likely to be widely restricted for investigation into drug trafficking.

The present order needs amendment. I suggest a variation as follows.

Ex parte Taylor was cited by Alberga.

Definition of "special procedure material" at p 707 of that case covers most material held by an attorney. At p 709. When the discretion of the judge as set out at p 709 is applied to 16 L it justifies the principle.

- (a) that each case should be considered on its own merits;
- (b) that there should be some degree of particularity depending on the circumstances of the case in order to satisfy the judge in the exercise of that discretion.

Ex parte Adoghesan re-enforces the principles set out in Taylor.

#### Definition of Drug Trafficking

Alberga says there is a fundamental objection in these proceedings because:

- (1) Definition of drug trafficking does not include a reference to money laundering ..... in the U.K. the definition does include such a reference and that the omission in one law has the effect of excluding an application for the production of a production order in a case such as this one which as far as Garces is concerned is a case of only money laundering.

Whether this case is one involving an investigation into drug trafficking is a matter of both law and fact.

We accept the definition in Cayman Law does not include a reference to money laundering. The same problem happens with confiscation orders where money laundering is concerned. Attorney General would like the judgment to comment on those omissions.

\* One of the facts of this case even before Alberga made

his submissions before the court was Khan's 1st affidavit which showed that the drug trafficking was still continuing. We have given additional information by affidavit that shows that the investigation is into an organisation that continues to engage in drug trafficking. The investigation is in aid of both local and foreign enquiries. So I submit that a production order has properly been made in this case notwithstanding that the narrower definition of drug trafficking exists in the Cayman Islands. I re-enforce the submission that although it needs to be shown there are reasonable grounds to suspect that Garces is benefitting from drug trafficking and indeed from the evidence given there may be reasonable grounds to suspect that he is assisting in drug trafficking we do not need to establish grounds for the suspicion that he is involved in drug trafficking. The law does not require that the investigation is against Garces.

Garces may not be near the head of the investigation but to get to the head one has to get at the smaller character. It is ~~by~~ following the trail of Garces' activity that this production order is sought. The objective is to facilitate the police in their attempt to shut down the organisation.

All we have to show is that there are reasonable grounds for suspecting he has benefitted. His activity cannot be separated from the drug trafficking of the organisation.

**The Privilege Point:**

Alberga says the onus is on the applicant to demonstrate to the Court that the privilege does not extend to items subject to legal privilege. Alberga further submits that that can only be done by being particular and in this case the applicant has not been particular. He cited Francis v Francis.

We say the proper test is set out in Francis' case and is as follows:

Where there are reasonable grounds to suspect that the material in question which may otherwise be subject to legal privilege is to be excluded from privilege because it may be held with the intention of furthering a criminal purpose regardless of whether the intention was that of the person

holding the material or of any other person. Accordingly direct application of the facts of Francis, conveyancing documents which may be intended by a 3rd party to be used laundering the proceeds of drug trafficking and which were innocently held by a solicitor are not subject to legal privilege therefore are not ~~prohibited~~ <sup>protected</sup>.

We say any documents or transactions affecting Brittany Bay held on behalf of Garces and connected to any of the entities we have listed could not be privileged.

We have no objection to the exclusion of legal advice.

In re Bain:

On 16L does not define legal privilege. The U.K. provision does. We have not gone sufficiently far to say that there are legal grounds for suspecting that the legal advice was to be of assistance in perpetrating the offence. Correspondence acknowledging receipt of funds would not be protected. Nor would other correspondence which did not contain legal advice.

We don't have section 29 of the U.K. Drug Trafficking Act so we don't have the English definitions. Therefore In re Bain is not binding on us but is persuasive. We won't object to a similar rider being placed here.

What we would wish to see included in Rules (Solicitor General will submit a typescript of his proposals). I should perhaps seek advice of the Bar Association).

Regina v Crown Court of Southwark.

B.C.C.I.

Nothing in the judgment suggests the investigation must be in relation to the specified person. the investigation can be wide.

Break

MR. ALBERGA IN REPLY:

Jurisdiction to vary or discharge accepted.

Accepted that order is too wide but S.G. submits it

1. It does not show that there was reasonable cause to suspect that Garces was an agent or front man of the Cabrerias.
2. No reasonable cause to suspect even the remotest connection between Garces and Cabrerias.
3. No reasonable cause to suspect that Garces used funds of the Cabrerias group to pay in respect of the purchase of a lot of land in Brittany Bay.
4. No reasonable ground to suspect that Garces had anything whatever to do with the \$200,000.00 given to Dexter Ebanks and for which he gave receipts not to Garces.
5. No reasonable cause to suspect that Garces had any connection with any of the companies allegedly used by the Cabrerias.

