IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CIVIL APPEAL NO. 28 OF 2009

BETWEEN:

OMNI NETWORKS LTD
FULTEC SYSTEMS LTD
DEAN FULLER **Appellants**

AND

THE FINANCIAL INTELLIGENCE UNIT **Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley - President
The Hon. Mr. Justice Carey - Justice of Appeal
The Hon. Mr. Justice Morrison - Justice of Appeal

Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin for the appellants.

Ms Antoinette Moore SC, Mrs Tricia Pitts-Anderson and Mikhael Arguelles for the respondent.

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15 March 2010; 9 March 2011.

MORRISON JA:

Introduction

[1] The hearing of this appeal was completed on 15 March 2010, at which time the court announced that the appeal would be allowed, with costs to the respondent in this court and in the court below, to be taxed if not sooner agreed.

I must apologise immediately for this late fulfilment of the promise given by the court at that time to provide reasons in writing for its decision. While it may be possible to explain the delay by reference to developments since that promise was made with regard to the composition of the court itself, I cannot possibly advance any of these by way of excuse for what has been by any measure an inordinate period of delay.

[2] In this judgment, I shall refer to the respondents individually as 'Omni', 'Fultec' and 'Mr Fuller' respectively, and collectively as 'the appellants', while I shall refer to the respondent as 'the FIU' or 'FIU'. Omni and Fultec are both companies duly incorporated under the laws of Belize. Mr Fuller is the managing director of Omni and a director of Fultec. The FIU is a body established by section 3 of the Financial Intelligence Unit Act, 2002, charged with the statutory responsibility of, among other things, investigating and prosecuting financial crimes (section 7(1)(a)).

[3] On 10 July 2009, Omni, Fultec and Mr Fuller were charged with the offence of money laundering, contrary to section 3 of the Money Laundering (Prevention) Act, 1996 ('the 1996 Act'). On 3 and 5 August 2009, the FIU, acting pursuant to its powers under section 11(1)(d) of the Money Laundering and Terrorism (Prevention) Act, 2008 ('the 2008 Act'), issued directives to Alliance Bank of Belize Ltd, Scotiabank (Belize) Ltd, Atlantic Bank Ltd, First Caribbean International Bank and Belize Bank Ltd ('the banks') to freeze funds standing to the credit of Omni, Fultec and Mr Fuller respectively in the banks until 13 August 2009. Thereafter, on 6 August 2009, Arana J granted an ex parte application by the FIU prohibiting Omni, Fultec and Mr Fuller from disposing of or otherwise dealing with the proceeds of all deposits in the banks in their respective names for a period of 28 days or further order. This is an appeal against Legall J's subsequent order, made on 9 December 2009, granting FIU's application to

extend Arana J's order until the hearing and determination of the criminal charges against Omni, Fultec and Mr Fuller, who also appeal from Legall J's contemporaneous order dismissing their application to discharge Arana J's order on the ground of non-disclosure and/or misrepresentation. The question for decision on this appeal is therefore whether Legall J ought to have extended Arana J's order or whether he ought to have discharged it.

The statutory framework

[4] The criminal charges against Omni, Fultec and Mr Fuller were laid pursuant to the provisions of the 1996 Act, section 2(1) of which defines 'money laundering' as follows:

> "'money laundering' means –
>
> (a) engaging, directly or indirectly, in a transaction that involves property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be proceeds of crime; or
> (b) receiving, possessing, managing, investing, concealing, disguising disposing of or bringing into Belize any property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime."

[5] Section 2(1) also defines 'freezing', as "temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority".

[6] The 2008 Act was enacted for the purpose of making detailed provisions for the prevention, investigation and prosecution of money laundering and terrorism. Section 11(1)(d) of the 2008 Act empowers the FIU to "instruct any reporting

entity to take such steps as may be appropriate, including the freezing of funds and other financial assets or economic resources of any person or entity, to facilitate any investigation, prosecution or proceeding for a money laundering offence...". In addition, section 39(1) empowers the FIU (or the Director of Public Prosecutions) to apply to the Supreme Court for a restraining order against any realisable property held by the accused or specified realisable property held by a person other than the accused. As provided for by section 39(2), such an application may be made ex parte, supported by an affidavit, which is required to state the following:

> "(a) where the accused has been convicted of a serious crime, the serious crime for which he was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodged against the conviction;
>
> (b) where the accused has not been convicted of a serious crime, the crime for which he is charged, or is being investigated and the grounds for believing that the defendant committed the offence;
>
> (c) a description of the property in respect of which the restraining order is sought;
>
> (d) the name and address of the person who is believed to be in possession of the property;
>
> (e) the grounds for the belief that the property is tainted property in relation to the offence or that the accused derived a benefit directly or indirectly from the commission of the offence;
>
> (f) where the application seeks a restraining order against property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the accused or is a gift caught by this Act; and
>
> (g) the grounds for the belief that a forfeiture order or a pecuniary penalty order may be or is likely to be made under this part in respect of the property."

[7] The affidavit filed on behalf of FIU in the instant case, in which Omni, Fultec and Mr Fuller have been charged, but not convicted, was therefore required to state in particular the offence for which they were charged and the grounds for believing that they had committed the offence (section 39(2)(b)). It was also required to state the grounds for believing that the property in respect of which the restraining order was sought was tainted property "in relation to the offence" or that Omni, Fultec and Mr Fuller derived a benefit directly or indirectly from the commission of the offence (section 39(2)(e)).

