

- provision for the appointment of a director of the Financial Intelligence Unit. A director was appointed in the person of Marilyn Williams who has sworn to several affidavits in this matter.
2. The first and second defendants are companies duly incorporated under the laws of Belize. The third defendant is managing director of the first defendant and director of the second defendant. The companies operate and have registered offices in Belize.
 3. On the 10th July, 2009 all the defendants were charged for the criminal offence of Money Laundering, contrary to section 3 of the Money Laundering Prevention Act, Chapter 104 of the Laws of Belize. The first defendant has a sub-agent, a registered company named Money Exchange International Ltd. – MEIL. Employees of MEIL and MEIL were also charged for the offence of money laundering. At this point in time, the criminal charges against all the accused have not yet been heard and determined by the court.
 4. Section 2 of the Money Laundering and Terrorism (Prevention) Act 2008, No. 18 of 2008 (the Act) defines the word “accused” as including a person charged with, or being investigated for, a serious crime. Money laundering is included in the definition of serious crime, as stipulated in the said section 2 of the Act. Section 39 (1) and (2) of the Act authorize the applicant to apply *ex parte* to the Supreme Court for a restraining order against any property held by an accused or person charged with a serious crime, which includes money laundering.

5. The general allegation against the defendants is that the second defendant, with the knowledge and agreement of the other defendants, provided identification information contained in drivers licences, which the said defendant obtained from the Belize City Council (Traffic Department) computers, to MEIL who used that information with the knowledge and agreement of the defendants to facilitate money laundering through MoneyGram International, a company situate in the U.S.A.
6. Acting in pursuance of the said section 39 of the Act, the applicant on 5th August, 2009 made an ex parte application to the Supreme Court for a restraining order against the defendants, jointly and severally, to restrain them from disposing of, or in anyway dealing with numbered accounts in the names of the defendants, or any of them, in Alliance Bank of Belize, Scotia Bank (Belize) Limited, First Caribbean International Bank and Belize Bank Ltd. On 6th August, 2008, Arana J granted the ex parte restraining order against the defendants prohibiting them from disposing of, or otherwise dealing with, bank deposits in the accounts in their names at the banks mentioned above.
7. An application was made on 20th August, 2009 by the defendants to discharge the ex parte order, or alternatively to vary the order to permit the defendants to access the funds in the said accounts to provide for living expenses, business expenses and attorney fees. On 27th August, 2009, Hafiz-Bertram J, made a consent order permitting the second defendant to access specified accounts, previously frozen by the order of 6th August, 2009, to meet living, business, and legal expenses and

to open bank accounts in a bank of its choice in Belize and to deposit funds therein to meet living, business and legal expenses.

8. Under section 48(1) of the Act, the applicant may apply to the Supreme Court that made a restraining order “for an extension of the period of the operation of the order.” Subsection (2) states that where an application is made under subsection (1) “the court may extend the operation of a restraining order for a specified period if it is satisfied that a forfeiture order may be made in respect of the property.”

9. By an application dated 27th August, 2009, the applicant applied to the court to extend the restraining order granted on 6th August, 2009. In support of the application, the applicant relies on circumstantial evidence. The applicant has submitted that when all the circumstances of the case are considered, the court ought to come to the conclusion that there are reasonable grounds for believing that the property of the defendants – the moneys in the aforesaid bank accounts – are tainted due to the offence of money laundering, or because the defendants derived benefit from the commission of the said offence. The basis for this submission is section 40 (1) (b) of the Act, the relevant parts of which state:

“40. (1) Subject to this section, where the Director of Public Prosecutions or the Financial Intelligence Unit applies to the Court for a restraining order against property and the Court is satisfied that –

(a)

- (b) where the accused has not been convicted of a serious crime, there is 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;

The court may make an order –

- (i) prohibiting the defendant or any person from disposing of, or otherwise dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order;”

10. Section 2 of the Act defines tainted property:

“Tainted property” means (i) property intended for use in or used in or in connection with the commission of a serious crime; or (ii) proceeds of crime.”

11. **Circumstantial Evidence**

It is therefore imperative that the court examines the circumstances of this case, to determine first of all if the property is tainted and secondly, if it is satisfied that a forfeiture order may be made with respect to the property restrained. The court is authorized by section 49(1) of the Act, to make a forfeiture order in relation to the property, where the person concerned with the property is convicted of a serious crime, such as money laundering.

