

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

Misc. Crim. Case No: HAM 117 of 2010

BETWEEN:

THE STATE

AND:

Applicant

MAHENDRA PAL CHAUDHRY

AND:

1st Respondent

FIJI ISLANDS REVENUE & CUSTOMS AUTHORITY

2nd Respondent

Date of Hearing: 22nd June 2010
Orders granted: 25th June 2010
Reasons published: 15th July 2010

Counsel: Mr. W. Pillay for State

DECISION

- [1] The State applies for production and inspection orders in relation to certain documents pertaining to the first respondent's tax matters and which are in possession of the second respondent. The application is made pursuant to section 50 of the Proceeds of Crime Act 1997.
- [2] Section 50 provides:
- (1) Where a police officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document the police officer may apply to a Judge in chambers in accordance with subsection (2) for an order under subsection (5).

against the person suspected of having possession or control of the document.

- (2) An application under subsection (1) shall be made ex parte and shall be in writing and be accompanied by an affidavit.
- (3) Where a police officer applies for an order under subsection (5) ... and includes in the affidavit a statement to the effect that the officer has reasonable grounds to believe that:
 - (a) the person who, was convicted of the offence, or is believed to have committed the offence, derived a benefit, directly or indirectly, from the commission of the offence, and
 - (b) property specified in the affidavit is subject to the effective control of the person referred to in paragraph (a),the Judge may treat any document relevant to identifying, locating or quantifying that property as a property-tracking document in relation to the offence for the purposes of this section.
- (4) In determining whether to treat a document, under subsection (3), as a property-tracking document in relation to an offence, the Judge may have regard to the matters referred to in subsection 25(2).
- (5) Subject to subsection (6), but notwithstanding any enactment which prohibits disclosure of information of a particular type, where an application is made under subsection (1) the Judge may, if satisfied that there are reasonable grounds for doing so, order the person to:
 - (a) produce to a police officer, at a specified time and place, any documents of the kind referred to in subsection (1) that are in the person's possession or control; or
 - (b) make available to a police officer for inspection, at a specified time or times, any documents of that kind that are in the person's possession or control.

- [3] As can be seen, section 50(2) creates an exception to the principle of open justice by allowing for an ex-parte application to be made before a judge in chambers in a course of a criminal investigation. The application of this nature does not offend the principle of open justice because there is a public interest in protecting the evidence during an investigative stage.
- [4] There may be an argument that the procedure under section 50(2) may be abused by the State and the affected party may not have a legal recourse to alleviate the abuse. However, in my judgment, the law provides sufficient safeguards against an abuse of the procedure. Firstly, the ex-parte application must be in writing and be accompanied by an affidavit from a police officer.
- [5] Secondly, the affidavit must have a statement upon which the police officer has found his reasonable belief of the matters contained in section 50(3)(a) and (b).
- [6] In the present case, the State has complied with all the procedural requirements.
- [7] As regards the substantive application, the court must be satisfied of the following:
1. ASP Puran Lal has reasonable grounds for suspecting that the second respondent has possession or control of a property-tracking document.
 2. ASP Puran Lal has reasonable grounds to believe that the first respondent has committed an offence and obtained a benefit from the commission of the offence.
 3. The property specified in the affidavit of ASP Puran Lal is in effective control of the first respondent.
- [8] Section 3 of the Proceeds of Crime Act defines a "property-tracking document". Section 3 states:

"Property-tracking document", in relation to an offence, means:

(a) a document relevant to:

- (i) identifying, locating or quantifying the property of a person who committed the offence; or
- (ii) identifying or locating any document-necessary for the transfer of property of a person who committed the offence; or

- [9] Although the court has not been referred to any authority regarding the approach to this kind of application, section 50 clearly sets out the test. The test is objective one, because there must be reasonable grounds for the belief that a person is in possession or control of a property-tracking document and that a person has committed an offence and has benefitted from the offence.
- [10] The application of the objective test does not require the court to look beyond what was in the mind of the police officer. It was the grounds which were in the mind of ASP Puran Lal at the time which must be found to be reasonable grounds for the belief which he had formed. All that the objective test requires is that those grounds be examined objectively and that they be judged at the time application is made.
- [11] In his affidavit ASP Puran Lal states that in 2008 the first respondent held the portfolio of the Minister of Finance, when issues relating to his tax payments for preceding years were brought to the public foray. The allegations were that he failed to declare receipts of monies from sources outside Fiji, namely India and had also failed to declare income from investments in Australia and New Zealand.
- [12] As a result of these allegations, the second respondent established an independent Committee of three eminent persons to investigate the allegations. The first

respondent co-operated with the investigations. On 10 March 2008, the Committee published a report containing the findings of the inquiry. The first respondent was absolved from breaches of any law.

- [13] Following the report of the Committee, the Reserve Bank of Fiji sought a second opinion from a senior solicitor in Australia, J. Stephen Kos QC. According to the opinion, the respondent has breached various provisions of the Exchange Control Act and the Proceeds of Crime Act. The opinion was proffered on the facts contained in the Committee report of the second respondent.
- [14] ASP Puran Lal's suspicion that the first respondent has committed criminal offences are based on the contents of the report by the Committee, the admissions of facts made before the Committee by the first respondent and the subsequent legal opinion of J. Stephens ICO, QC. He further believes that the tax documents of the first respondent which are in possession of the second respondent will assist in the police investigation of potential breaches of the provisions of the Exchange Control Act and the Proceeds of Crime Act by the first respondent and therefore the documents sought are property tracking documents. It has been shown that there had been reasonable grounds for forming such a suspicion and belief.
- [15] For the reasons I have given, the application is granted.




Daniel Goundar
JUDGE

At Suva
15th July 2010

Solicitors:

Office of the Director of Public Prosecutions for Applicant