[8] Section 40(1) of the 2008 Act makes it clear that it is only upon the court being satisfied that a defendant has been charged with a serious crime and that there is reasonable cause to believe that the property is tainted property in relation to an offence, or that the defendant has derived a benefit directly or indirectly from the commission of the offence, that a restraining order can be made against that defendant's property. Section 40(2) provides that such an order may be made subject to provision being made for meeting out of the property reasonable living, business and legal expenses, as well as expenses required for the servicing of any specified debts incurred by the person against whom the restraining order is made. Section 42 provides that the court may, before making a restraining order, require notice to be given to, and give a hearing to, any person who appears to have an interest in the property in respect of which the order is sought, unless the court is of the opinion that the giving of such notice "would result in the disappearance, dissipation or reduction in the tainted property". Section 47(4) permits the making of an application to revoke or vary such a restraining order, subject to such conditions as the court thinks fit and section 48(1) empowers the FIU (or the Director of Public Prosecutions) to apply to the court for an extension of the period of operation of any order.

The ex parte application

9. FIU's ex parte application for court orders was filed on 5 August 2009, supported by a single affidavit sworn to on the same date by its director, Ms Marilyn Williams. The grounds stated in the notice of application were as follows:

> "(1) The three defendants have been charged with the offence of Money Laundering, and further investigation is currently in progress involving these Defendants.
>
> (2) The Applicant believes that the Defendants have committed the offence based on the evidence in the supporting affidavit.
>
> (3) The Applicant has issued directives to the aforesaid Banks and Financial Institutions for the freezing of funds pursuant to section 11(1)(d) of the Act.
>
> (4) The Applicant verily believes that if the order sought is not granted the Defendants will continue to lauder [sic] additional monies through these Bank accounts and continue to commingle laundered money with other funds."

[10] In her affidavit in support, Ms Williams stated that, as a result of a search conducted by the FIU and the police Criminal Investigation Branch into the affairs of a company known as Money Exchange International Ltd ('MEIL') on 31 December 2008, one Ms Melonie Coye and others had been charged with the offence of money laundering.

[11] Further investigations had revealed, Ms Williams continued, that Omni and Mr Fuller (in his capacity as "General Manager/Chairman of the said company") "were involved in a relationship with MEIL and Melonie Coye and others to launder money", and that Fultec and Mr Fuller ("acting as Director of the said company") were "part of the above-mentioned relationship with MEIL and Melonie Coye and others to launder money" (Ms Williams' affidavit, paras 3 and 4).

[12] Ms Williams then went on to assert that "as the Master Agent and principal for MEIL...[Omni]...has fiduciary duties and obligations to its agents, i.e. MEIL, as part of the operating conditions for MoneyGram Sub-Agents" and that she had confirmed from speaking "with officials from the Central Bank of Belize" that Omni "is indeed responsible and vicariously liable for its sub-agent". FIU's analysis of Omni's finances revealed, Ms Williams further asserted, that the company, which earned commissions from its relationship with MEIL, had "exceeded, in the millions, the commissions that a company of this nature would normally make". To support this conclusion, Ms Williams made reference to a particular account in the name of "Dean Fuller/Omni Networks", which between 2006 and 2009 showed balances which "skyrocketed" from a low of $996,588.08 to a high of $8,347,721.91 in 2007, before dropping in February 2009 to "only $4,970.00", and concluded that the bulk of this last downward movement in the account had occurred "after the officers of MEIL were raided on 31st December 2008 and subsequently charged with the offence of money laundering" (paras 5 – 7).

[13] As regards Fultec, Ms Williams stated FIU's conclusion, based on its "investigations and from evidence gathered from officials at the Belize City Council Traffic Department" that "the database that was used to store all Belize City license holders derived from and originated from" Fultec. This, Ms Williams asserted further, had "been proved to a relative certainty", as "documents seized from the 31st December 2008 raid on MEIL revealed electronic evidence that appear in MEIL's database that could only have come from Fultec systems" (para. 8).

[14] Ms Williams then brought together (in paras 9-11) FIU's thesis as regards the criminal involvement of Omni, Fultec and Mr Fuller as follows:

"9. Dean Fuller has been involved intimately in facilitating this 'triangular' illegal relationship. In his position as Manager and Chairman of OMNI Networks, the MoneyGram Master Agent, he knew that MEIL needed legitimate information to substantiate their send/receive forms to MoneyGram International. The names could not be randomly made up and had to be 'real' persons that had legitimate Social Security numbers or drivers licenses. MoneyGram International, after doing their arbitrary spot checks to ensure legitimacy of all transactions, would have been deceived into believing that such persons were in fact using the money transfer service when they were not.

10. Fultec Systems had a contract with the Belize City Council to print all drivers' licenses for the Traffic Department and as a result was in possession of the database consisting of the list of Belize City residents who hold drivers' licenses. MEIL needed such a legitimate source of identification for their illegitimate send/receive transactions.

11. Dean Fuller as the Chairman and Manager of OMNI Networks had the requisite knowledge through its relationship with OMNI/MEIL that such a database was needed. As the Director of Fultec Systems he was aware that such a database existed and that Fultec Systems had access to it. Dean Fuller, from our information and investigation provided the database to MEIL to effect the illicit activities. He benefited from these illicit activities through commissions that Omni Networks garnered through its principal/agent relationship with MEIL."

[15] On this evidence, Arana J felt able to grant FIU's application for a freezing order in respect of some 14 accounts in the banks held variously in the names of Omni, Fultec and Mr Fuller (and others), based on Ms Williams' conclusion from this material that the deposits in the accounts were "the proceeds of crime" and "were derived, obtained or realized as a result of the commission of money laundering offences" (paras. 15 and 16). The order was granted for a period of 28 days or until further order, with liberty to either party to apply to set it aside or to discharge it.