12. The applicant submits that the below mentioned circumstances are enough to satisfy the requirements of sections 40(1)(b) and 48(2) above. The circumstances, according to the applicant, are:

- (1) All of the defendants and MEIL and employees of MEIL have been charged for the offence of Money Laundering.
- (2) All the defendants and MEIL have a connected business relationship. The third defendant is managing director and director of the first and second defendants respectively, and MEIL is a sub-agent of the first defendant.
- (3) The business relationship is money transfer services. The third defendant applied on behalf of the first defendant to Central Bank of Belize, for permission for the first defendant to operate as a money transfer service with MoneyGram International, a company with offices situate in the U.S.A. The permission was granted by letters dated 15th and 28th February, 2007 to the first defendant to operate the money transfer service.
- (4) On 21st November, 2007, the first defendant entered into a written agreement called the International Money Transfer Sub-representative Agreement with MEIL in which a person named Micheal Coye held an

administrative position. Micheal Coye is one of the employees of MEIL charged for money laundering.

- (5) By letter dated 7th November, 2007, the Central Bank of Belize granted approval for MEIL to operate as sub-agent for Omni Networks Ltd., the first defendant.
- (6) The third defendant admitted that MEIL was sub-agent of the first defendant by virtue of the said agreement mentioned at 4 above.
- (7) The first defendant had administrative obligations with respect to MEIL. The first defendant had to submit on a weekly basis to Central Bank of Belize copies of all completed foreign exchanges application forms for each money transfer transaction, which must bear the signature of the agent or sub-agent who conducted the transaction. The first defendant had the duty to ensure that the forms are completed while the customer is present.
- (8) The first defendant also had the duty to submit to the Central Bank of Belize on a weekly basis the following information in relation to each foreign exchange transfer into Belize –
 - (a) Name and address of sender and recipient.

- (b) Country of origin of transfer.
 - (c) Date and amount of transfer
 - (d) The type of transfer.
- (9) The first defendant had to comply with operating guidelines for the money transfer business and therefore imposed operating conditions upon its sub-agent MEIL.
- (10) There was therefore an administrative and business relationship between the first defendant, the third defendant, and MEIL, in relation to the money transfer business.
- (11) There was also a banking and financial relationship between the first defendant, the third defendant and MEIL in which there was, according to the applicant, an intermingling of funds between the agent and sub-agent. The first defendant, bank account No. 2141 at Alliance Bank was used for all MoneyGram International payments to MEIL.
- (12) When MEIL was appointed sub-agent for the first defendant in November, 2007, the said account No. 2141 had, according to the applicant, only \$2.00 in the account. After MEIL was appointed sub-agent, the deposits in the said account, according to the applicant, jumped to over \$3,000,000 in December, 2008. The deposits in the said account for the period September to

December, 2008, generally exceeded withdrawals, leaving a balance at December, 2008 of \$3,687.708. The increase of the funds in account No. 2141 shows, according to the applicant, a “co-mingling” of funds between agent and sub-agent and a financial and banking relationship between the two. The applicant relies on bank statements tendered and marked M.W. 4 and M.W. 5 to show increases in the accounts.

- (13) The first defendant had another account No. 698-1-10-5066481 at Belize Bank Limited. This account also showed large increases in deposits after MEIL was appointed its sub-agent in November, 2007. From a balance of \$996,588.08 in 2006, it increased its deposits to over \$8,347.721 in 2007 and to over \$6,000,000 in deposits to the account in 2008. Applicant relies on bank statement tendered and marked M.W. 7 to prove the increase of the deposits.

- (14) After officers of MEIL were charged with the offence of Money Laundering in January, 2009, deposits decreased in account No. 2141 at Alliance Bank to \$83,923. The first defendant account No. 695-1-10-5066481 at Belize Bank, after the charge for money laundering, also shows a reduced balance of \$4,970 as at 23rd February, 2009 from \$6,025.419 as at 31st December, 2008. The applicant relies on bank statements tendered and marked M.W. 4 and 7 to prove the reduction in the accounts.

- (15) The second defendant Fultec, through its director, the third defendant, entered into a contract with the Belize City Council Traffic Department on 12th February, 2005 to provide the City Council with computer equipment. The contract, according to the claimant, was for Fultec to provide the City Council Traffic Department with computer software, called ID works, to enable the production of drivers licences in Belize City. The traffic department had a traffic data base with information of licence holders in Belize City. This information in the data base is stored in the ID works supplied to the City Council by Fultec. MEIL, according to the claimant, used this information as a source of identification for the purpose of money laundering.
- (16) The contract between Fultec and the Belize City Council (Traffic Department) provided that all repairs and maintenance of the computer equipment were restricted to the Fultec personnel; and therefore, according to the submission, Fultec had access to drivers licence information stored in the Belize City Council (Traffic Department) data base.
- (17) A search of MEIL's premises on 31st December, 2008, by security forces, a document was found at the premises of MEIL which contained some of the identical ID works

characteristics of the data base that was supplied to the City Council Traffic department by Fultec. Copies of this document was tendered and marked M.W. 10. The document in MEIL's premises, came, according to the applicant, from the second defendant Fultec.

