

The Challenges of Investigating and Prosecuting Money-Laundering – The Way Forward for Fiji

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Money-laundering procedures and prosecutions have not been easy to introduce to the law enforcement world. This is because prosecutors and investigators were trained to believe that their jobs ended with convictions and sentences. It was always thought that the criminal justice system is really about crime and punishment. The idea of removing financial gain from criminal behaviour, and enforcing that idea through the courts as part of the criminal trial is a new one. Yet it makes good sense. What is the sense in sentencing a fraudster to 3 years imprisonment, if on his immediate release, he will have a million dollars of the proceeds of crime to play with? Of course, legislation and the deprivation of the proceeds of crime will never take away all the fruits of crime, as we learn from the film “Wall Street”. Yet by removing financial profit from offending, the law goes a long way to create a deterrent value in the criminal justice system.

The Law

The Proceeds of Crime Act 1997 was the first substantive law to create a regime of restraining orders over tainted property. Perhaps the most important part of this Act is the interpretation section, followed by the definition section. This because the scope of the substantive sections in the Act, is limited to the definition of the terms used. Thus, an account is defined as “any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for a fixed term deposit or a safety deposit box”.

Proceeds of crime are “proceeds of a serious offence or any property that is derived or realised directly or indirectly by any person from acts or omissions that occurred outside Fiji and would, if the acts or omissions had occurred in Fiji, have constituted a serious offence”.

A property-tracking document is defined as a document relevant to “identifying, locating or quantifying the property of a person who

committed the offence” or “identifying or locating any document necessary for the transfer of property of a person who committed the offence” or a document relevant to “identifying, locating, or quantifying tainted property in relation to the offence” or “identifying, locating, or quantifying any document necessary for the transfer of tainted property in relation to the offence”.

“Tainted property” is “property used in or in connection with the commission of the offence” or “proceeds of the offence”.

“Realisable property” is defined under section 4(3) of the Act as “any property held by a person who has been convicted of or charged with, a serious offence” and “any property held by any other person to whom the person so convicted or charged has directly or indirectly made a gift caught by this Act”.

Every investigator and prosecutor working in this area of the law must be very familiar with the definition and interpretation sections of the Act. Part 11 of the Act creates Forfeiture Orders, and Confiscation Orders. Section 5(1) of the Act provides that the DPP may apply for either once a person is convicted of a criminal offence and on proving that property is tainted property or benefits derived from the commission of the offence.

How does the court conclude that property is tainted? Section 11(2) provides that the court may draw inferences when the evidence establishes that the property was in the person’s possession at the time of or immediately after the commission of the offence and that the property was used in, or in connection with the commission of the offence. The court may also draw such inferences where the evidence establishes that property which was found in the person’s possession or under his or her control during investigations and the property was derived obtained or realised as a result of the offence for which the person was convicted. The court can also draw such an inference when the evidence establishes that the value of all ascertainable property of the person convicted exceeds the value of all ascertainable property before the commission of the offence, and the court is satisfied that the income was not to lawful activities.

This is an important section for investigators. How many police officers and FICAC investigators compare the bank balances of accused persons before and after the offending? How many, in a caution interview ask about the sources of income and about how income was derived to (for instance) buy a house or a boat? A real challenge for all investigators of fraud and corruption, is to start asking where money came from, and what connection there might be to the offending.

A recent decision in the Lautoka High Court illustrates how forfeiture orders are made. The procedure in DPP v Anand Kumar Prasad and