The application to discharge Arana J's order

[16] By notice of application dated 20 August 2009, Omni, Fultec and Mr Fuller moved the court for an order discharging Arana J's order on the grounds that (i) FIU had failed to set out the grounds for its belief that the applicants' accounts were tainted property in relation to the offence of money laundering; (ii) that FIU had not made full and frank disclosure of material facts relevant to the application for the restraining order; and (iii) that the restraining order made no provision for living expenses, attorneys fees and specified debts from the sums frozen. In the alternative, the application sought a variation of the restraining order in specified terms to allow the applicants to meet their living expenses, attorneys' fees and specified debts from the sums frozen by the order.

[17] The application was supported by an affidavit sworn to by Mr Fuller on 20 August 2009, in which he confirmed that he was the managing director of Omni, which is the "Master Agent" for MoneyGram International, a company with offices in the United States of America, and also that Omni had several sub-agents in Belize, including MEIL. In this affidavit, which ran to 72 paragraphs and was supported by copious documentation, Mr Fuller provided a detailed response to the several allegations in Ms Williams' first affidavit. While it is impossible to provide in this judgment even a summary of the material covered by this affidavit within a reasonable compass, I will nevertheless try to set out the general nature of Mr Fuller's response to the principal assertions made by Ms Williams in her first affidavit, which were, firstly, that the relationship between Omni and MEIL was a fiduciary one; secondly, that the amounts standing to the credit of a particular account in the name of Mr Fuller and Omni had "skyrocketed" in a manner that "exceeded exorbitantly, in the millions, the commissions" that a company such as Omni "would normally make", and had then reduced significantly after the raid on MEIL's offices and the subsequent charges brought against its officers; thirdly, that the database used to store information on all

Belize City licence holders, which was found at MEIL's offices during the 31 December 2008 raid, "derived and originated from" Fultec; and fourthly, that Mr Fuller was "involved intimately in facilitating this 'triangular' illegal relationship".

(i) The Omni/MEIL relationship

[18] Mr Fuller stated that this was a purely contractual relationship, which was regulated by an "International Money Transfer Sub-Representative Agreement" which had been entered into on 21 November 2007 (a copy of the agreement was exhibited). In accordance with the terms of this agreement, Mr Fuller illustrated the typical money remittance transaction involving MoneyGram, MEIL and Omni by the following example (at para. 20):

> "(1) a relative/friend in Belize; a person attends at a MoneyGram Agency in the United States and transfers US$300.00 to a relative/friend in Belize;
>
> (2) the relative/friend in Belize attends at MEIL's office, fills out a Receipt, produces proof of identification and receives the equivalent of the US$300.00;
>
> (3) MEIL has paid the equivalent of US$300.00 on behalf of MoneyGram and it therefore submits a claim directly to MoneyGram (not OMNI) for monies it have [sic] disbursed on behalf of MoneyGram;
>
> (4) MoneyGram wires the sum of US$300.00 to Alliance Bank Account No. 2141 so that OMNI can remit payment of the wire to MEIL.
>
> (5) OMNI sends MEIL a cheque for the equivalent of US$300.00. "

[19] Mr Fuller stated further that MoneyGram made payments to Omni for the settlement of accounts with sub-agents, including MEIL, approximately twice per week and Omni would immediately pay those amounts to the sub-agents. By

this means, Omni operated as a mere conduit for the settlements paid from time to time by MoneyGram to sub-agents in Belize, including MEIL, and Omni therefore had no beneficial interest in any amounts paid to it by MoneyGram for payment to MEIL and other sub-agents. As at January 2009, when MEIL's accounts were frozen at the instance of the FIU, an amount totalling $3,075,530.53, representing cheques written by Omni in favour of, but uncashed by, MEIL, remained in trust in Omni's account for MEIL, as a result of which Omni transferred this amount into a short term certificate of deposit (dated 9 June 2009 and exhibited to the affidavit) at Alliance Bank of Belize Ltd with a credit note captioned "proceeds for Money Exchange International Limited". Omni and MEIL were accordingly not in an employer/employee relationship and Omni had no involvement in or control over the daily management of MEIL or its employees.

[20] These arrangements, which were all subject to reporting requirements on a frequent basis by the Central Bank of Belize, were disclosed to and known by Ms Williams and the FIU, who, Mr Fuller asserted (at para. 21), "had unrestricted access to Omni's accounts" well before the making of the ex parte application for the restraining order in August 2009.

(ii) The source of funds in Omni's account

[21] Mr Fuller denied that Omni had ever earned millions of dollars in commissions or otherwise and explained that in 2005 Omni had provided a business solution to the telephone companies operating in Belize to the problem of how to accomplish "the sale of cellular phone pin numbers without having to sell plastic phone cards" (para. 9). Omni provided the solution through "e-pins", that is, the electronic version of phone cards, and thereafter became a

wholesaler of e-pins, which it purchased from the telephone companies and sold to businesses throughout Belize by providing them with 'Omni Networks' phone card terminals (similar to a credit card terminal). By this means, Omni Networks phone card terminals "could have been found in almost every gas station and store in Belize thereby facilitating the easy [sic] of sale of phone pin numbers". Phone card customers would therefore visit any of these locations and place an order, whereupon a phone card would immediately be printed from the phone card terminal.

[22] This enterprise resulted, Mr Fuller stated, in "high turnovers", as a result of which "millions of dollars were passing through Omni's Alliance Bank Account No. 2141 on a monthly basis between 2006 and 2007" (para. 11). In support of this assertion, Mr Fuller exhibited to his affidavit a spreadsheet showing Omni's income from the sale of e-pins, which indicated that in 2006 a total of $9,056,100.00 passed through the account, while in 2007 the total was $9,908,580.84. In each of those two years, Omni's total commissions were $374,710.88 and $201,194.83 respectively.