13. The circumstances above are the submissions of the applicant inviting the court to find that Fultec, the No. 2 defendant, supplied information concerning particulars of identity of drivers licences stored in the computer of the traffic department of the Belize City Council to MEIL; who used the stolen information, with the knowledge and approval of the No. 1 and 3 defendants for the unlawful transfer of moneys, through MoneyGram International, for money laundering purposes. Therefore there is reasonable cause to believe that the moneys generated are tainted in relation to the offence of money laundering. Moreover, says the applicant, the above circumstances are enough to satisfy the court that a forfeiture order may be made. Therefore, according to the applicant, the restraining order should be extended or continued.

Evidence in Defence

14. The defendant Fuller in his first affidavit seems to understand the allegation of the applicant. He swore in paragraph 55 of his first affidavit as follows:

“55. The Claimant alleges at paragraphs 9 to 11 of Mrs. Williams affidavit that

as a director of FULTEC and OMNI I had access to and supplied the Belize City Council Traffic Department's Licence Database to MEIL, thereby enabling MEIL, to obtain legitimate identity information to facilitate money laundering through MoneyGram."

15. The third defendant, on behalf of the defendants, admitted some of the circumstances numbered above and denied others. He admitted as follows: –

- (1) That he was managing director of OMNI the first defendant and director of Fultec, the second defendant.
- (2) That MEIL is sub-agent of OMNI.
- (3) That OMNI was master agent for Money Gram International in the U.S.A.
- (4) That OMNI operated banking business at Alliance Bank account No. 2141.
- (5) That moneys were paid into OMNI's account No. 2141 at Alliance Bank by MoneyGram International in the U.S.A. for MEIL, and OMNI would pay moneys to

MEIL from the said account No. 2141. OMNI was a conduit for payment of the money to MEIL.

- (6) That officers of MEIL have been charged for the offence of money laundering. The defendants were also charged with the same offence.
- (7) That OMNI operated bank account No. 698-1-10-5066481 at Belize Bank.
- (8) That Fultec had a contract with the Belize City Council (Traffic Department) concerning the supply of computer equipment.
- (9) MEIL had to submit to OMNI on a weekly basis, send and receive money transaction forms.
- (10) OMNI provided operational conditions for MEIL so that OMNI could ensure MEIL complies with money transfer regulations.
- (11) As managing director of OMNI, the third defendant deals with the day to day administration of OMNI.
- (12) That the third defendant was a signatory to the contract between the Belize City Council (Traffic Department) and Fultec.

16. The defendants deny that OMNI generated millions of dollars in commission from its relationship with MEIL. The defendant Fuller states that a substantial portion of the amounts in account 2141 at Alliance Bank and account No. 695-1-10-5066481 at Belize Bank came about by the purchase and sale of e-pins or phone cards, a business in which OMNI was engaged.
17. The defendant Fuller swore that OMNI had machines and terminals for the sale of e-pins or phone cards in almost every gas station or store in Belize. He swore that it was the business of selling the e-pins or phone cards that resulted substantially in millions of dollars in account No. 2141 at Alliance Bank, and that OMNI, contrary to allegations of the applicant, did not generate millions of dollars in commission from any relationship with MEIL. The millions of dollars in account No. 2141 at Alliance Bank, according to the defendants, came about largely because of the sale of e-pins and only a small amount of \$21,799.20 in that account for the period November to December 2007, represented transactions done by MEIL. The defendant gave the procedure for wire transfer of funds using MoneyGram as follows:

- “(1) 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 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.”

18. OMNI, according to the defendant Fuller, acts as a conduit for paying out moneys to MEIL in relation to the money transfer business. He further swore that OMNI had no beneficial interest in moneys paid to it by MoneyGram for onward payment to MEIL. What is of concern, however, is why MEIL did not have a separate account in which MoneyGram International could wire the amount owing to MEIL, instead of having OMNI operate as a “conduit” for paying the money to MEIL. There is nothing in the agreement making MEIL the sub-agent of OMNI, that prevents MEIL from operating a separate bank account for the purpose of receiving payments from MoneyGram International.

19. The defendant Fuller also states that the amount in OMNI account at Belize Bank Account No. 695-1-10-506648 in the amount of \$8,347,721.91 in 2007 was not the result of money generated solely

from MoneyGram. The defendant Fuller swore that for the period November, 2007 to March, 2009 when OMNI acted as master agent for MoneyGram, OMNI suffered net losses of \$31,577 for the period ended 31st December, 2007 and \$28,562 for the period ended 30th June, 2008. OMNI did not earn, according to the defendant, millions in commissions from MEIL.

