BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

Criminal Case No. 12 of 2008

IN THE MATTER OF THE PROCEEDS OF CRIMINAL CONDUCT ACT (NO. 5 OF 1997) OF THE LAWS OF THE VIRGIN ISLANDS

BETWEEN:

THE QUEEN

- v -

(1) IPOC INTERNATIONAL GROWTH FUND LIMITED
(2) LAPAL LIMITED
(3) ALBANY INVEST LIMITED
(4) MERCURY IMPORT LIMITED

Defendants

Appearances:

Mr Hodge M. Malek QC of 4-5 Gray's Inn Square, London with him Mr Terrence F. Williams D.P.P., Ms Tamia N. Richards, Ms Christilyn M. Benjamin and Ms Michelle E. Prattley for the Crown

Mr Andrew Mitchell QC of Furnival Street Chambers, London for IPOC International Growth Fund Limited

Mr Richard Kovalevsky QC of 3 Bedford Row, London for Lapal Limited, Albany Invest Limited and Mercury Import Limited

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2008: April 30, May 01
2008: May 01, August 20

Criminal Law – Money Laundering – Defendants pleaded guilty to perverting the course of justice and furnishing false information contrary to the Criminal Code – Relevant criminal conduct and the benefit derived therefrom – proper case for confiscation order to be made – sections 6, (1) (a), 6 (2), 6 (3), 6 (6), 6 (7), 6 (8), 7 (1)(a), 9 (2), 9 (3), 9 (4), 9 (7), 10 (1), 10 (2), 10 (3), 10 (4) and 10. (8) of the Proceeds of Criminal Conduct Act, No 5 of 1997 referred to.- Unlimited Fines are the only penalty for corporate entities that are guilty of offences under Criminal Code 1997– sections 22 (b), 23 (2) and 24 applied

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** The British Virgin Islands ("the BVI") is the domiciliary forum to over 850,000 International Business Companies ("IBC's")[1]. This "world" of global commerce brings with it increasing cross-border activities. Consequently, money laundering

[1] As of 20 August 2008, 445,865 of those companies are active.

is an ensuing issue. The term "money laundering" is a misnomer. Often, it is not the money that is laundered but any form of property that directly or indirectly represents the proceeds of crime. Property is laundered because the illegitimacy of the source needs to be properly disguised.[2] Globally, money laundering accounts for hundreds of billions of dollars every year, turning the proceeds of crime into apparently legal funds. And according to some studies, virtually none of the cash is ever traced by the authorities.[3] However, this case proves otherwise. Following 17 months of investigation by authorities in the BVI and Bermuda, this Court on 1 May 2008 confiscated more than US$45 million from the First Defendant, IPOC, a Bermuda-based mutual fund which pleaded guilty to serious fraud-related crimes possibly the largest court order of its kind ever made in the Commonwealth.[4] Curiously, the name IPOC is the acronym of a program that is designed to assist Canadian Police to identify, assess, seize, restrain and forfeit illicit wealth derived from money laundering and similar crimes.

[2] Additionally, the Court ordered the Second Defendant, Lapal to pay costs of US$600,000 and a fine of US$100,000. The Third Defendant, Albany was ordered to pay costs of US$1,000,000 and a fine of US$100,000 while the Fourth Defendant, Mercury was ordered to pay costs of US$600,000 and a fine of US$100,000.

Background facts

The offences: perverting the course of justice and furnishing false information

[3] The Crown has methodically and helpfully summarised the background facts in the case. For present purposes, I shall gratefully accept them. On 30 April 2008, the Defendants were convicted of perverting the course of justice[5] and furnishing false information.[6]

[4] These are indictable offences to which the Proceeds of Criminal Conduct Act, No. 5 of 1997 ("the Act") applies.[7] Accordingly, IPOC has been convicted of two qualifying offences and it is therefore an appropriate case for the provisions of section 9 of the Act to apply [8]. It is important to place on record that the Learned Director of Public Prosecutions ("the DPP")

[2] For more on this, see: Article: "Protecting BVI Funds from money laundering" written by Martin A. Litwak, Inter-American Bar Association, Vol. 3 -2005.
[3] News.BBC.co.uk (headnote) "Dirty Money" January 2006 accessed 4/7/2008.
[4] United Kingdom Overseas Territories Association News Spring 2008 Newsletter, page 4.
[5] Section 93(a) of the Criminal Code, 1997 of the Laws of the Virgin Islands.
[6] Section 221 (1)(b) of the Criminal Code, 1997 of the Laws of the Virgin Islands.
[7] See section 2(5)(d) of the Act and Schedule 1 of the Criminal Code of the Laws of the Virgin Islands, 1997.
[8] Section 9 (1) defines "qualifying offence" in relation to proceedings before the court".

has given the written notice to the Court, as mandated by section 10 (2) that this is an appropriate case to proceed under section 6 against IPOC[9].