[23] After November 2007, Omni begun to use this account solely for the purpose of its MoneyGram banking business, transferring its e-pin business to its main Alliance Bank account no. 1743 and, between November 2007 and March 2009 Omni transacted all its MoneyGram business through account no. 2141 (subsequently renamed, at the behest of the bank, as the 'Omni Network/MoneyGram Limited' account). The result of all of this, Mr Fuller stated, was that was that in 2007 the bulk of the monies passing through account no. 2141 related to the e-pin business, with only $21,799.22 passing through the account in the months of November and December of that year being attributable to MoneyGram/MEIL transactions. Further, between November 2007 and March 2009, Omni as agent for MoneyGram earned gross commissions and income of

no more than $327,000.00 and in fact suffered net losses of $31,577.00 for the period ended December 2007 and $28,562.00 for the period ended 30 June 2008. Exhibited to Mr Fuller's affidavit in support of these assertions, were audited financial statements for 2006 and 2007 in respect of Omni and its subsidiary company, Money Services of Belize Ltd.

[24] Mr Fuller complained that FIU and Ms Williams had "unrestricted access to all of Omni's accounts and had been aware since April/May 2009 "exactly where MEIL's funds were held and the reason why Omni has such funds in its account for MEIL" (para. 27). In particular, FIU was aware that Omni had an amount of $3,075,530.53 in its account for MEIL", representing funds paid "to Omni by MoneyGram for transactions originating in the United States and which had been disbursed by MEIL in Belize" (para. 21). Omni therefore acted as a "mere conduit" for the settlements paid by MoneyGram to its sub-agents in Belize and accordingly had no beneficial interest in the $3,075,530.53 paid to it for reimbursement to MEIL and which were still held by Omni (in compliance with a directive from the FIU dated 9 June 2009) in a short term deposit account at Alliance Bank in accordance with a credit note captioned "proceeds for Money Exchange International Limited".

(iii) Fultec and the Belize City Council database

[25] Mr Fuller flatly denied that either he, Omni or Fultec had access to or supplied the city council's licence database to MEIL and described Ms Williams' allegation in this regard as "scandalous and not supported by any facts" (para. 56). By way of background, he explained that in 2003 Fultec had won the contract to provide the city council with hardware and software to enable it to produce an identification card, but that the database, which contained information on licensed drivers in Belize City, was developed by the city council's traffic

department over time and was, as far as he knew, stored at the city council "and administered solely by its personnel" (para. 58).

(iv) Mr Fuller's role in the "triangular illegal relationship"

[26] Mr Fuller accordingly denied any involvement in any such relationship or indeed in any kind of "suspicious activity". He pointed out that by virtue of its licence Omni was obliged to provide the Central Bank with monthly summaries of it send and receive transactions for MoneyGram, copies of its bank statements as well as copious other documentation as required by the Central Bank. Copies of documentation provided to the Central Bank for the months of October, November and December 2008 were also produced and exhibited by Mr Fuller, indicating that, although the total amounts of monies passing through Omni's account for this period ran into millions of dollars, the amount of commission earned by Omni on these amounts was a total of $174,195.44.

[27] In addition, Mr Fuller also indicated that several of the accounts in the various banks frozen by the restraining order had existed prior to Omni's relationship with MoneyGram and therefore had nothing to do with MEIL. Among these were a term deposit established with Belize Bank shortly after his daughter's birth in 2004 for her benefit, a certificate of deposit established at Scotiabank in his and his wife names in 2008, representing part of the proceeds of an insurance claim settled in their favour in July 2007 and an account at FirstCaribbean International Bank established in 2001, again jointly with his wife.

[28] Mr Fuller's wife, Diana Fuller, also swore to an affidavit in support of the application to discharge Arana J's order. She provided details of the circumstances in which several accounts held in the name of Fultec had come into existence (in most cases before MEIL commenced doing business in Belize)

and also gave details of another frozen account in the names of herself and her husband, which had been established by them shortly after their daughter's birth in 2004 and had been maintained for her benefit since that time. Finally, she provided detailed information on the amounts needed on a monthly basis for the maintenance of Fultec's business and the payment of its legal expenses, as well as for the living expenses of her family. She too exhibited a number of bank statements and certificates of deposit, as well as audited financial statements for Fultec for the period 2006 to 2008.

[29] By an application dated 27 August 2009, supported by a second affidavit from Ms Williams, FIU sought to extend Arana J's order, as well as to add 15 specified accounts to those which it sought to restrain. On that same date, by the consent of the parties, Hafiz-Bertram J varied the previous order so as to make provision for the appellants' living and business expenses and permitting Fultec to open a bank account to carry on its business.

[30] Further affidavits dated 1 September 2009 were filed by both Mr and Mrs Fuller, providing information with respect to the additional accounts which FIU was seeking to restrain, primarily for the purpose of establishing, on the basis of their provenance, that these accounts could not possibly be tainted with the proceeds of money laundering and ought not therefore to be subjected to any restraint of any kind. In direct response to the application to add 15 accounts to the list covered by the restraining order, Mr Fuller produced evidence to show that, among the accounts that it was now being sought by FIU to include in the order, was an account beneficially owned by his mother, representing the sale of her home a few years previously. For her part, Mrs Fuller provided detailed information to demonstrate that one of those accounts had been opened by Fultec, on the specific advice of an officer of Scotiabank, for the purpose of providing a separate interest bearing account for the deposit of accumulated

credit card payments made by its customers to Fultec and that no funds from Omni/MoneyGram transactions had been paid into this account.