20. In relation to the allegation that Fultec supplied information in relation to particulars of drivers licences, derived from the Belize City Council Traffic Department data base, to MEIL, the defendant Fuller denies, this, claiming that the allegation is scandalous. Fultec, according to defendant Fuller, provided the Belize City Council with computer equipment to produce identification cards, and did not have access to the City Council data base. Fultec, says the defendant, did not have access to Belize City Council Traffic Department drivers licence information.

21. The defendants therefore submitted that the claimant misunderstood the source of the funds in the accounts; misunderstood the relationship between the defendants and MEIL; and came to the erroneous conclusion, not supported by any evidence, that Fultec supplied drivers licence information to MEIL. Moreover, say the defendants, there is absolutely no evidence supplied by the claimant that the moneys in the accounts are tainted due to money laundering. In addition, say the defendants, there is absolutely no evidence that Fultec supplied drivers licence information to MEIL. The defendants therefore submitted that sections 40(1)(b) and 48(2) of the Act were

not satisfied; and therefore the restraining order should be discharged and not extended.

Findings

22. There can be no doubt that there was a business, financial and banking relationship among the defendants and MEIL. I believe that exhibit M.W. 10 which is a document headed, "I.D.W. Belize Drivers licence" with information concerning drivers licence, was found at the premises of MEIL after a security raid. I have no doubt that moneys payable to MEIL in relation to its money transfer business with MoneyGram International were deposited in OMNI, the first defendant's account, rather than a separate MEIL account.

23. Moreover, I believe the third defendant in December, 2006, applied for a licence for the first defendant to operate a money transfer service with MoneyGram International. The first defendant was granted permission for MEIL to operate as its sub-agent for the money transfer business. I believe the third defendant signed a contract with the Belize City Council for Fultec to provide computer services and equipment. Clause 9.3 of the contract states that Fultec shall provide repairs and maintenance service to the equipment; and the repairs and maintenance service are to be carried out by Fultec employees only. I believe the third defendant had control and held management positions in the first and second defendants, and that the first defendant was involved in the banking operations of MEIL. I believe there was a financial, business and banking relationship between the defendants and MEIL.

24. Another circumstance of this case, which I believe, is the many accounts each defendant has in different banks in Belize. The first defendant has nine accounts distributed among five different banks. The second defendant has eleven accounts in four different banks, and the third defendant has four accounts in three different banks. The three defendants together have a total of twenty-four different numbered accounts in five different banks. The question naturally arises: Why so many accounts in different banks?
25. I find that exhibit M.W. 10 was found at MEIL's office, and that MEIL did not have a separate account of its own to receive payments from MoneyGram; but had to go through OMNI account No. 2141 at Alliance Bank. Another question arises: Why was exhibit M.W. 10 at MEIL's offices, and why MEIL did not have a separate account for the MoneyGram payments?
26. It is for the court, in the exercise of its criminal jurisdiction, to decide whether the defendants are innocent or guilty of money laundering. That is not my function in these civil proceedings. My function is to examine the evidence and arguments on both sides and make a decision as to whether there is reasonable cause to believe that the funds in the accounts mentioned in the application for the restraining order are tainted in relation to the offence for which the defendants were charged and whether the court may make a forfeiture order with respect to the funds in the accounts.

27. I have not had the benefit of any authority interpreting section 40(1) (b); but it seems to me, that the belief need not rise to the standard of proof in criminal trial – proof beyond a reasonable doubt – but the civil standard of proof – on a balance of probabilities. So the applicant has to establish firstly, on a balance of probability, that there is reasonable cause to believe that the property or money in the accounts are tainted, as defined in section 2 of the Act, because of money laundering; and secondly, that a forfeiture order may be made in respect of the money or property. Is there reasonable cause to believe, on a balance of probability, on the basis of all the evidence, that the No. 2 defendant with the knowledge and agreement of the other defendants, supplied Belize City Council (Traffic Department) licence information to MEIL, thereby enabling MEIL to obtain legitimate identity information to facilitate money laundering through MoneyGram International?
28. Money laundering is not an offence like some other offences where direct eye witness testimony of the event is often available. It is one of those offences where proof is often, though not always, arrived at by logic, inferences and deduction from the facts and circumstances of the case. This should be borne in mind when deciding, on a balance of probability, whether the property is tainted as defined in the Act.
29. Considering the number of accounts in the name of the defendants in different banks; the presence of exhibit M.W. 10 at MEIL's office; the fact that MEIL had no separate account in which its payments from MoneyGram could be deposited; the access to City Council

Traffic Department computers which housed drivers licence information; the business and financial connection between the defendants and MEIL; the increase in funds in the defendants accounts after MEIL was incorporated; the reduction in funds in the accounts after MEIL and some of its officers were charged for money laundering; as shown by exhibit M.W. 4 and 7; the fact that all the defendants and MEIL were charged for money laundering; the fact that only Fultec employees had access for repairing purposes to the traffic department computers containing drivers licence information, and considering the denials and submissions of the defendants, and all the evidence in this case, I am of the view that there is circumstantial evidence in this case 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; and that a forfeiture order may be made in respect of them in the event of conviction in the criminal trial.