The Defendants

[5] The four Defendants are all limited liability companies within the same group of connected companies controlled by a Danish citizen. For convenience, I shall refer to the group as the IPOC Group. The charges relate to offences committed during 2004 and 2005.

[6] IPOC was incorporated in Bermuda on 19 June 2000 and was classified by the Bermuda Monetary Authority as a collective investment scheme or mutual fund company. It was managed from Bermuda and had banking facilities with the Bermuda Commercial Bank, which also acted as custodian. In 2004 and 2005, its directors were Michael North, David Hauenstein and Roderick Forrest. Vidya Sharma was the first Vice-President of IPOC until October 2003. The main assets of IPOC were interests held directly and indirectly in a major Russian telecoms company, MegaFon. IPOC is subject to a winding up Petition issued by the Government of Bermuda on 12 January 2007 which is scheduled to be heard this year.

[7] Lapal was incorporated as an IBC in the BVI on 9 April 2001. It was managed from Bermuda and had banking facilities with the Bermuda Commercial Bank. In 2004 and 2005, its directors were Coy Limited and Nicholas Hoskins. The registered agent is AMS Trustees Limited. Lapal made substantial payments to IPOC.

[8] Albany was incorporated as an IBC in the BVI on 15 May 2002. It was managed from and had banking facilities in the Republic of Cyprus. From 23 March 2004, its directors were Demetrios Demetriades and Harris Demetriades. The registered agent is Trident Trust Company (BVI) Limited. Albany made substantial payments to IPOC.

[9] Mercury was incorporated as an IBC in the BVI on 17 April 2002. It was managed from and had banking facilities in the Republic of Cyprus. From 23 March 2004, its directors were Demetrios Demetriades and Harris Demetriades. The registered agent is Trident Trust Company (BVI) Limited. Mercury made substantial payments to IPOC.

[9] See Prosecutor's Statement filed on 30 April 2008.

The Civil Proceedings

[10] There are a large number of companies in the IPOC Group whose beneficial ownership has been a matter of much controversy in civil proceedings in which IPOC has been engaged in during the period 2003 to 2007. Further, the origin of the funds in the IPOC Group, paid into Court (as outlined below) has been disputed.

[11] Much of the litigation related to a long-running dispute over the ownership of a 25.1% stake in Russian telecommunications giant, MegaFon. LV Finance was a company beneficially owned by a Russian-born American businessman, Leonid Rozhetskin[10] and others. In 2001, LV Finance entered into two option agreements which, if exercised, would have transferred the asset holding the MegaFon stake to IPOC. LV Finance held its stake in MegaFon through its wholly owned subsidiary, Transcontinental Mobile Investment Limited ("TMI") and TMI's subsidiary, OOO CT Mobile ("CT Mobile"). The two options purported to grant IPOC the right to purchase 100% of the shares in TMI (which held the MegaFon stake) from LV Finance. The first option agreement of 10 April 2001 related to 77.7% of TMI and the second option agreement of 14 December 2001 related to the remaining 22.3% of TMI. In 2003, TMI sold all its shares in CT Mobile and hence the MegaFon stake to 9 companies. On 1 August 2003, the 9 companies sold all their shares in CT Mobile to 3 BVI companies (Avenue, Janow Properties and Santel) that were owned by OOO Alfa – Eco ("Alfa"). The Alfa Group is beneficially owned by a Russian businessman, Mikhail Fridman. MegaFon is reported to be worth around US$10 billion.

[12] The options and the transfer of the MegaFon stake led to worldwide court and arbitration proceedings under which IPOC claimed to enforce the options and gain control of the MegaFon stake. Arbitrations were brought in Zurich and Geneva in Switzerland. In those proceedings, LV Finance and the Alfa Group claimed, inter alia, that the options were not valid. On 16 May 2006, the Zurich Arbitral Tribunal rejected IPOC's claim to enforce the option agreement.

