Hilary Term
[2017] UKPC 5
Privy Council Appeal No 0102 of 2013

JUDGMENT

The Attorney General (Appellant) *v* Samuel Knowles Jnr and another (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

20 March 2017

Heard on 21 February 2017

Appellant	*Respondents*
Peter Knox QC	Damian A L Gomez QC Krisspin Sands
(Instructed by Charles Russell Speechlys LLP)	(Instructed by Tynes & Tynes)

LORD HUGHES:

1. Samuel Knowles Jnr ("the defendant") is a Bahamian who has been convicted in the United States of America of offences of drug trafficking and is serving a long prison sentence there. The jury which convicted him also returned a special verdict of forfeiture in the sum of US$13,900,000. The present proceedings concern the efforts of the Attorney General for The Bahamas to register this order as an external confiscation order for enforcement according to the provisions of the Proceeds of Crime Act 2000, chapter 93. After initial ex parte registration, the defendant and others connected to him sought at an inter partes hearing to discharge it. Senior Justice Longley, as he then was, refused to do so, but the Court of Appeal concluded that the registration had not been legally permissible and so discharged it. The Attorney General appeals.

2. The prosecution of the defendant was hard-fought at every stage. It began with indictments laid against him in Florida in May and December 2000. Attempts by the US Department of Justice to extradite him from The Bahamas were hotly contested both in the USA and in The Bahamas. The Bahamian challenge progressed as far as the Board in July 2006. The American challenge succeeded in preventing extradition in relation to the December indictment. The defendant was, however, eventually extradited in August 2006 although he continued to mount strenuous, if ineffective, objections to his return to the USA. His trial (on the May indictment) began in November 2007. He was convicted, without giving evidence on his own behalf, on 5 March 2008.

3. In the meantime, in The Bahamas, application had been made on behalf of the US authorities for a restraint order freezing assets alleged to belong to the defendant, against the possibility of an eventual conviction and ensuing confiscation order. An order was made, ex parte in the usual way, on 1 November 2001. The assets frozen included some dozen or so different parcels of real property, several of them condominium units, approximately nine bank accounts, and the assets of a car rental business at the airport which is called A1 Car Rentals Ltd. The case against the defendant at trial was that he was responsible for directing the importation into the USA of very large quantities of drugs, and for receiving and repatriating very large sums of money from the proceeds of their sale. It has always been the claim of the US prosecutors that the assets restrained were in reality in the beneficial ownership of the defendant, albeit carefully acquired in the name of his relations in an attempt to put them beyond the reach of the authorities. Equally, it has always been the claim of the defendant, and of various members of his family plus the car rental company, that these assets were nothing to do with him, but were, rather, the fruits of the honest endeavours of his relations. It is convenient to refer to the members of his family and the car rental company as "the other respondents".

4. It is no doubt because the prosecution contends that these assets are the defendant's, and because it is therefore likely that it may in due course seek to enforce the proceeds of crime order against them, that the other respondents have engaged actively to contest the present application to register the US forfeiture order. It is a historic feature of the long-drawn out progress of this prosecution that although the original restraint order has been discharged, and replaced by a fresh one dated 9 June 2011 in marginally more restricted terms, there has not been any trial of the question of the ownership of the restrained assets, nor of the source of the funds from which they were acquired, despite the passage of some 16 years since the first order was made. It is not necessary, for the purpose of the present proceedings, to reach any conclusion about how or why that has come about. It is plain from the documents which the Board has seen that neither side has grappled properly with the issues of ownership or source of funds, and that the evidence filed consists very largely of mere assertion on each side, albeit supplemented in the case of the prosecution by an unsworn statement and a document advanced as a partial admission against interest as against one of the other respondents. It seems unlikely that the issue of ownership can be determined, if it has to be, without much fuller evidence. If the other respondents wish to assert that they own the assets beneficially, it is likely that they will have to produce evidence of the source of legitimate funds from which they were acquired. But the more important thing to observe is that the present application is not concerned with the issue of ownership, unless it is relevant to the validity of the registration of the US order. The validity of the registration, on the one hand, and, on the other, the identification of assets against which the US order might (if registered) in future be enforced are not the same things.