Non-disclosure

30. The defendants submitted that, in the ex parte application for the restraining order, there were material non-disclosures to the court by Mrs. Williams; and had the full facts been disclosed to the court, the court would not have granted the ex parte application for the restraining order. The defendants further submitted, supported by impressive authorities, that where “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.” This is, without doubt, the general principle, which the courts have followed

for more than one hundred and fifty years, in dealing with applications to discharge injunctions on the ground of material non-disclosure.

31. The defendants alleged several material non-disclosures. The defendants said that Mrs. Williams misled the court in saying that OMNI generated millions of dollars in commission, as a result of its relationship with MEIL in 2007. In fact what Mrs. Williams said was that she reasonably believed that as a result of its relationship with MEIL, OMNI generated millions in commission, and she gave reasons for her belief. Her reasons were that with the commencement of MEIL's money transfer business, OMNI's account at Belize Bank showed an increase of deposits from \$996,588.08 in 2006 to \$8,347,721.91 in 2007. Mrs. Williams presented an exhibit M.W. 7 which shows the increase in deposits.
32. The defendants say that the millions were generated by the sale of e-pins or phone cards. What Mrs. Williams is saying is that she believed, based on exhibit M.W. 7 that the millions came about because of its relationship with MEIL. I do not see non-disclosure here. It is a question of whom the court believes and whether the reasons could lead to that belief.
33. The defendants say that Mrs. Williams since April or May 2009 knew that OMNI had \$3,075,530 in its account for MEIL and she sent a letter dated 9th June, 2009 to numbers one and three defendants not to release any moneys in the Alliance account to MEIL. Yet she did not disclose this to the court. But this letter, which is exhibit D.F. 5,

does not mention MEIL specifically nor any amount of money. The letter states:

“June 9, 2009

Dear Mr. Bradley.

Re: Omni Networks Limited

In response to your correspondence dated June 5, 2009, the FIU instructs that no monies being held at Alliance Bank Limited or any other bank for that matter be turned over in any way, shape or form to the Attorney for Melonie Coye, to Melonie Coye herself, any of the other individuals charged, any agent acting for any of the accused including, but not limited to, their attorneys, friends, relatives and/or anyone for that matter. To do so would constitute an offence under the **Money Laundering and Terrorism (Prevention) Act, 2008.**

The FIU urges Mr. Fuller and/or any person in the employment of Omni networks Limited to notify us of any suspicious action being taken or attempting to be taken in relation to the above-mentioned monies being held.

Sincerely yours,

Marilyn Williams (Mrs.)
Director

34. The letter is dated 9th June, 2009, and it does not specifically mention the sub-agent MEIL, but requests OMNI to give the applicant certain information. Moreover, I see no evidence to support the submission

that Mrs. Williams knew that OMNI had \$3,075.530. in its account for MEIL.

35. It is further submitted that paragraph 7 of Mrs. Williams affidavit implies that millions of dollars “were spirited away” immediately after MEIL office was raided and officers charged, and there was no bank statement exhibited or disclosed to substantiate paragraph 7. In fact paragraph 7 states that the 2006 report on the accounts of the No. 1 and No. 3 defendants in Belize Bank reflects an amount of \$996,588 for the whole year. Paragraph 7 continues: “in 2007 that amount sky rocketed to \$8,347,721.91 and \$6,025,419.17 in 2008. As at February 23, 2009 the amount in that account is only \$4,970.00 as the bulk appears to have been moved after the officers of MEIL were raided on 31st December, 2008 and subsequently charged with money laundering.” Mrs. Williams did tender a bank statement exhibited in her affidavit dated 17th September, 2009 as exhibit M.W. 7 which shows the said upward and downward movements of cash in the account at Belize Bank.

36. The defendants state that Mrs. Williams failed to disclose that account No. 2141 at Atlantic Bank was a mere conduit for payments from MoneyGram to sub-agents in Belize; though there was information, submitted to Central Bank, that this was so. I cannot say this is a material non-disclosure when the mere conduit for payments allegation is denied by the claimant. Alternatively, there is no evidence that Mrs. Williams knew of the documents at Central Bank and did not disclose them. As head of the applicant, it is argued that

she should have known about these documents at Central Bank. I will consider this argument below.