The BVI Civil Proceedings and the relevant Criminal Conduct

[13] In September 2003, IPOC issued proceedings in the BVI claiming from the Alfa Group and other defendants the 25.1% stake in MegaFon and enforcement of the two option

[10] Mr Rozhetskin, 41 years old, went missing on March 16, this year from his villa in Latvia. Police confirmed that traces of blood found in the house in the resort town of Jurmala, were that of Mr Rozhetskin- The Royal Gazette, 30 April 2008.

agreements. On 4 September 2003, IPOC obtained an ex parte injunction and receivership order against the 16 civil defendants who subsequently applied and succeeded in setting aside the injunction and receivership orders. They argued that the BVI was not the appropriate forum to try the proceedings. They also applied for security for costs and fortification of the undertaking in damages.

[14] On 1 October 2003, d'Auvergne J discharged the receivership order and permission to serve out of the jurisdiction on two Russian companies who were amongst the 16 civil defendants, namely CT Mobile and Alfa - Eco. The judge also ordered that IPOC provides US$30 million by way of security for costs and fortification of the undertaking as to damages in relation to the injunction. On 7 October 2003, IPOC paid the sum of US$30 million into Court of which US$23 million had been transferred into the BVI from IPOC's account at Bermuda Commercial Bank in Bermuda. This account in turn had been funded by payments from inter alia, Lapal, Albany and Mercury. On 8 June 2004, Mitchell JA [Ag]l ordered IPOC to pay a further US$10 million into Court. It was paid on 21 June 2004. The amount in Court as of 29 April 2008 was US $45,455,430.82, which includes accrued interest.

[15] By May 2004, the civil defendants including LF Finance and CT Mobile had sought to enforce the cross-undertaking in damages given by IPOC. They alleged that IPOC was a money laundering vehicle and the sums paid into court were the proceeds of crime. IPOC vigourously resisted those allegations and filed affidavit evidence as to the origin of its funds. The evidence included a report of the accountants, Ernst & Young dated August 2004, based on information and documents provided by IPOC and a number of witnesses including Michael North and Jeffrey Galmond (described as the beneficial owner of IPOC and its related entities).

[16] On 20 September 2004, the Court of Appeal ordered IPOC to make disclosure of documents. Pursuant to that Order, IPOC produced 5 files of documents. IPOC alleged that a significant proportion of its funds and that of the IPOC Group (including that of Lapal, Albany and Mercury) was the income from numerous consultancy agreements entered into by members of the IPOC Group and explained in part, the origin of the US40 million paid into the court (including the US$23 million paid from Bermuda).

[17] As a result, the BVI authorities launched an investigation into the contracts/consultancy agreements and found that a significant number of the counterparties were either not true parties to the agreements or the counterparties' signatures on various agreements were forged and in diverse cases, no contract was entered into with the named counterparties. In addition, in a number of instances, no consultancy services were provided and the payments had not been received from purported parties to these agreements.

[18] Further information about the false consultancy agreements is set out in the Statement of Facts[11].

The benefit from the relevant criminal conduct

[19] Subsection 6 (3) of the Act provides that the Court must first determine whether the Defendants have benefited from any relevant criminal conduct. The threshold test for obtaining a benefit is set out in section 6(6) which states that "*For the purposes of this Act, a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained."*

[20] Section 7 provides that "where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage."

[21] The standard of proof required to determine whether a person has benefited from any offence; or the amount to be recovered in a person's case, shall be on a balance of probabilities: section 6(9) as amended by the Proceeds of Criminal Conduct (Amendment) Act, 2008.

[22] In the present case, the Defendants misled the Court through the use of false evidence and false information. IPOC was permitted to benefit and obtain a pecuniary advantage through the acceptance of the funds as security and the continuance of the injunction and the proceedings generally, thus tying up the MegaFon's stake for its advantage. It also gained a further pecuniary advantage in that it was not put to the task of finding another sum of US $40 million with an undisputed origin. In the circumstances, it is apposite for the Court to

[11] See Statement of Facts filed on 30 April 2008, particularly, paragraphs 19 -24.

make the assumptions in section 9(4) of the Act that all of the funds were received as a result of or in connection with offences to which the Act applies. The Prosecution accepts that applying the assumptions the full extent of the benefit is limited to the funds in Court.