Others Civil Action HBM 03 of 2010 was a civil procedure under section 19C 19D and 19E of the Proceeds of Crime Amendment Act No 7 of 2004. That procedure was chosen because it did not require proof of a conviction as section 11 does. The facts of the case are interesting. There is a well-known resort in the Yasawas called "Turtle Island". The directors of the company which owns the resort are Mr. Richard Evanson and Ms Milika Cokotiono. A criminal investigation was conducted into the affairs of this resort in relation to employees of the resort. The affidavit of Inspector Aiyaz Ali, the investigating officer and an investigator of the Anti- Money Laundering and Proceeds of Crime Unit which was filed in support of the DPP's application, stated that he discovered that 84 company cheques had been forged and paid into the bank accounts of several defendants. One employee, who earned only \$345 fortnightly, was able to deposit the sum of \$481,134.47 into two bank accounts during the time he was employed at Turtle Island. The DPP alleged that one of the defendants four vehicles for cash although his weekly income was only \$170. He transferred one of the vehicles to his mother. Another defendant, a mechanic at the resort owned a business which had a bank account. Deposits from some of the forged cheques were deposited into his company account. Some cheques were paid into his personal account. A vehicle was bought from some of this money. Another defendant, a Prime Banker at ANZ Nadi was alleged to have facilitated bogus transfers from the Resort account to the employees' accounts, accepted money from one of the defendants with which she bought a car. She was his sister. The court found that the defendant was not an interested third party and that the court was unable to conclude that she did not know of the illegal transaction passing through her brother's bank account at the ANZ. The court concluded that she knew that the property was tainted. The court also considered whether a piece of land bought by the first defendant was tainted property. The evidence was that the defendant was not in the country at the time of the transfer, yet it purportedly was signed by him in front of his solicitor! The court found the land to be tainted property. The court then made forfeiture orders for the vehicles, the balance of cash in a bank account (less than \$10000) and the land, The court also ordered the sale of the vehicles for fair market value and the proceeds of sale to be deposited in the Consolidated Fund as proceeds of crime. Although that was a case of civil forfeiture which did not require proof of a conviction, the court was clearly prepared to make fairly sweeping orders to ensure the defendants did not benefit from proceeds of crime.

Section 11 is in relation to forfeiture after conviction. Unless the order is made after the property has already been restrained prior to trial, it

would be a case of closing the door after the horse has bolted. The test under section 11 is whether “the court is satisfied that the property is tainted property or terrorist property”. The test is whether the property was used in or in connection with the commission of the offence or whether the property was derived obtained or realised as a result of the commission of the offence. Section 11(4) provides that the court may have regard the rights or interests of third parties in the property, the gravity of the offence, any hardship caused by the order, or to the use that is ordinarily made of the property. In Epeli Duve v The State and Others 2005 HAM 023/05, the court held that once tainted property is found in the possession of an offender, the property is deemed to be proceeds of crime unless the defendant proves otherwise on a balance of probabilities. In that case the defendants alleged that they had used their own means to buy the property, but the court rejected that explanation on the ground that they had given some other explanation in their caution interviews.

Section 13 is specifically about third parties. A third party may apply to the court for an order. The court must consider whether the applicant has an interest in the property, whether the applicant was involved in the commission of the offence, and the applicant acquired the interest either before the offence was committed or acquired the interest bona fide and for fair value and did not know or could not know that the property was tainted.

Civil forfeiture orders have several advantages. They may be made without a conviction, they may be made ex parte, they are made on “reasonable grounds”, they may be made in relation to property outside of Fiji, and the court can make orders for the sale of property. This last power is very helpful when the property is perishable or will deteriorate with time, such as vehicles and boats.

The test under section 19E is whether the DPP has satisfied the court on a balance of probabilities that the property is tainted, and where a person claims an interest in the property, he or she must satisfy the court that the interest was not acquired as a result of a serious offence committed by the person, and that the property was acquired after the offence was committed for fair value and that he or she did not know and could not reasonably have known that the property was tainted. And, of course, this section was used in the Turtle Island case with success.

A power which has never been used in our courts, is the power to make a Pecuniary Penalty Order under section 20 of the Proceeds of Crime Act. The Order requires proof of a conviction, and of evidence that the person has benefitted from the offence. The court may then order payment into

court of an amount of the total value, or less of the benefits from the offence.

Section 21 lays down rules for assessing benefit which transfer the burden of proving that property held at the time of the offending, was not proceeds of crime, to the defendant.

Restraining Orders are provided for under section 34 of the Act. The test is – Are there reasonable grounds to suspect that any property is property in respect of which a forfeiture order may be made under sections 11 or 19?

If so the DPP may apply to restrain any realisable property, and may make the application ex parte and supported by an affidavit setting out the following:

- 1. A description of the property.*
- 2. The location of the property.*
- 3. The grounds for the belief that the property is tainted.*

What are the orders the court can make?