37. Mrs. Williams in her affidavit swore that officials of Central Bank of Belize confirmed to her that OMNI was responsible and vicariously liable for its sub-agent. The defendants therefore submitted that there was no disclosure of the names of the officials who said that OMNI was vicariously liable and responsible for its sub-agent. This is a non-disclosure.
38. The defendant submitted that Mrs. Williams is guilty of material non-disclosure when she alleged that the No. 3 defendant provided the Belize City Council Traffic Department data base to M.E.I.L. and presented no document to substantiate these allegations. The applicant is relying on exhibit M.W. 10 and the circumstantial evidence mentioned above to support the allegations.
39. It was also submitted that there was a failure to disclose evidence to show that the funds in the accounts are tainted. I have held above that there is enough circumstantial evidence to satisfy section 40(1) (b) of the Act.
40. It was also submitted that Mrs. Williams failed to disclose Certificate of Deposit No. 4604053 at Scotia Bank, established from an account at Belize Unit Trust Corporation which account had in excess of \$120,000 in July, 2007, before MEIL came into existence; and therefore the moneys could not have been tainted or connected to

any relationship with MEIL. The defendants submitted that if Mrs. Williams had exercised “due diligence” she would have realized that the funds were with the Corporation since July, 2007 and therefore could not be tainted. There is no evidence that Mrs. Williams knew the funds were with the Corporation since July, 2007. In relation to the argument that she should have known about this matter, I will consider this argument below.

Legal Authorities

41. It is well established from the authorities that an applicant for an injunction or restraining order must make proper inquiries before making the application for an injunction or restraining order. The reason for this is obvious. An applicant for an injunction must be able to satisfy the court of the full facts of the application, and he could not do this if he has not made proper inquiries. Moreover, the court, in an *ex parte* application and other applications, has a right to know the full facts of the allegation before exercising its coercive power. It could not properly do this, if the allegations have not been properly investigated, or if proper inquiries are not made. The duty of disclosure, it must be remembered, applies not only to material facts known to the applicant, but also to any additional facts, which he should have known, if he had made proper inquiries.

42. There are numerous authorities which establish the above principles; but I think the authority which captures admirably the principles is *Memory Corporation PLC v. Sidhu* 2000 1 W.L.R. 1443, at p 1453, *per Walker LJ* –

“The compelling duty on a litigant to make full and frank disclosure on a without notice application (and especially on a without notice application for relief which freezes the defendant’s assets, invades his privacy and threatens his reputation) is not in dispute. The principle goes back to *Castelli v. Cook (1849) 7 Hare 89, 94* and to the well known case of *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess [1917] K.B. 486, 509*, in which Warrington L.J. said:

“It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.”

43. Bingham J in *Siporex Trade S.A. v. Comdel Ltd. 1986 2 Lloyds Rep. 428, at p. 437* concurred:

“Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and

the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established.”

44. In *Rex v. Kensington Income Tax Commissioners 1917 1 KB. 501 at p 509* the above principles are supported:

“It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.”

“It is perfectly well settled that a person who makes an *ex parte* application to the Court – that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be

deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”

With unassailable logic, Scrutton LJ in *Kensington* above, at p 514 agreed –

“And it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure. One of the commonest cases is an *ex parte* injunction obtained either in the Chancery of the King’s Bench Division. I find in **1849 Wigram V.-C** in the case of *Castelli v. Cook* (1) stating the rule in this way: “A plaintiff applying *ex parte* comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go.”

45. But the law has insisted, that in spite of the general principles above, the court has a discretion to continue the injunction or grant a new one, although there has been material non-disclosure. In *Bank Mellat v. Nikpour 1985 F.S.R. 87 at page 90*, Lord Denning M.R. says that “it is not every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded.” In *Brink’s Mat Ltd. v. Ellombe 1981 1 W.L.R. 1350; at p 1357* the court said:

“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 well 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. 1343H – 1344A.*”: see *1988 1 W.L.R. 1337*

46. Slade LJ in *Brink’s Mat* above at page 1361, having paid homage to the general principle of non-disclosure, suggested that notwithstanding non-disclosure the court in the exercise of its discretion could continue the injunction. In *Arena Corporation Ltd. v.*

Schroeder 2003 EWHC1089 Deputy Judge Allan Boyce, quoting *Balcombe LJ in Brinks Mat* above at page 1358 said:

“The rule that an *ex parte* injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained: see *Rex v. Kensington Income Tax Commissioners. Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 509*. But it also serves as a deterrent to ensure that persons who make *ex parte* applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty.

Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original *ex parte* injunction was obtained: I make two comments on the exercise of this discretion. (1) Whilst, having regard to the purpose of the rule, the discretion is one to be exercised sparingly. (2) I agree with the views of Dillon L.J. in the *Lloyds Bowmaker case, at p. 1349C-D*, that if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction.”