The parties' first appearance before Legall J

[31] The parties first appeared before Legall J on 3 September 2009. It is clear from the transcript of the proceedings that, from the very outset, the judge entertained serious doubts whether, in the light of the appellants' responses to Ms Williams' first affidavit, FIU could sustain its application to extend the restraining order (or, indeed, resist the application to discharge it). The judge was primarily concerned with the apparent absence of any evidence to support the allegations made by Ms Williams in her first affidavit. Finally, after an extended discussion, mainly between the judge and counsel for FIU, the judge acceded, over strenuous objection by counsel for the appellants, to an application by FIU for an adjournment to enable it to file a further affidavit, with the explicit aim of addressing the judge's stated concerns. Leave was also granted to the appellants to file further affidavits in response and to cross examine Ms Williams on her affidavits.

[32] Legall J also granted, again with the consent of the parties, an order permitting Omni to open a bank account to enable it to carry on its business in Belize and the matter was set for continuation on 29 September 2009.

[33] In a third affidavit dated 17 September 2009, Ms Williams purported to provide further details of the relationship between Omni, Fultec and Mr Fuller and analyses of the banking information furnished by Mr Fuller in his affidavits. She continued to assert that there was a "co-mingling" of Omni's and MEIL's funds, to point to "large injections of funds" to Omni's account no. 2141 with Alliance Bank and to maintain her "reasonable belief" that Omni, Fultec, Mr Fuller and MEIL

"are involved in an illegal relationship for which all parties have been charged with money laundering offences" (para. 20). To this affidavit, Ms Williams exhibited (it appears, for the first time) copies of the information and complaint laid against the appellants for the alleged breach of section 3 of the 2006 Act.

[34] In separate third affidavits sworn to on 25 September 2009, both Mr and Mrs Fuller again joined issue with Ms Williams on her third affidavit, repeating much of the information and analysis provided in their earlier affidavits. Greater detail was also provided by Mr Fuller on the nature of the relationship between Belize City Council and Fultec, pointing out in particular that Fultec's involvement with the city council was for the limited purpose of providing software for the production of the driver's licences, and not for the actual printing of the licences, as Ms Williams had stated in her first affidavit. Mr Fuller reiterated that any information allegedly obtained by FIU from MEIL was not provided by Fultec, since Fultec had not had anything to do with the driver's licence database.

The hearing and Legall J's judgment

[35] After a hearing at which Ms Williams and Mr Fuller were both cross examined on their affidavits, Legall J gave judgment on 17 November 2009 ordering the extension of the restraining order made by Arana J on 6 August 2009, until the hearing and determination of the criminal charges against the appellants. He also added a number of accounts to those originally covered by the order, but made provision for Mr Fuller's living expenses to be met out of a specified account. After a review of the evidence as well as numerous authorities, the judge made a number of findings, which may be summarised as follows:

(i) On the evidence, there was a "financial, business and banking relationship between the defendants and MEIL" (para 23);

(ii) from the evidence, it appears that, between them, the appellants had a total of 24 different numbered accounts in five different banks, naturally giving rise to the question, "Why so many different accounts in different banks?" (para. 24);

(iii) the Belize City Council database was found at MEIL's offices and MEIL did not have a separate account of its own to receive payments from MoneyGram, giving rise to the question "Why was [the database at MEIL's offices, and why MEIL did not have a separate account for the MoneyGram payments?" (para. 25);

(iv) taking all factors into account (including the increases and decreases in funds in the appellants' accounts after the incorporation of MEIL and after the raid on its offices respectively), there was circumstantial evidence on a balance of probabilities to justify the conclusion "that there is reasonable cause to believe that moneys in the accounts at the banks are tainted" (Para 29).

[36] Finally, as regards the appellants' complaint of non-disclosure by FIU on the ex parte application, Legall J concluded that "In spite of some non-disclosures", he would nevertheless, in the exercise of his discretion, decline to discharge the restraining order (para. 60).

The appeal

[36] In their grounds of appeal, the appellants challenged a number of the judge's findings. For the purposes of this judgment, I would summarise the issues to which the challenge gives rise, I hope without any disservice to the full detail in which they are set out in the grounds of appeal, in this way:

(i) Whether the judge took into account irrelevant considerations and thus erred in finding that there was circumstantial evidence upon which to find that there was reasonable cause to believe that the moneys in the accounts were tainted;

(ii) whether the judge gave insufficient consideration to the evidence put forward by the appellants;

(iii) whether, having found that there were instances of non-disclosure on the part of FIU in making the ex parte application before Arana J, the judge erred in nevertheless refusing to discharge the restraining order on that ground; and

(iv) whether the decision of the judge is unreasonable and cannot be supported having regard to the evidence.

[37] At the very outset of his detailed skeleton arguments, Mr Courtenay SC reminded us of the oft cited decision of the House of Lords in ***Hadmor Productions Ltd v Hamilton*** [1983] 1 AC 191, by way of realistic acknowledgment of the fact that, in challenging Legall J's exercise of his undoubted discretion, the appellants bore the burden of demonstrating that the judge's decision "was based upon a misunderstanding of the law or of the evidence before him...or was so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it" (per Lord Diplock, at page 220). But this was in fact a case, Mr Courtenay submitted, in which the onus on the appellants had been fully discharged, with the result that the appeal ought to be allowed.