- 1. An order prohibiting the defendant from disposing of or dealing with the property*
- 2. An order that the Attorney-General take custody of the property and deal with it in accordance with the directions of the court.*
- 3. The order can be made in respect of property in Fiji or elsewhere (Section 35(1)(C))*
- 4. A Restraining Order may be made subject to conditions including provision for meeting the person's reasonable living expenses, or reasonable expenses in defending a criminal charge and any proceedings under the Act.*
- 5. Restraining Orders can also be made subject to an order that provision may be made for the payment of a specified debt.*
- 6 The court may make a restraining order whether or not there are reasonable grounds for believing that there is an immediate risk of the property being disposed of.*

An application for variation of a restraining order to pay legal expenses was made in Makario Anisimai v State (2004) HAM0014/04S. In that case the applicant asked for payments to be made to him to allow him to find a lawyer, from a frozen bank account. The application was refused on the ground that the applicant had failed to give evidence of his income from his various businesses, including balance sheets and statements of account.

Additionally, the court can make ancillary orders, which allow for;

- 1. Varying of the property to which the restraining order relates.*
- 2. Varying any condition of the restraining order.*
- 3. Ordering the examination on oath of any witness about the affairs of the defendant.*

4. *Providing for the carrying out of any undertaking for damages or costs in relation to the making of the restraining order.*
5. *Directing the owner or the defendant to give a specified person a statement on oath setting out particulars or dealings with the property.*
6. *Regulating what the Attorney-General may do with the property.*
7. *Granting an application by a person who has interest in the property for variation of the order excluding the person's interest from the order.*

Contravention of a restraining order is an offence under the Act, and a restraining order remains in force if made on the basis that a charge is proposed, 48 hours after the period given to charge the person, and if made on the basis of a charge, until the person is acquitted or unless the charge is withdrawn. In any event, under section 44(2) a restraining order ceases to be in force at the end of 6 months after the day it was made unless the court has extended the time.

Division 3 of the Act deals with Production and Inspection Orders made when a police officer has reasonable grounds for suspecting that a person has possession or control of a property-tracking document. Applications are made ex parte and accompanied by an affidavit. The affidavit must set out the grounds for such belief, that is, that the person who is believed to have committed the offence, derived a benefit directly or indirectly, from the commission of the offence, and that the property is subject to the effective control of the person who has control of the document. The judge can make the following orders;

1. *Order the person to produce to a police officer at a specified time and place, any specified documents,*
2. *Order the person to make available for inspection any such documents.*

The police then have wide powers under section 51 to inspect the documents. To take copies of it, or to retain the document as long as it is reasonably necessary.

Also interesting is a monitoring order, directing a financial institution to give information to the DPP. The definition of the term "financial institution" is as it is under the Financial Transactions Reporting Act 2004, and it includes, not just banks but also lawyers' trust accounts and real estate agencies.

Offences of money-laundering are set out in sections 69 and 70 of the Proceeds of Crime Act. Section 69(3) provides that a person is taken to be engaged in money-laundering if;

1. *The person engages directly or indirectly in a transaction that involves money or other property that is proceeds of crime;*

2. *The person receives, possesses, conceals, uses, disposes of or brings into Fiji, any money or property that are proceeds of crime;*
3. *The person converts or transfers money or other property derived directly or indirectly from a serious offence or a foreign serious offence with the aim of concealing or disguising the illicit origin of the property;*
4. *The person disguises the true nature of money or property derived directly or indirectly from a serious offence or a foreign serious offence;*
5. *The person assists a person who falls into any of these categories;*

And the person knows or ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

It is not necessary for the prosecution to prove that a serious offence, or a foreign serious offence was in fact committed.

Section 70 creates an offence of possessing, concealing, disposing of, or importing money or property reasonably suspected of being proceeds of crime.

The first conviction under section 69 was in the case of State v Timothy Aaron O'Keefe HAA 20/06 in which Winter J imposed a sentence of 5 years imprisonment. The maximum possible is 20. The Court of Appeal however reduced the sentence to 3 ½ years, on the basis that it exceeded the sentence imposed for the "substantive" offence of obtaining by false pretences. Since money laundering is clearly intended to be a stand alone offence for which proof of the commission of a substantive offence is unnecessary, it appears that the Court did not consider the legislative intent of the section 69 offences.