Was there an "external confiscation order"?

5. The power to register an external confiscation order is found in section 50 of the Proceeds of Crime Act. That section provides:

> "50.(1) On an application made by or on behalf of the Government of a designated country, the Supreme Court may register an external confiscation order made there if -
>
> (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
>
> (b) it is satisfied, where the person affected by the order did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him, to defend them; and

(c) it is of the opinion that enforcing the order in The Bahamas would not be contrary to the interests of justice."

6. An "external confiscation order" is defined in section 49(4) as follows:

> "'external confiscation order' means an order made by a court in a designated country for the purpose -
>
> (a) of recovering property, or the value of such property, obtained as a result of or in connection with -
>
> (i) drug trafficking; or
>
> (ii) any offence listed in the Schedule to this Act; or
>
> (b) of depriving a person of a pecuniary advantage so obtained; …"

7. The affidavit evidence filed in support of the application to register exhibited a copy of the jury verdict. It was recorded on a pro-forma. It said:

> "We, the jury, unanimously find … that United States currency was proceeds and/or was used to facilitate the drug violations.
>
> We, the jury, unanimously find … that $13,900,000 in United States currency were proceeds and/or used to facilitate a drug trafficking violation(s) (sic)."

The court order made in consequence of this verdict also clearly followed a general form. It said:

> "All right, title and interest of the defendant Samuel Knowles in the following property is hereby forfeited to the United States of America pursuant to 21 USC paras 846 and 963: …"

and then, written into the space provided, were the words:

> "A money judgment in the amount of $13,900,000 in United States currency."

8. In Bahamian law, as in England and Wales, there is a difference between a confiscation order and a forfeiture order. A confiscation order, post-conviction at least, relates to the value of benefit obtained as a result of, or in connection with, crime. It is not an order to surrender specific property, but an order to pay a sum of money. If the stipulated sum is not paid, the order may be enforced against any assets held by the defendant, whether honestly or criminally acquired. Forfeiture, on the other hand, in Bahamian and English law, is an order to surrender specific property, generally on the grounds that it has been used in the course of crime. The same terminology is not in use in the United States, where "forfeiture" encompasses what in The Bahamas would be called confiscation. Before the Court of Appeal and the Board, although not before the judge, Mr Gomez QC, for the other respondents, took the point that the US order in the present case was ambiguous and left open the possibility that it related to money used rather than obtained in the course of crime, in which event it would not be within the definition in section 49(4) of an external confiscation order.

9. If the basis of the US order had been unclear, it would not have been open to the other respondents to mount this argument only on appeal. To resolve it would have required further evidence and no request to adduce any was ever made. As it is, however, the position is sufficiently clear.

10. The evidence in support of the application for registration also included some of the evidence given at the defendant's trial and the substantial reasoned judgment of the Court of Appeals (11th circuit) which dismissed his appeal. From both it is clear that the evidence before the jury was of the defendant shipping drugs in industrial quantities across the Caribbean from Jamaica via The Bahamas and into Florida, of receiving very large sums which represented their proceeds of sale there, and of repatriating this money in cash to The Bahamas. There was no hint of a suggestion that he had been possessed of substantial capital acquired from some source other than crime and then used in the trade. Nor is there any question of the defendant having been a judgment creditor entitled to the benefit of a money judgment in some other proceedings; indeed, if he had been, the order would doubtless have identified it.

11. Furthermore, the evidence in support of the application included the affidavit of Mr Karavetsos, who was the Chief of Narcotics for Florida in the office of the Attorney General and had appeared as part of the prosecution team at the trial of the defendant. In it, when addressing the condition for registration imposed by section 50, he said:

> "Enforcement in The Bahamas of the [US order] would not be contrary to the interest of justice because the forfeited assets

represent property obtained directly or indirectly as a result of drug trafficking ..."

12. Like the Court of Appeal, the Board is quite satisfied that, although the terminology of the US order is on its face capable of ambiguity, partly because of the difference of language in that country and partly because a pro-forma was used, this was an order for the payment of the value of money obtained by or in connection with his crime. Accordingly, the order was an external confiscation order.

Was there a request for registration from the USA?