The conclusion that he had reasonable cause to suspect Garces of carrying on money laundering enterprise for the Cabrerias group is mere speculation and does not amount to a reasonable ground of suspicion.

Oral. p 80.

The fact that someone in Panama signed an agreement to buy two lots in Brittany Bay is not surprising. Evidence is that Cabrerias owned Brittany Bay. If they were marketing the land it is not surprising that someone in Panama might wish to buy. The fact that the lawyer in Panama said there was another man does not lead to the man being Garces. The fact that Garces' man is in McField's files is not surprising as he is the lawyer acting for Brittany Bay.

After finding the name Khan spoke to the Panama lawyer who said Garces might be the man but he gave no reason why he came to that conclusion. The fact that the sales agreement were not signed by the parties at the same time and place is not of importance. For that fact to feel that Garces might be another source for the laundering of money is to take a quantum leap.

Fax from Garces to Gill is not odd. The lawyer has funds for and he has contracted to buy a piece of land. For him to be told go to the lawyer is not unusual.

The value of the evidence is only that Gill had money for Garces who was a purchaser of land in Brittany Bay. The oral

should not be discharged as provisions of 16L have been satisfied.

Khan's evidence makes it reasonable to suspect - says S.G. that Garces was laundering for the group. S.G. has conceded that Garces is a money launderer only and has benefited from drug trafficking but not that he has carried on drug trafficking. For those reasons section 16 L has been satisfied.

In reply I say:

1. Evidence given by Khan to me and what is contained in his affidavits, when analysed, do not show reasonable grounds for suspecting that Garces had laundered any money for the Cabrerias organisation, that he was a "front" man in that organisation or was in any way connected with the companies used by that organisation.
2. No reasonable grounds for suspicion by Khan that Garces benefited from drug trafficking.
3. Cumulatively, what Khan has said only shows that Garces was a purchaser of land in the Brittany Bay subdivision and is in no different position to any other purchaser of a lot or lots offered for sale in that subdivision.
4. When section 16 L is read as a whole the investigation into drug trafficking by the person ultimately specified in the order. It does not mean an investigation into drug trafficking generally in the world.
5. For a production order 16 L to be obtained it must be shown that Garces as the person specified in 16 L was the target of the investigation under 3.
5. The only investigation relating to Garces was an investigation into money laundering and as money laundering is not defined as any part of drug trafficking in the Misuse of Drugs Law no production order can be made in respect of Garces.

Khan's oral and affidavit evidence

Cedeno v O'Brien

"Reason to suspect" is different from mere suspicion. Khan is merely speculating.

My submission about the evidence will:

evidence does not mention the \$200,000.00 which Khan later mentions.

It is pure speculation tht Garces might be providing money on behalf of Cabrerias to purchase land at Brittany Bay. That is suspicion without more. No reason to suspect.

Khan's first affidavit of 8th October 1991.

1. Cabrerias admit to owning Brittany Bay. They bought it.
2. They reserved seven lots. Garces bought two.

The mere fact that 2 lots in a subdivision has been sold to him doesn't make him a money launderer.

What is the connection between the \$200,000.00 and Garces to found a reasonable suspicion.

Ebanks did not receive the \$200,000 from Garces. It is not said that Garces was the Panamanian.

3rd Affidavit of Khan.

Lunch break

Is there any evidence that Garces benefited from drug trafficking? Our law has no definition of what is benefitting from drug trafficking. But English law has a definition (See Sec 1 (3) of the English Law once 38 (2) of that Law.).

Construction of Misuse of Drugs Law.

Section 16 reasonably interpreted as a whole contemplates that the investigation must be into drug trafficking by the person specified in 16 L (4) I say that 16 (1) relates to 16 (4) Since the investigation into Garces was for money laundering there is a fatal defect since a production order in relation to money laundering cannot be obtained.

I say that a person who engages in money laundering cannot benefit from drug trafficking as drug trafficking does not include money laundering.

The form

This form is filed in the Registry. Solicitor General says it cites Garces as a specified person and not as the target of the investigation. Alberga says it cites him as the  
**Court:** Ruling reserve. Documents surrendered by Mr. Gill when presented with the order to remain sealed in the custody of the Clerk pending the ruling on this matter.