[23] In addition, IPOC benefited from the offences in the sum held in Court, inclusive of accrued interest to the moment of confiscation. The Defendants have no other assets within this jurisdiction. In fact, Lapal, Albany and Mercury are merely holding companies. Accordingly, IPOC's realisable assets within the jurisdiction are the same as the recoverable amount for the purposes of any confiscation order.

[24] On 27 April 2007, the IPOC Group gave an undertaking to the Court not to remove the funds which were held in the Court.[12] The undertaking was in response to a restraint application by the Attorney General whose powers in respect of criminal matter have been transferred to the DPP. Two days later, the High Court made a Restraint Order over the funds in Court and this undertaking was released. The investigation has been conducted with the assistance of the Bermuda authorities.

Court's consideration

[25] It is not in dispute that the two offences are qualifying offences within the meaning of section 9 of the Act. The value of the benefit within the meaning of section 6 is agreed as amounting to the full amount of the monies paid into court including interest.[13]

[26] The maximum sentence which this Court could impose for false accounting as well as perverting the course of justice in relation to a corporate entity is an unlimited fine.[14] Whilst the amount of fine is unlimited, it should not be excessive.[15] Thus the court has been given an unfettered discretion in sentencing which allows it to take account of the particular circumstances of each case.

[27] The circumstances of these offences, by any standard, are of utmost gravity to this Territory which maintains its commitment to the prosecution and prevention of money laundering. In

[12] See Supplementary Bundle at pages 690-692.
[13] See: sections 6(1)(a), 6 (2), 6 (3), 6 (6), 6 (7), 6 (8), 7 (1)(a), 9 (2), 9 (3), 9 (4), 9 (7), 10 (1), 10 (2), 10 (3), 10 (4) and 10. (8).
[14] See sections 22(b), 23(2) and 24 of the Criminal Code, 1997.
[15] See section 24(1) (a) of the Criminal Code.

that light, I can only say that the Crown was both magnanimous and pragmatic in proceeding in the manner it did and in assisting with sentencing.

[28] The actual sentence that a court will impose will depend upon the existence and evaluation of the aggravating and mitigating factors. Surely, it is not enough for the court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark upon an evaluative process. It must weigh the aggravating and mitigating factors. I also bear in mind the four classical principles of retribution, deterrence, prevention and rehabilitation. These principles are universal and need no narration.

[29] Bearing these factors in mind, I will consider the actual sentence to be imposed upon these companies. First and foremost, the Court regards these offences as sorely grave taking into consideration (i) the amounts involved; (ii) the concerted and collaborative efforts to deceive the court through false evidence and manufactured documents; and (iii) the public interest. These are the aggravating factors.

[30] The Court also takes account of the mitigating factors. Unsurprisingly, the companies' directors were nowhere in sight. Their respective lawyers pleaded guilty on their behalf. In mitigation, Mr Mitchell QC said that IPOC has settled the entire course of its global civil litigation and pleaded guilty at the earliest possible opportunity. On behalf of Lapal, Albany and Mercury, Mr Kovalevsky QC said that "his clients were soon going to begin the liquidation process in the BVI and that they have no interest whatsoever in trading." At first blush, this appears to be an ideal plea in mitigation. But, in reality, it is not because a company which has been involved in criminal activities in this jurisdiction would be wound up in the public interest by the Financial Services Commission. The added proposal that these companies would not trade is inconsequential since it is a fact that most of the IBC's in this Territory are holding companies and do not trade.

[31] Learned Queen's Counsel, Mr Malek, appearing for the Crown seeks confiscation of US$45,455,430.82 against IPOC which is its available funds in the jurisdiction held in the court cash account. Section 7(1)(a) of the Act provides that where the Court makes a confiscation order, it shall take account of such order before imposing any fine.

[32] Mr Malek QC also seeks the Crown's costs in these proceedings in an amount of US$2,050,000. The Defendants, Lapal, Albany and Mercury have not objected to payment of this sum. Learned Queen's Counsel next requested that these companies be wound up as soon as practicable and not be traded. Mr Kovalevsky QC has given an undertaking to the Court that they would do so in due course. The winding up process will commence no later than 31 March 2009 which will give them the opportunity for an orderly cessation of operations. The companies should be dissolved by the end of 2009.

