

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 0781 of 2019

COMMISSIONER OF POLICE

CLAIMANT

AND

**FIRST CARIBBEAN INTERNATIONAL
BANK (BARBADOS) LTD.**

DEFENDANT

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 18 June 2019

Appearances: Ms. Olivia Davis in association with Mr. Alliston Seale for the Claimant.

DECISION

INTRODUCTION

[1] Two issues are considered in this decision. These are (i) who may apply to the Court for a production order for the purposes of the *Mutual Assistance in Criminal Matters Act, Cap. 140A* (“MACMA”); and (ii) what is the proper procedure for initiating an application for such an order.

[2] The issues arise in this way. On 6 June 2019, the Claimant, the Commissioner of Police, (“the Commissioner”) filed a fixed date claim form (“FDCF”), a Notice of Application, an affidavit and a Certificate of Urgency in the

Supreme Court Registry. The title to these documents states that the proceedings are between the Commissioner, as Claimant, and First Caribbean International Bank (Barbados) Limited (“the Bank”), as Defendant. The affidavit is sworn by Sonia Thompson, Acting Inspector No. 588 of the Royal Barbados Police Force.

- [3] The FDCF is in the form provided for by *Part 8.1(5)* of the *Supreme Court (Civil Procedure) Rules, 2008 (“CPR”)*. That rule is referred to in the heading of the FDCF which commences in this way:

The Claimant, TYRONE GRIFFITH, Commissioner of Police of Police Headquarters, Roebuck Street, Bridgetown St. Michael, claims against the Defendant, FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD. of The Michael Mansoor Building, Warrens, St. Michael.

- [4] The FDCF goes on to state that the Commissioner applies to the Court for an order that the Bank “produce and make accessible for inspection to [Acting Inspector Thompson]” certain items in relation to an identified individual (“X”).
- [5] The Notice of Application is headed “APPLICATION FOR ORDERS DURING OR AFTER COURT PROCEEDINGS”. It then bears the inscriptions “**Form 10**” and “(Rule 11.4(4))”. The document commences with a statement that the Commissioner applies to the Court for an order and goes

on to specify the order sought in identical terms to what is contained in the FDCF.

- [6] Nothing in the body of the FDCF or the Notice of Application indicates the statutory provision or other authority pursuant to which the claim or the application is made, or that the application relates to a request by a Foreign State for assistance under *MACMA*. However, in the heading of the Affidavit and on the backing sheets of all the documents, the following appears:

IN THE MATTER of a Without Notice Application by the Director, Office of International Affairs Criminal Division, Department of Justice United States of America for **Mutual Legal [sic] Assistance in Criminal Matters Act, Chapter 140A.**

AND IN THE MATTER OF the Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-23

AND IN THE MATTER OF AN APPLICATION for a Production Order under **Section 42** of **The [sic] Proceeds of Crime Act, Chapter 143** of the Laws of Barbados, against **First Caribbean INTERNATIONAL BANK (BARBADOS) LIMITED** in respect of the financial affairs of [X] and [Y].

- [7] Nothing on the record suggests that the Bank has been served with the proceedings. When the matter came on before me, Ms. Olivia Davis who appeared for the Commissioner indicated that it was an *ex parte* application pursuant to *section 42* of the *Proceeds of Crime Act, Cap. 143* (“*POCA*”). She stated that the application was being made to support a request by the

United States Department of Justice for assistance in a criminal matter in the United States of America.

THE STATUTORY PROVISIONS

[8] *MACMA* provides a legal framework for mutual assistance in criminal matters between Barbados and countries within and outside the Commonwealth. Insofar as is relevant, *section 31A* of *MACMA* provides:

31A. Without prejudice to any other provision of this Act, the following provisions of the *Proceeds of Crime Act*, shall apply *mutatis mutandis*, in respect of a serious offence under this Act:

(a) sections 42 to 46 (production and inspection orders);

[9] *Section 42* of *POCA* is in these terms:

42. (1) Where

(a) a person has been convicted of a scheduled offence and a police officer has reasonable grounds for suspecting that a person has possession or control of

(i) a document relevant to identifying, locating or quantifying property of the person who committed the offence or to identifying or locating a document necessary for the transfer of property of the person who committed the offence,

(ii) a document relevant to identifying, locating or quantifying tainted property in relation to the offence or to identifying or locating a document necessary for the transfer of tainted property in relation to the offence, or

(b) a police officer has reasonable grounds for suspecting that a person has committed a scheduled offence and that a person has possession or control of any document referred to in paragraph (a),

the police officer may apply to a Judge in Chambers in accordance with subsection (2) for an order under subsection (5) against the person suspected of having possession or control of a document of the kind referred to in paragraph (a) or against the person referred to in paragraph (b).

(2) An application under subsection (1) shall be made *ex parte* and shall be in writing and be accompanied by an affidavit.