The “should have known” argument

47. It is clear that the general principle of material non-disclosure applies to what was known by the applicant for the injunction or restraining

order and what the applicant should have known if he had made diligent enquires. “The duty,” says Gibson LJ in *Brinks Mat* above at page 1356, “of disclosure applies not only to material facts known to the applicant but also to any additional facts which he should have known if he had made such enquiries.” He continued at page 1357:

“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.”

48. In *Director of the Serious Fraud Office v. A* [2007] EWCA Crim. 1927, the Court of Appeal quashed an order made by a judge that discharged a restraint order on the ground of non-disclosure. Lord Justice Hughes speaking for the Court of Appeal said:

“If there has been a material failure of disclosure, that may justify discharging the order, but it need not do so whether the non-disclosure was deliberate or accidental will be a material factor, although not necessarily determinative.”

49. In *Brinks Mat* above at page 1359 Slade LJ seems to suggest a practical issue, which perhaps should be considered in *ex parte* applications:

“By their very nature, *ex parte* applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one.”

50. Some of the allegations made by the defendants of material non-disclosure by the applicant are based on what Mrs. Williams should have known. I think the court, in the exercise of its discretion, should be inclined to treat material non-disclosures known by the applicant more strongly than an applicant who should have known after due inquiries. If the applicant knew the material facts and did not disclose them, the discretion generally ought to be exercised against the applicant by discharging the injunction. But if the applicant did not know of the material fact, but ought to have known, or with due diligence ought or would have known; or if the non-disclosure was innocent or accidental and not deliberate, I think the court in such a case, as the authorities above seem to suggest, should consider these matters in the exercise of its discretion whether or not to discharge the injunction or the restraining order. But it depends on the circumstances of the case, and the nature of the material non-disclosure.
51. Although there have been instances of non-disclosures some of which were based on what the claimant should have known, I think, under the circumstances of this case, and on the authorities, the court should

exercise its discretion and refuse the application to discharge the restraining order on the ground of material non-disclosure.

Varying the order: living and business expenses

52. It is submitted on behalf of the defendants, that in the event the court refuses to discharge the restraining order, then the order should be varied to enable the defendant to pay for living and business expenses. The Act contains provision which empowers the court to make orders concerning living, business and legal expenses. As shown above, section 40(1) of the Act empowers the court to make a restraining order if satisfied of certain matters specified therein. Subsection 2 of section 40 continues:

“(2) An order under subsection (1) may be made subject to such conditions as the Court thinks fit and, without limiting the generality of this subsection, may make provision for meeting out of the property or a specified part of the property, any or all of the following:

- (a) the person’s reasonable living expenses
(including the reasonable living expenses of the person’s dependants. If any) and reasonable business expenses.

- (b) the person’s reasonable expenses in defending the criminal charge and any proceedings under this Part;

53. But sections 47 (1), (4) and (5) state:

“47.(1) A person who has an interest in property in respect of which a restraining order was made may, at any time, apply to the Court for an order under subsection (4).

(4) On an application under subsection (1), the court may revoke or vary the order or make the order subject to such conditions as the Court thinks fit. For the purposes of this subsection the Court may –

- (a)
- (b) vary the order to permit the payment of reasonable living expenses of the applicant, including his dependants, if any, and reasonable legal or business expenses of the applicant.

(5) An order under subsection (4) may only be made if the court is satisfied that -

- (a) the applicant is the lawful owner of the property or is entitled to lawful possession thereof and appears to be innocent of any complicity in the commission of a serious crime or of any collusion in relation to such offence; and
- (b) the property will no longer be required for the purpose of any investigation or as evidence in any proceedings.”

54. It seems to me that under section 40 the court is authorized, having heard the applicant and defendant, and having decided to make a restraining order, to make provision for meeting out of the restrained property, provision for living, business and legal expenses in relation to the person whose property is to be restrained. Section 47, it seems to me, would apply when a restraining order had already been made under section 40; and subsequently a third person who has some interest in the property restrained and who may have some family or other relationship to the person whose property was restrained, and would like to vary the restraining order to permit the payment to him of living, business and legal expenses. Such a third person, would have to satisfy section 47(5) before the court could vary the original restraining order.
55. Sections 40(2) and 47(5) of the Act would be contradictory if they are referring to the same person applying for relief. Under section 40(2) there is no general restriction on the power of the court to make orders for living, business and legal expenses; but under section 47(5) such orders can only be made if matters specified therein are satisfied. Parliament could not have intended that the defendant under section 40(2) would be eligible for relief without satisfying the matters under section 47(5); but the said defendant would have to satisfy section 47(5) before being eligible for relief. I am therefore of the view that, in this case, I can make an order under section 40(2) to make provision for living and business expenses of the defendants.