[38] Before us, Mr Courtenay supplemented the wide ranging submissions in his skeleton arguments by a composite submission, taking all the grounds of appeal together. After referring to the statutory framework that underpins these proceedings, he pointed out that, despite the fact that this application was brought by FIU pursuant to section 39(2)(b) of the 2008 Act, which required it to state the grounds for its belief that the appellants had committed the offence/s for which they were charged, no evidence had been given with regard the particulars of the offence that had given rise to the proceedings in the court below. Quite apart from the statutory requirements, he further submitted, FIU as the applicant for an ex parte order had a general duty of disclosure, which required it to direct the court's attention to the law, the evidence and to any possible defences available to the absent respondents to the application. In the instant case, there was a "flagrant and egregious breach" of section 42 on the ex parte application, since given that the accounts in question had already been frozen by the directives given to the banks by FIU pursuant to its powers under section 11(1)(d) of the Act, there had been no necessity for an application to be made ex parte in the circumstances. In addition to Ms Williams' failure to disclose the sources of the funds in any of the accounts which FIU sought to freeze, Legall J had not taken into consideration the evidence put forward by the appellants, which demonstrated that several of the accounts had no connection at all with the business carried on by Omni, Fultec or MEIL.

[39] In support of these submissions, Mr Courtenay referred us to a number of authorities to demonstrate the approach of the courts to breaches of the duty of disclosure on ex parte applications and the consequences of non-disclosure, as well as to applications for freezing orders made in analogous circumstances. I will shortly come to a consideration of some of these authorities.

[40] Miss Moore SC and Mrs Pitts-Anderson for FIU also provided us with detailed skeleton arguments in support of Legall J's decision. In her oral

submissions, Mrs Pitts-Anderson was content to maintain that FIU had placed sufficient evidence before the judge to justify the judge's order extending Arana J's order. In particular, she submitted that careful scrutiny of the "Omni and MEIL financial arrangement" demonstrated that funds in Omni's accounts were tainted by the connection with MEIL and that there was a conspiracy to commit the offences of money laundering as well as fraud.

[41] With regard to the complaint of non-disclosure, Mrs Pitts-Anderson also referred us to and relied upon the leading authorities, as Mr Courtenay had done, to make the point primarily that even if there is a finding that the applicant for an injunction ex parte has been guilty of non-disclosure, discharge of the injunction on that basis is not automatic, the court nevertheless having a discretion whether or not to discharge or to continue the injunction. Additionally, we were also referred by counsel for FIU to textbook material on the subject of money laundering offences generally.

[42] The submission on behalf of FIU was accordingly that, in all the circumstances, Legall J had properly exercised his discretion and there was therefore no basis upon which this court should disturb the orders made by him.

Some relevant authorities

[43] On the matter of non-disclosure, it seems to me that the relevant principles are not in doubt and it is not therefore necessary to seek further than the well known judgment of Ralph Gibson LJ in ***Brink's-Mat Ltd v Elcombe and others*** [1988] 1 WLR 1350, 1356-1357 (a case cited by both counsel), in which, after a

comprehensive review of the authorities, the principles are summarised as follows:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:
>
> (1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts ' see ***Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac*** [1917] 1 K.B. 486, 514, per Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see ***Rex v Kensington Income Tax Commissioners,*** per Lord Cozens-Hardy M.R. at p. 504, citing ***Dalglish v Jarvie*** (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in ***Thormax Ltd v Schott Industrial Glass Ltd*** [1981] F.S.R 289, 295.
>
> (3) The applicant must make proper inquiries before making the application: see ***Bank Mellat v Nikpour*** [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see for example, the examination by Scott J. of the possible effect of an ***Anton Piller*** order in ***Colombia Pictures Industries Inc v Robinson*** [1987] Ch. 38; and (c) of the degree of legitimate urgency and the time available for the

making of inquiries: see per Slade L.J. in ***Bank Mellat v Nikpour*** [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure...is deprived of any advantage he may have derived by that breach of duty': see Donaldson L.J. in ***Bank Mellat v Nikpour,*** at p. 91, citing Warrington L.J. in the ***Kensington Income Tax Commissioners'*** case [1917] 1K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometime be afforded'. per Lord Denning M.R. in ***Bank Mellat v Nikpour*** [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> 'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may will grant...a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed': per Glidewell L.J. in ***Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc*** ante, pp 1343-1344A."

[44] It is therefore clear from this summary of the legal position that, while the general rule is that an ex parte injunction will be discharged if it was obtained without full disclosure, the court nevertheless has a discretion in particular cases, taking into account all the relevant facts and circumstances, to continue the injunction or to grant a fresh injunction in its place, notwithstanding the original non-disclosure. (See also ***Arena Corporation Ltd (in voluntary liquidation) v Schroeder*** [2003] EWHC 1089 (Ch), paras 162-214, to which we were referred by Mr Courtenay, where the principles are exhaustively discussed and analysed.)

[45] Mr Courtenay also referred us to ***Thane Investments Ltd and others v Brian Tomlinson and others*** [2003] EWCA Civ 1272, which was a case in which the court was asked to grant ex parte a freezing order, by way of a ***Mareva*** injunction, in aid of intended proceedings against the defendants for misfeasance in their capacity as directors of a limited company. The order was granted as prayed and in due course the defendants made an application to discharge it on the grounds that it had been made on the basis of misrepresentations and that it was inappropriate, having regard to all the circumstances. Neuberger J (as he then was) declined to discharge the order and the defendants appealed to the Court of Appeal, where Peter Gibson LJ observed (at para. 20) that the court had "repeatedly stressed that a cautious approach is appropriate before what has been called one of the court's nuclear weapons...is deployed, particularly if an order is sought and obtained without notice to the person made subject to the order". (This was a reference to the characterisation of the ***Mareva*** injunction by

Donaldson J, as he then was, in ***Bank Mellat v Nikpour*** [1985] FSR 85, 92.) Peter Gibson LJ then went on to refer with approval (at para. 21) to the observation of Neuberger J in the court below that "...the duty of a person seeking an order, and in particular an order which can have as substantial an effect as a freezing order, in the absence of the Defendant against whom it is sought, is strict and important". After referring to the evidence upon which the judge below had made the freezing order, which he found to be deficient in a number of respects, Peter Gibson LJ observed (at para. 26) that it was important on applications "for so seriously intrusive an order as a freezing order that great care should be taken in the presentation of the evidence to the court, so that the court can see not only whether the applicant has a good arguable case but also whether there is a real risk of dissipation of assets". In the result, the appeal was allowed and the freezing order made by the judge at first instance was discharged.