(3) Where a police officer applies for an order under subsection (5) in respect of a scheduled offence and includes in the affidavit a statement to the effect that the officer has reasonable grounds to believe that

(a) the person who was convicted of the offence or who is believed to have committed the offence, derived a benefit directly or indirectly from the commission of the offence; and

(b) property specified in the affidavit is subject to the effective control of the person referred to in paragraph (a),

the Judge may treat any document relevant to identifying, locating or quantifying that property as a document in respect of which an order may be issued under subsection (5).

(4) ...

(5) Where an application is made under subsection (1) for an order against a person, the Judge may, subject to subsections (6) and (7) make an order requiring the person to

- (a) produce to a police officer any documents of the kind referred to in subsection (1) that are in the person's possession or control; or
- (b) make available to a police officer for inspection, any documents of the kind referred to in subsection (1) that are in the person's possession or control.

....

[10] *Sections 43, 44 and 46* of *POCA* deal with the scope of police powers under a production order; the evidential value of any information obtained; and the consequences of a failure to comply by the person ordered to make production. *Section 45* allows a person who by order is required to produce a document, to apply for a variation of the order.

THE AFFIDAVIT

[11] I shall confine my comments on the affidavit to what is salient for present purposes. At paragraphs 1 and 2, Acting Inspector Thompson deposed that she is attached to the Financial Crimes Investigations Unit of the Royal Barbados Police Force; and that the affidavit is “in Support of an Application for Mutual Legal Assistance by the United States of America Department of Justice ...”. In the penultimate paragraph, she asks “that this Honourable Court grant this Application herein”. She makes no claim in the affidavit to being the applicant.

[12] At paragraphs 5 to 9, the Acting Inspector deposed as to her knowledge and information in relation to criminal charges brought in the USA against X, and alleged activity by X in respect of two accounts held at the Bank. She goes on to state at paragraphs 10 to 12:

- 10) As a result of the aforementioned information there are reasonable grounds for believing that [X] derived a benefit from the commission of the offence ...”
- 11) Further that the bank accounts held at the [Bank] are subject to the effective control of [X].
- 12) It is therefore reasonably believed that the said funds have passed through these these *[sic]* accounts

[13] There is no assertion in the affidavit that the Commissioner possesses the knowledge and information to which Acting Inspector Thompson deposed or that he has reasonable grounds for suspecting anything in relation to the matter.

SUBMISSIONS AND DISCUSSION

[14] It is against that background that I raised the issues with Counsel as to (i) whether the Commissioner was competent to bring an application pursuant to *section 42* of *POCA*; and (ii) whether the FDCF and Notice of Application were effective for making an application pursuant to that provision. The Court also expressed concerns as to whether the proceedings before it were *ex parte*

or *inter partes*, given the presence of the Bank's name, as Defendant, in the title to the proceedings.

[15] Ms. Davis submitted that there is an *ex parte* application before the Court. She defended the filing of the FDCF and the Notice of Application. She submitted that the application was made by way of the Notice of Application but that it was necessary to file the FDCF since the Commissioner had filed the application on a certificate of urgency. She urged further that an application for a production order was properly before the Court; and that the Commissioner could make the application.

[16] Counsel's submission as to the Commissioner's competence was not underpinned by any reference to *section 42* of *POCA*. She referred generally to the various roles of the Attorney General, the Director of Public Prosecutions and the Commissioner in the respect of requests under *MACMA*. In that context, she considered the Commissioner to be the appropriate person to make an application for a production order.

[17] *Section 42* of *POCA* allows for no such approach. That provision does not automatically include or exclude the Commissioner or any other police officer as an applicant. However, it is clear from *section 42(1)* that the application must be made by a police officer who has reasonable grounds for suspecting

that at least one of the situations or events particularised in that sub-section exists or has occurred.

[18] Fuller explication may be required. *Section 42(1)(a)* of *POCA* provides that where a person is convicted of a scheduled offence “and a police officer has reasonable grounds for suspecting” that the person has possession or control of a document of the type specified in *section 42(1)(a)(i)* or *(ii)*, “the police officer may apply to a Judge in Chambers for an order under subsection (5)”. Similarly, *section 42(1)(b)* provides that where “a police officer has reasonable grounds for suspecting” that a person has committed a scheduled offence and has possession or control of any document referred to in *section 42(1)(a)(i)* or *(ii)*, “the police officer” may apply for an order under *subsection (5)*. It is evident from these provisions that the application must be made by the same officer who has reasonable grounds for the required suspicion.