56. There is evidence that sums were already allocated for legal expenses. The defendants claim living expenses in the amount of \$8,098.00 per month. Receipts were submitted as exhibits D.F. 13 in support of the amount claimed for living expenses. The second defendant applies for the sum of \$400,000 per month to meet business expenses. There is evidence in the affidavit of Diane Fuller that the business requires a cash flow monthly of about \$422,000; and that the business of the company is the purchase and sale of computers. But details of how this amount was arrived at were not given in evidence. The applicant had consented to a variation of the order of 6th August, 2009 to allow the said second defendant to open a bank account of its choice in Belize for the purpose of carrying on its business. I agree that there is merit in the application for a variation of the restraining order to provide for living expenses and to allow the second defendant to open a bank account of its choice in Belize.

Additional Accounts

57. The applicant by application dated 20th August, 2009 applied to include fifteen additional numbered accounts at several banks in the restraining order granted on 6th August, 2009. The accounts and the banks are:

“Scotia Bank

Account No. 4604044 (Fultec Systems Limited)

Account No. 4604271 (Fultec Systems Limited)

Account No. 4604270 (Fultec Systems Limited)

Account No. 8734558 (Dean Fuller)

Account No. 6000015 (Fultec Systems Limited)

Account No. 4604043 (Dean Fuller)

Account No. 4604283 (Dean Fuller)

Account No. 8702868 (Fultec Systems Limited)

Account No. 8733934 (Fultec Systems Limited)

MasterCard Account Number: 5123 5750 1000 7518

(Dean Fuller)

Xcape The Ultimate Massage Aromatherapy Center

#6000050 (Diana and Dean Fuller)

Alliance Bank

Certificate of Deposit Account #40557 (OMNI

Networks Limited)

Belize Bank

Account No. 680-1-1-1724 (Fultec Systems Limited)

Account No. 680-3-10-3000 6094-02 (Dean Fuller)

Account No. 695-1-1-66481 (OMNI Networks Limited)”

58. I have considered the affidavits of Dean Fuller and Diane Fuller both dated 1st September, 2009 with respect to the application to include the new accounts mentioned above in the restraining order. I have decided to exclude account No. 4604283 and account No. 8734558 at Scotia Bank from the restraining order. I believe that the funds therein belong to the mother of the third defendant. The other new accounts will be included in the restraining order.

CONCLUSION

59. There is circumstantial evidence from which there is reasonable cause to believe, on a balance of probability, that the accounts in the banks are tainted in relation to the offence of money laundering, and that a forfeited order may be made in respect of the moneys in the accounts, if there is a conviction in the criminal charges.

60. In spite of some non-disclosures, the court exercises its discretion and declines to discharge the restraining order. The court grants the application of the applicant dated 26th August, 2009 to include in the restraining order dated 6th August, 2009, new accounts in Scotia Bank, Alliance Bank and Belize Bank mentioned in the said application; except accounts number 8734558 and 4604283, accounts with funds belonging to the mother of the third defendant.

61. I therefore make the following orders:
 1. It is ordered that the restraining order made in this matter by Madam Justice Arana on 6th August, 2009 is extended until the hearing and determination of the criminal charge against the defendants.

 2. It is ordered that the following accounts are included in the said restraining order made on 6th August, 2009 by Madam Arana:
Scotia Bank
Account No. 4604044 (Fultec Systems Limited)

Account No. 4604271 (Fultec Systems Limited)
Account No. 4604270 (Fultec Systems Limited)
Account No. 6000015 (Fultec Systems Limited)
Account No. 4604043 (Dean Fuller)
Account No. 8702868 (Fultec Systems Limited)
Account No. 8733934 (Fultec Systems Limited)
MasterCard Account Number: 5123 5750 1000 7518
(Dean Fuller)
Xcape The Ultimate Massage Aromatherapy Center
#6000050 (Diana and Dean Fuller)

Alliance Bank

Certificate of Deposit Account #40557 (OMNI
Networks Limited)

Belize Bank

Account No. 680-1-1-1724 (Fultec Systems Limited)
Account No. 680-3-10-3000 6094-02 (Dean Fuller)
Account No. 695-1-1-66481 (OMNI Networks Limited)

3. It is ordered that the third defendant Dean Fuller shall have access to the frozen account No. 2141 at Alliance Bank, and the bank shall allow such access, to make withdrawals to meet living expenses in the sum of \$8,098.00 each and every month commencing from 1st December, 2009 until the hearing and determination of the criminal charge against the defendants.
4. It is ordered that the second defendant, Fultec, shall be at

liberty to open a bank account with any bank of its choice in Belize and shall use and have access to that account.

5. Costs to the applicant to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
17th November, 2009