Section 72 of the Act provides that the standard of proof (other than for the money-laundering offences) is proof on a balance of probabilities.

Closely related to the Proceeds of Crime Act, is the Mutual Assistance in Criminal Matters Act 1997, the Extradition Act, and of course the Financial Transactions Reporting Act 2004.

Challenges in Enforcement

So complicated are some of these provisions that it would be too much to expect lawyers and investigators to be familiar with these provisions without specialist training. Prosecutors who do not have a working knowledge of the various sections in these

Acts, cannot hope to explain them to the judges they appear before. Judges are not as unintelligent as many lawyers think they are and they will make the necessary orders that they should provided counsel has led them to the drinking trough. Knowledge of the law in relation to proceeds of crime and money-laundering is the first challenge.

The second is an inability to have affidavits and draft orders in order. The affidavit material must reflect the grounds on which the orders can be made. If the material lacks grounds, the orders cannot be made.

The third major challenge is an attitudinal one. It is not only in fraud cases that there are proceeds of crime. They may emerge in the evidence in a murder trail, or a corruption investigation. However, few investigators pursue a line of questioning which might allow the DPP to make the necessary applications. Let me give you an example.

“Q-It is alleged that you accepted a gift of \$6000 from N.K Singh Construction Ltd. Is it true?

A-Yes its true.

Q- Why did you accept this money?

A- It was just a gift between friends.

Q- Was it for the granting of a Crown lease?

A- No.

Q- What did you do with this money?

A. I used it.

Q. Do you wish to read you interview notes?

A-No.

Q- Do you want to say anything else?

A-No.”

Where did the money go? Was there a bank account? Did he spend the money on wine women or song, or on vehicles and computers which are proceeds of crime? Suspects are not always asked, and there are no investigations into the proceeds of crime. Investigators need to start thinking differently about the way they conduct their investigations. In a recent workshop

for lawyers and investigators the resource person said that the most important thing was to follow the money. He was right. In a case of receiving stolen property, the money must be traced from the stolen goods to bank accounts, to solicitors' trust accounts, to shady dealings with real estate agents to the movement of money to overseas bank accounts. In a murder case where the motive was pecuniary, the profit must be removed from the crime. This will require an attitudinal change in the way investigations and prosecutions are conducted.

A fourth challenge is being able to enforce orders abroad. Beautiful as Fiji is, much of the profits from all types of commercial activities are channelled abroad to interest paying bank accounts, casinos, real estate and "charitable" organisations. Being able to use Interpol to gather information and to enforce orders through the foreign processes is important. Often however, it falls into the too hard basket.

Finally, the Civil Forfeiture Order procedure which requires no proof of a conviction or charge is under-used. If we wait for investigations to be complete and for charges to be imminent before we apply for a restraining order, the chances of the money disappearing are high. This is because the defendant has had ample notice of the investigations. The Civil Forfeiture procedure has a low threshold for proof, and is a useful quick procedure that the DPP's Office should use more often.

Conclusion-the way forward

The challenges facing the law enforcement institutions in regard to money-laundering have only partially been met by the passing of good laws. The challenges can only truly be met with continuous training, exposure to other jurisdictions with more regular use of the provisions of the law in relation to money-laundering, and better teamwork between the relevant agencies. The Financial Intelligence Unit with its resident police officers and its efficient link with Egmont countries is a good start. It shows Fiji's willingness to investigate and prosecute money-laundering. However the paucity of prosecutions suggests one of

two things-that there are no money-launderers in Fiji, or that the law is not being effectively enforced. If I were to list the greatest challenge of the four I have listed, it is that we lack widespread and effective expertise in enforcing the laws. To this end, more such conferences, and more participation at workshops and conferences by officers from the FIU, the police Force, from FICAC and FIRCA would do a great deal to develop local expertise.

It is suspected that millions of dollars are laundered yearly. It would be shameful if Fiji and the Pacific were to create a black hole for laundered money to disappear into without a trace, simply because we lack expertise or the will to enforce our laws.