[19] The above opinion relates to *section 42* of *POCA* as it stands. However, *Section 31A* of *MACMA* provides that without prejudice to any other provision of *MACMA*, *section 42* of *POCA* shall apply “mutatis mutandis” in respect of a “serious offence” under *MACMA*. The words “without prejudice to” in *section 31A* of *MACMA* indicate that if there is a conflict between anything in *MACMA* and *section 42* of *POCA*, *MACMA* must prevail. In respect of the term “mutatis mutandis”, Venkataramiah J provided the

following useful explanation in *Ashok Service Centre & anor. v State of*

Orissa 1983 AIR 394:

Earl Jowitt's 'The Dictionary of English Law (1959)' defines 'mutatis mutandis' as 'with the necessary changes in points of detail'. Black's Law Dictionary (Revised 4th Edn. 1968) defines 'mutatis mutandis' as 'with the necessary changes in point of detail, meaning that matters or things are generally the same, but to be altered when necessary as to names, offices, and the like. Houseman v. Waterhouse, 191 App. Div. 850, 112 N.Y.S 249, 251.' In Bouvier's Law Dictionary (3rd Revision, Vol. II), the expression 'mutatis mutandis' is defined as '(T)he necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like. Extension of an 'earlier Act mutatis mutandis to a later Act brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the thing changed, subject of course to express provisions made in the later Act.

[20] Therefore, the Court must consider whether there is anything in *MACMA* which alters the position it articulated above as to who may bring an application under *section 42* of *POCA*. The Court has no unbridled authority to re-write that provision. It can only imply change if (i) adaptation is necessary under the “mutatis mutandis” mandate or (ii) some provision in *MACMA* requires it.

[21] I have seen nothing in *MACMA* which dictates a departure from the preliminary view I took in respect of *section 42* of *POCA*; neither is any

modification to it required to make the provision fit for the purposes of *MACMA*.

[22] The position remains therefore as set out at paragraphs [17] and [18] above. The application must be made by a police officer who has reasonable grounds for suspecting that at least one of the required positions or events stipulated in *section 42* of *POCA* exists or has occurred, as the case may be. That is the qualifying factor that renders a person competent to apply for a production order. There is no evidence that the Commissioner meets that requirement. It follows that he is not competent to make the application.

[23] Effectively, that disposes of the matter. However, I will briefly address the issue of the procedure adopted by the Commissioner. The Court does not agree with Counsel that the Commissioner was required to file a FDCF since he filed a Certificate of Urgency. Assuming without so deciding that the *CPR* apply, there is nothing in them to support that contention.

[24] Furthermore, the Court does not accept that a FDCF or an application in the form of *Form 10* of the *CPR* are proper documents for making an application under *section 42* of *POCA*. Additionally, it is wrong to name a person as a defendant in the title to the application or to style it as a “Notice of Application”. The reasons for these statements follow.

[25] The requisite procedure for an order under *section 42* of *POCA* is set out in *subsection (2)* of that provision. It mandates that the application be (i) made *ex parte* (ii) be in writing; and (iii) be accompanied by an affidavit. No particular form of application has been prescribed. However, the application does not fall within the types of applications that the *CPR* allow to be brought by a *FDCF* or a *Form 10*.

[26] *CPR 8.1(4)* and *(5)* regulate the use of claim forms. Those provisions read:

(4) A claim form must be in Form 1, with or without variation, except in the circumstances set out in sub-rule (5).

(5) Form 2 (fixed date claim form) must be used

(a) in proceedings for possession of land;

(b) in claims arising out of hire-purchase or credit sale agreements;

(c) whenever its use is required by a rule or practice direction; and

(d) where by any enactment proceedings are required to be commenced by originating summons or motion.

[27] *CPR 8.1(5)* is not applicable. Therefore, a *FDCF* cannot be the correct mode of bringing the application.

[28] The use of *Form 10* is regulated by *CPR 11.4(4)*. *CPR 11.1* provides that *Part 11* deals with “interlocutory applications” for court orders. It specifies those to be “applications made before, during or after court proceedings.” An

application for a production order pursuant to *section 42* of *POCA* cannot be so categorised. The statutory provision does not contemplate any related proceedings other than an application under *section 45* by the person ordered to make production to have the order varied.

[29] *CPR 11.4(4)* must be viewed in the context of the rules that precede it. *CPR 11.4(1)* stipulates a general rule that an applicant must give notice of an application to each respondent. *CPR 11.4(2)* sets out circumstances in which an applicant may make an application without giving notice. *CPR 11.4(4)* then provides that “[n]otice of the application must be included in the form used to make the application (Form 10)”. Notice is not required if an application is *ex parte*. None of this is to suggest that *CPR 11* applies.

[30] This brings me fully to the naming of the Bank as a defendant on the documents. *Section 42* of *POCA* creates no cause of action against the person from whom production is being sought. Hence, there is no basis for commencing proceedings against that person as a defendant. Where a person is named on the application as a defendant, a Court can legitimately inquire about service since on the face of the documents filed, the proceedings appear to be *inter partes*.

[31] Undoubtedly, therefore, the procedure adopted by the Commissioner is wrong. However, given that the Commissioner is not competent to make the

application, it is unnecessary for the Court to determine whether the matter ought to proceed despite those defects.

DISPOSAL

[32] The Commissioner has not demonstrated that he is a proper person to make the application for the production order. For that reason, the matter must be dismissed.

OLSON DeC. ALLEYNE

JUDGE OF THE HIGH COURT