[46] Perhaps even more to the point is ***Director of the Serious Fraud Office v A*** [2007] EWCA Crim 1927 (to which we were referred by counsel for FIU in their skeleton arguments), which was a case in which a restraining order had been made ex parte under the Proceeds of Crime Act. Hughes LJ made the following comment (at para, 4) on the effect of such an order:

> "A restraint order is a far-reaching order. Although it takes away no property or assets from the person under investigation, and is by definition temporary in

> application, it prevents him from using the frozen property in any way until the criminal investigation and any ensuing prosecution is over. That may restrict him considerably in what he can do by way of business or private activity. If it turns out that the person is not shown to be guilty of crime, he may in the meantime have lost a good deal because of the restrictions put upon him by the order…The restriction of a restraint order may sometimes last for a long time, though it can be reviewed if it is persisting unfairly. The order has sometimes been called draconian, and so it may (deliberately) be."

[47] These authorities suggest that, in keeping with the general principles governing the exercise of any jurisdiction to grant injunctive relief on ex parte applications, the powers of the court to make such orders pursuant to section 39 of the 2008 Act must in all cases be exercised cautiously, with due regard to the statutory preconditions to the exercise of the jurisdiction and the requirements of fairness to the absent respondent.

Discussion and analysis

[48] Against this regrettably extended background, I come now to a consideration of the issues which I have identified as arising on this appeal (see para. [36] above). I will, firstly, say a word on the issue of non-disclosure (issue (iii)). In his judgment in this case, Legall J concluded that "there have been instances of non-disclosures some of which were based on what the claimant should have known" (para. 51), but considered that, on the basis of the

authorities, it was open to him to decide whether in the particular circumstances of the case he ought nevertheless to continue the ex parte restraining order made by Arana J. It appears to me that in the light of the authorities collected by Ralph Gibson LJ in his judgment in the ***Brinks-Mat*** case (see para. [42] above), the judge was entitled to take this view of the matter and that, even if this court were to entertain a contrary opinion on the facts of the case, we would, on the principle of ***Hadmor Productions***, be obliged to defer to the judge's exercise of his discretion on this issue.

[49] In the light of this conclusion on the non-disclosure issue, it therefore appears to me that the critical question is the one that goes to the heart of the matter, that is, whether Legall J was correct in concluding, on the basis of all the material before him, that the injunction previously granted ex parte by Arana J should be extended until the hearing and determination of the criminal charge against the appellants. The remaining issues (i), (ii) and (iv) accordingly resolve themselves into this single question.

[50] As has already been seen, FIU's application was brought pursuant to section 39(1)(b) of the 2008 Act, with the result that it was required to show on affidavit the offence for which the appellants were charged and the grounds for believing that they had committed it. FIU was also required (by section 39(2)(e)) to state "the grounds for the belief that the property is tainted property in relation

to the offence or that the accused derived a benefit directly or indirectly from the commission of the offence". Further, as section 40(1)(b) stipulates, before granting the ex parte order in the first place, Arana J was required to be "satisfied that...there [was] reasonable cause to believe that the property is tainted property in relation to an offence or that the accused derived a benefit directly or indirectly from the commission of the offence".

[51] In this regard, it appears to me that the first area of infirmity in the material that was before the judge on the ex parte application related to the particulars of the offence with which the appellants were charged. They were charged (as stated in the Information and Complaint laid against them on 10 July 2009) with the offence of money laundering, contrary to section 3 of the 2006 Act, viz., -

> "...the said [Fultec, Omni and Dean Fuller]...between the 9th day of October 2007 and 1st day of January 2009 at Belize City in the Belize Judicial District, were engaged, directly or indirectly, in transactions involving property To Wit: BZ$6,588,702.21 or thereabouts that is the proceeds of crime knowing or having reasonable grounds to believe the same to be the proceeds of crime".

[52] Mr Courtenay complained, with considerable justification in my view, that the charge was vague and gave no indication of or clue to how the sum of BZ$6,588,702.21, stated with such precision, was arrived at or what it was supposed to represent. Given this laconic beginning, one would have expected, and more importantly, section 39(2)(b) and (e) seems to require, that the affidavit evidence would supply the deficiency. However, Ms Williams' first affidavit was completely silent with regard to the figure stated in the charge (in fact, it was not mentioned at all). Indeed, it is certainly strongly arguable, it seems to me, that the affidavit provided no reasonable basis upon which it could be concluded that the moneys in the bank accounts were tainted property in relation to an offence or that the appellants had derived a benefit, directly or indirectly, from the commission of the offence. In my view, that affidavit did not come up to the strict standards demanded by the authorities in respect of an ex parte application for an order of such potentially far-reaching effects as a restraining order under section 39 of the 2008 Act.

[53] But we are now long past that stage and so I must now come to the question whether Legall J had before him sufficient material to justify the order which he ultimately made extending Arana J's order. It will be recalled that, as I have already pointed out (at para. [31] above), when the matter first came before him on 3 September 2009, Legall J seemed inclined to the view that the evidence adduced on behalf of the appellants at that stage had sufficiently answered FIU's

case and that he then adjourned the matter to allow both sides to file further affidavits.