13. As has been seen, an application for registration of an external confiscation order may be made either by or on behalf of the government of a designated country. The USA has been designated by subordinate legislation made under section 49(1) of the 2000 Act, the Proceeds of Crime (Designated Countries and Territories) Order 2001 ("the 2001 Order"). The designated appropriate authority in that country is the US Attorney General.

14. Section 49(1)(b)(ii) of the 2000 Act also empowers the relevant minister to make, by way of subordinate legislation, inter alia "such provision as to evidence or proof of any matter for the purposes of this section and section 50 … as appears to him to be expedient". The 2001 Order does this also, and provides by article 7 as follows:

> "7.(1) Where the Attorney General receives a written request from the appropriate authority of a designated country to register an external confiscation order under section 50 of the Act, and that request is accompanied -
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> (a) by two copies of the external confiscation order with a translation into English where necessary; and
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> (b) by a certificate issued by or on behalf of the appropriate authority stating -
>
> (i) that the order is in force and not subject to appeal; and
>
> (ii) where the person affected by the order did not appear in the proceedings, that he received notice of

> the proceedings in sufficient time to enable him to defend them,
>
> the Attorney-General, if he is of the opinion that enforcing the order in The Bahamas would not be contrary to the interests of justice, shall lodge a copy of the request, the order and the certificate with the Registrar of the Supreme Court for registration in accordance with section 50 of the Act."

15. There was no written request from the US Attorney General for registration before any of the courts which have considered this application. That persuaded the Court of Appeal that the application had to fail. The Board respectfully takes a different view.

16. First, there clearly has been a request from the US Attorney General. The same affidavit of Mr Karavetsos mentioned above said explicitly that it was made, following information being sought by the Attorney General of The Bahamas, "in connection with a request for judicial assistance". The nature of the assistance sought was explicit from the subsequent assertion, quoted in para 11 above, that enforcement would meet the test for it contained in section 50. Like the judge, the Board is quite satisfied that a request from the US had been made.

17. Second, all that article 7 of the 2001 Order does is to provide one possible evidential route to registration. It does not mandate it as the only one. The language of the enabling section (section 49(1)(b)(ii)) is permissive. The minister is empowered to make any provision for evidence which seems to him expedient, not required to make one which is necessary. It is clear from section 50 that an application for registration can be made directly by the government of the foreign country concerned, and in that event there would be no occasion to have recourse to the article 7 procedure. Nor, where the application is made by the Attorney General of The Bahamas on behalf of the foreign government, is article 7 the only procedure which can be adopted. It is open to the Attorney General to demonstrate by other evidence, to the satisfaction of the court, that he acts on behalf of the foreign government.

18. Third, even if article 7 were to be read as imposing a unique requirement for the procedural route to registration, it would not follow that a failure to comply with its precise terms would render registration invalid. As the House of Lords explained in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340, the consequences of a failure to comply with a statutory procedure do not depend on prior classification of the statutory provision as either mandatory or directory, but on an analysis of what Parliament had intended those consequences to be. In that case, procedural rules governing the postponement of confiscation proceedings after sentence, although couched in prescriptive terms, were held not to carry the consequence that an order made after

breach of their terms was invalid. In that case there was the additional factor, not present here, of a duty cast by the statute on the court to make a confiscation order, but otherwise the reasoning is applicable. On the facts of this case, there can be no unfairness to a defendant or to anyone else if the order is registered without there having been two copies of it or a certificate in the prescribed form, but the information is contained in an affidavit, and no such unfairness is suggested. Whilst there is no statutory duty to register an external order, the enforcement of such is part of the modern comparatively high level of reciprocal international co-operation in the removal from criminals of the proceeds of their crime.

19. The Board should record, however, that it does not accept the additional submission made by the Attorney General that if the article 7 procedure is followed, the Attorney is the sole judge of whether the order should be registered, and that registration will follow as an administrative act performed by the Registrar of the Supreme Court. Section 50 makes clear that registration is accomplished by the court, after consideration of whether it is contrary to the interests of justice. The reference in article 7 to lodging the request with the Registrar is simply to the commencement of the court proceedings for registration, as the reference in the concluding words of the article to section 50 makes clear.

Was registration prevented by lack of notice to the other respondents?