[33] The Court also imposed a fine of US$100,000 concurrent on each count upon Lapal, Albany and Mercury to be paid within 7 days.

Order

[34] For convenience, I have reproduced the Order in full as shown below:

1) The First Defendant, IPOC International Growth Fund Limited, having been convicted on 30 April, 2008 of two counts of perverting the course of justice and furnishing false information contrary to sections 93(a) and 221 (1)(b) respectively of the Criminal Code, 1997 of the Laws of the Virgin Islands:

    1. be required to pay the sum of US $45,455,430.82 pursuant to the Confiscation Order made today (as set out in the separate Order of today's date).

    2. in view of (1) there be no further financial or other penalty.

2) The Second Defendant, Lapal Limited, having been convicted on 30 April, 2008 of two counts of perverting the course of justice and furnishing false information contrary to sections 93(a) and 221(1)(b) respectively of the Criminal Code, 1997 of the Laws of the Virgin Islands:

    1. is ordered to pay costs of US $600,000, such costs to be paid within 7 days.

    2. is sentenced to a fine of US $100,000 concurrent on each count, such fine to be paid within 7 days.

3) The Third Defendant, Albany Invest Limited, having been convicted on 30 April 2008 of two counts of perverting the course of justice and furnishing false information contrary to sections 93(a) and 221(1)(b) respectively of the Criminal Code, 1997 of the Laws of the Virgin Islands:

    1. is ordered to pay costs of US $1,000,000 such costs to be paid within 7 days.

    2. is sentenced to a fine of US $100,000 concurrent on each count, such fine to be paid within 7 days.

4) The Fourth Defendant, Mercury Import Limited, having been convicted on 30 April 2008 of two counts of perverting the course of justice and furnishing false information contrary to sections 93(a) and 221(1)(b) respectively of the Criminal Code, 1997 of the Laws of the Virgin Islands:

    1. is ordered to pay costs of US $600,000 such costs to be paid within 7 days.

    2. is sentenced to a fine of US $100,000 concurrent on each count, such fine to be paid within 7 days.

[35] For the avoidance of any doubt, the costs and fines imposed on these Defendants will not be paid from the monies paid into Court which are to be subject to confiscation. Instead, they will be paid from other funds, outside the jurisdiction.

Conclusion

[36] In his concluding remarks, Mr Malek QC commended the work done by the Bermuda Police and the Royal Virgin Islands Police Force as well as the Attorney General's Chambers in both jurisdictions saying that well over one-half million pages of documents were produced during the 17-month investigation signifying the complexity and density of this case. He said that "it is not envisioned in the BVI or Bermuda there will be future allegations against IPOC. So really this is the end of the IPOC saga in every case."

[37] While it is so, this case heralds the dawn of a new day in the BVI. It marks the beginning of the BVI's commitment to the prosecution and prevention of money laundering. The

government's efforts in this area have been superlative and are in keeping with evolving international standards.

[38] In **R v Rezvi**[16], Lord Steyn said:

> "It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential."

[39] To this end, the Legislature has passed many acts; the most recent being the Anti-Money Laundering and Terrorist Financing Code of Practice Act 2008 which was enacted on 22 February 2008 indicating the Territory's continued commitment to prevent the concealment and retention of proceeds of crime by white collar criminals.

[40] I conclude by quoting the judicious words of BVI's DPP, Mr Williams:

> "The successful prosecution of the IPOC case shows the Territory's commitment to protect the integrity of the criminal justice system… It also demonstrates the fact that the BVI strictly regulates the corporate entities which operate in our jurisdiction. It shows that we will not allow BVI corporate vehicles to be used improperly."[17]

[41] Last but not least, I am grateful to all Counsel particularly Mr Malek QC and Mr Williams for their admirable written as well as oral submissions which assisted me tremendously. I also wish to commend Learned Queens Counsel Mr Mitchell and Mr Kovalevsky for the very demanding tasks which they marshalled so very well in this case.

Indra Hariprashad-Charles

High Court Judge

[16] [2003] 1 AC 1099, 1146, 1152.

[17] UKOTA (United Kingdom Overseas Territories Association News, Spring 2008, page 4.