[54] As matters stood before the additional material thus permitted by the judge was filed, the case against the appellants was based entirely on Ms Williams' first affidavit, the general thrust of which was that the funds in the various accounts were tainted by reason of their connection to the offence of money laundering with which the appellants were charged. As has been seen, the case was erected on three major allegations, firstly, that FIU's investigations had revealed that Omni, Fultec and Mr Fuller "were involved in a relationship with MEIL and Melonie Coye and others to launder money" (para. 3); secondly, that from FIU's analysis of Omni's finances, the amount of money in Omni's accounts "has exceeded exorbitantly, in the millions, the commissions that a company of this nature would normally make" (para. 6); and, thirdly, by virtue of the "triangular illegal relationship" between Omni, Fultec and Mr Fuller (para. 9), coupled with Fultec's intimate familiarity with the Belize City Council's database of licensed drivers in the city, Mr Fuller and the other appellants were able to facilitate fictitious money transfer transactions that in reality amounted to money laundering

[55] As regards the first of these allegations, the evidence produced by the appellants established that Omni was the representative in Belize of

MoneyGram, an international money transfer business based in the United States of America, and that MEIL was party to a written sub-agency agreement with Omni. By virtue of its licence, Omni was required to and did submit monthly reports to the Central Bank of Belize, supplying, among other things, details of all of its MoneyGram transactions, as well as its own bank statements. As regards the second allegation, Mr Fuller provided detailed information as to Omni's involvement in the business of supplying e-pins to telephone card users, a business that generated high cash flows, to demonstrate that any apparent "skyrocketing" of its bank balances was attributable to this activity and not to its relationship with either MEIL or MoneyGram, which in fact accounted for commission earnings on a relatively modest scale. In respect of both the first and the second allegations, Omni's responses were supported by copious documentation, including copies of agreements, bank statements and audited financial statements. And finally, as regards the use (or misuse) of the city council database, Fultec demonstrated that, given the nature of the assignment that it had undertaken for the city council, it had had no involvement with the creation or maintenance of the database.

[56] The third affidavit produced by Ms Williams pursuant to the leave granted by the judge on 3 September 2009, ostensibly for the purpose of rebutting the affidavit evidence adduced on behalf of the appellants, did not, it seems to me, alter the basic structure of the case against the appellants, or impair their responses in any way. Thus Ms Williams continued to maintain, without any

reference to Mr Fuller's detailed responses, that "after MEIL began its operation as Omni's sub agent, Omni's account no. 2141 experienced a large injection of funds" (para. 9) and that this was a "direct result of the co-mingling of funds between Omni and MEIL" (para. 11). Similarly, despite the appellants' insistence, supported by accounting data and audited financial statements, that the money transfer business generated only modest levels of commission earnings, Ms Williams nevertheless reiterated, again without reference to the evidence which she purported to be rebutting, that "the Claimant reasonably believes that Omni did derive benefits from and generated millions in commissions as a result of its sub agency with MEIL, which was charged with Money Laundering Offences in January 2009". And finally, as regards the alleged access of Fultec to the city council's drivers' licence information, it appears to me that Mrs Fuller's description of Ms Williams' continued assertion that Mr Fuller facilitated an illegal relationship between Omni, Fultec and MEIL as "an unreasonable and unsubstantiated 'hunch'" was fully justified.

[57] On the basis of all of the foregoing, it is my view that the appellants by their detailed responses had done more than enough to meet the case put forward by FIU through Ms Williams, whose affidavits to a very large extent amounted to no more than broad, sweeping assertions, devoid of any substantiating detail whatsoever. One particularly egregious example of this was the bald assertion in her first affidavit that Omni "has exceeded exorbitantly, in the millions, the commissions that a company of this nature would normally make" (para. 6),

without any indication of the source of her information as to what a company "of this nature" might be expected to earn "normally".

Conclusion

[58] Towards the end of his judgment (para. 29), Legall J restated the substance of Ms Williams' allegations against the appellants, without any specific reference to the appellants' responses, and stated that he was of the view "that there is circumstantial evidence…for the court to hold, on a balance of probability, that there is reasonable cause to believe that moneys in the accounts at the banks are tainted". In my view, given all the evidence that was before him and for all the reasons that I have attempted to state, the learned judge could only have come to this conclusion by having regard to irrelevant considerations and by failing to give adequate consideration to the evidence put forward on behalf of the appellants, thus justifying this court's interference with the manner in which he chose to exercise his discretion. It is for these reasons that I concurred with by brothers in allowing this appeal, with costs to the appellants, to be agreed or taxed.

[59] Before leaving this matter, I would like to say a word about the fact that it was thought necessary to make the application for the restraining order against

the appellants without notice in this case. While it is true that section 39(2) specifically sanctions the making of such an application ex parte, the reason for proceeding in this manner will usually be that it is feared that if the defendant is given any intimation of the intention to seek a freezing order, he will take immediate steps to pre-empt or frustrate the order by dissipation of his assets or their removal from the reach of the court. However, the decision of the Privy Council in ***National Commercial Bank Jamaica Ltd v Olint Corp. Ltd*** [2009] 1 WLR 1405 provides a timely reminder that, in the words of Lord Hoffmann (at para. [13], "*audi alterem partem* is a salutary and important principle…a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act". In the instant case, by the time the application for the restraining order came to be filed (5 August 2009), the appellants' bank accounts had already been frozen by directives issued by the FIU, pursuant to its powers under section 11(1)(d) of the 2008 Act, so it seems to me that there was no danger or risk in either FIU deciding or the judge requiring (as section 42 specifically empowers her to do) that notice of the application should be given to the appellants. It may well be that if this had been done in this case, considerable savings of expense and time to all concerned might have been achieved.

Postscript

[60] Mottley P and Carey JA have asked me to state that they have read the foregoing reasons for the decision of the court in the instant case, and that they are in entire agreement with them and wish to add nothing.

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MORRISON JA