20. Before both the judge and the Court of Appeal the other respondents contended that the US forfeiture order affected them and that accordingly section 50(1)(b) (ante) required notice of the proceedings in the US court to have been served upon them. Similarly, they contended that the order was invalid in US law because by its terms it recorded that the prosecution was required to publish it in a form which gave notice to "any person other than the defendant, having or claiming an interest in the property ordered forfeited" of their right to seek a hearing of their claim.

21. The primary contention of the other respondents seems to have been that the US order was actually directed at the assets of which they claim unencumbered ownership, that is to say those which were and remain the subject of the restraint order. That is a misconception. Whilst the restraint order did indeed freeze defined assets, the order made by the US trial court after conviction did not. It was an order for payment of a sum of money and nothing more. Both the judge and the Court of Appeal were plainly correct to hold that the order did not operate on any interest in any asset which anyone other than the defendant enjoyed. Mr Gomez realistically accepted as much in the course of argument.

22. The Court of Appeal was persuaded, however, that the other respondents were "affected" by the order for the purposes of section 50(1)(b) and thus that the order could not be registered for want of notice to them, and that the order ought, in US law, to have

been published. The Court of Appeal held that the US order was directed at property "of a specifiable category, namely money", and that the other respondents were people who "may be affected" by it "if they have interests in any property covered by [it]." Those, however, are conclusions inconsistent with the correct analysis recorded in para 21 above. The US order did not affect (or cover) any property in which the other respondents claim an interest. It was an order made exclusively against the defendant, and was that he pay $13,900,000. The provision in the US order for publication only applied if there were persons other than the defendant who claimed an interest in "the property ordered forfeited", but the other respondents do not claim, and never have claimed, a beneficial interest in any money held by the defendant. Section 50(1)(b) of the Bahamian Proceeds of Crime Act likewise bites on "the person affected by the order". That was, in this case, the defendant and no one else. Indeed, that was Mr Gomez' express submission in his written case when making the point that the court had no power to make a registration order *against the other respondents* (for which argument, see para 24 below).

23. It is not enough that if and when the order is registered, attempts might be made to enforce it by, inter alia, attaching the various assets which were frozen by the restraint order. That, if it occurs, as it may well, will not be because the order by itself has any impact on any of these assets, but because the defendant fails to pay the money required, and it becomes necessary to enforce by identifying assets in which he is said to have a beneficial interest. If and when that happens, the other respondents will be fully entitled to make good their claims, if they can, that it is they and not he who are the beneficial owners of those assets.

Two other submissions

24. Mr Gomez submitted that the judge had been wrong to order registration "as against the other respondents". He was correct to contend, as has been said above, that the US order was made only against the defendant and that he was the only person affected by it. But the judge, in ordering registration, was not making an order against the other respondents, except to the extent that he rejected their argument that registration should be refused. He was simply maintaining the registration of the external order, as the terms of his order made clear.

25. Section 63 of the Supreme Court Act, cap 53, provides that a judgment in the Supreme Court shall operate as an equitable charge upon every estate or interest in real or personal property to which the judgment debtor has title. It is also true that section 50(2) of the Proceeds of Crime Act says that a registered external confiscation order is to be enforced in The Bahamas in the same manner as a confiscation order made in The Bahamas. But it does not at all follow that the effect of registration here is to deprive the other respondents of their interest (if any) in the assets which they claim. It does not. The separate procedure for the enforcement of a Bahamian confiscation order is set out

in sections 27 and following of the Proceeds of Crime Act and includes the appointment of a receiver to realise assets held by the defendant. Even if such an order could be considered a judgment of the Supreme Court within section 63 of the Supreme Court Act, that section only creates an equitable charge over the interest which the judgment debtor holds in any property; it does not purport, and could not purport, to charge a beneficial interest held by a third party.

Conclusion

26. For the foregoing reasons, the Board will humbly advise Her Majesty that this appeal by the Attorney General should be allowed and the order of the judge registering the US order under section 50 of the Proceeds of Crime Act should be restored.

27. The Board invites the parties to make submissions as to costs, on notice to each other, within 21 days of receipt of this judgment, and with any reply to the submissions of the other within a further 21 days of receipt of the same.