

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0084 of 2018
[High Court Civil Action No. HBC 147 of 2017]

BETWEEN : ABINESH AJEET SINGH
Appellant

AND : THE DIRECTOR OF PUBLIC PROSECUTIONS
1st Respondent

AND : WESTPAC BANKING CORPORATION
2nd Respondent

AND : SUNFLOWER AVIATION LIMITED
3rd Respondent

Coram : Basnayake, JA
Lecamwasam, JA
Guneratne, JA

Counsel : Mr. J. Sharma for the Appellant
Mr. D. Jack for the 1st Respondent
Ms. M. Fong for the 2nd Respondent
Mr. A. K. Narayan for the 3rd Respondent

Date of Hearing: 02 May 2022

Date of Judgment: 27 May 2022

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Lecamwasam, JA.

Lecamwasam, JA

- [2] This appeal relates to a civil forfeiture Order sought by the Director of Public Prosecutions (DPP) in regard to a sum of \$320,304.16 currently held in Account No. 9803553503 of the Westpac Banking Corporation. The said account is in the name of the Appellant. The DPP filed summons pursuant to Sections 19C, 19D, and 19E of the Proceeds of Crime Act No.7 of 2004 which summons was supported by the affidavits of Timothy Joyce and by Josua Cakausesse to which the Respondent, i.e. the Appellant before this court, filed an affidavit in opposition.
- [3] The Learned High Court judge having heard the case, granted the reliefs in terms of the Plaintiff's application (Sunflower Aviation Ltd, the 3rd Respondent in this case). The instant appeal is against the above order of the Learned High Court Judge dated 27th July 2018 on the following grounds of appeal:

GROUNDS OF APPEAL

1. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding and/or granting Order in Terms of the First Respondent's Originating Summons dated 19th July, 2017.*
2. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in failing to properly consider or consider at all, the requirements of Section 3, 4 and 19E of the Proceeds of Crime Act (as amended).*
3. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in failing to consider Articles 27 & 33 of the Constitution of the Republic of Fiji.*

4. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in making the findings he did at paragraph 24 of his Ruling without there being any unequivocal evidence to support such finding.*
5. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at para 8 – page 2 of the Ruling) “The Defendant argues that he only took money that was due to him on account of his services as a sub-contractor of the Plaintiff”.*
6. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at para 18 – page 3 of the Ruling) “In his case, I am satisfied on the balance of probabilities that the property in question is tainted property” without giving any or any proper reasons for such finding.*
7. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at para 25 – page 4 of the Ruling) “it is fairly probable that the Defendant was in fact a subcontractor of the Plaintiff” and then holding at paragraph 25 in his Ruling – it is not my duty to point out in this case to make a finding as to whether or not the Defendant was an employee or was a subcontractor of the Plaintiff.*
8. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at paragraph 25 – page 4 of the Ruling) “it is fairly probable that the Defendant was in fact a subcontractor of the Plaintiff” and then holding that “all monies that the defendant received into his account was tainted property”.*
9. *THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at para 26 & 27 – page 4 of the Ruling) “all monies that the Defendant received into his account was tainted property. His probable entitlement to a part of it based on the probability that he was a subcontractor, is irrelevant” and at paragraph 24 in his Ruling – whether the Defendant was*

engaged as an employed or as a subcontractor, he would have to be paid for his services by the Plaintiff.

10. THAT the Learned Justice Anare Tuilevuka erred in law and in fact in failing to properly and/or judiciously exercise his discretion in ordering forfeiture to the State of funds belonging to the Appellant.

11. THAT the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding that "all the monies that the Defendant received in his account was tainted property" and ordering all the monies to be forfeited to the State.

12. THE Appellant/Original Plaintiff reserves the right to include or amend the grounds of appeal appearing hereinabove on the receipt of the records of the proceedings before the Learned Judge of the High Court.

13. Such further and other orders as this Honorable Court may deem just.

[4] The factual background as narrated by the Appellant is that, the Appellant was engaged in a private jet ground handling business from 2004 to 2006. He was required to cease his business which was styled International Ground Handling Services (IGHS) due to his inability to meet the new regulatory requirement for Ground Handling Service Provider License (GHSPL) that had been put in place by the Civil Aviation Authority of Fiji (CAAF). The Appellant's inability to comply related especially to the lack of equipment and facilities including hangars on the airside.

[5] The Appellant asserts that he was then employed by the former owner of Sunflower Aviation Limited, the Original Interested Party (the 3rd Respondent in this case) Mr. Don Collingwood as it did not have a ground handling division. Although the 3rd respondent had the requisite facilities to operate ground handling services it did not have the customers or expertise to run the lucrative business. The opportunity for the Appellant to engage had arisen due to his extensive experience in the non-scheduled private and commercial aircraft ground handling industry and contacts. Prior to the appellant joining

it, the 3rd Respondent was neither involved in nor was it carrying out ground handling services for non-scheduled corporate private flights to Fiji.

- [6] Having joined the 3rd Respondent in 2013, The Appellant had left the company in August 2015. The 3rd Respondent in its affidavit states that the appellant was employed by Sunflower Aviation Ltd (interested party) as Manager Ground Handling and Manager Security. The appellant counters this position on the basis that he was an independent contractor under the 3rd Respondent and not subject to any supervision or control. However, despite the lack of agreement as to the nature of the contractual relationship between the appellant and the 3rd Respondent, the appellant worked for the 3rd Respondent in the capacity of Manager Ground Handling and Security until August 2015.
- [7] During this period, the 3rd Respondent alleged that the appellant forwarded his personal invoices to clients of Sunflower Aviation Ltd for whom ground handling services were provided by using the email address of Sunflower Aviation Ltd. and requesting for monies to be deposited into his personal bank account. He had been given a separate mobile phone, the number of which was listed on the invoices that he had prepared for clients requesting for monies to be deposited into his personal bank account.
- [8] The 3rd Respondent alleges that the appellant had stolen a total of F\$520,898.76 from Sunflower Aviation Ltd and some part of the money is held in his personal bank account at Westpac Bank, which resulted in the 3rd Respondent making a complaint to the DPP to this effect. After investigations, having been satisfied that a sum of \$320,304.16 lying in the Westpac Bank account is tainted property, the DPP moved for civil forfeiture of the said amount by originating summons pursuant to Section 19C, 19D and 19E of the Proceeds of Crime Act.
- [9] The Appellant argued that the money he collected was fees that was due to him on account of his services as a sub-contractor of the 3rd Respondent. In support of this assertion, at paragraph 54 of his affidavit, the Appellant attempted to demonstrate that his account hold funds received from different persons and entities for his services as an

independent contractor. He further asserts that, out of the funds in the bank a sum of F\$265,962.34 was from such other persons and entities while his dues from the 3rd Respondent was a mere \$112,890.46. Even if this assertion is to be treated as fact, despite the nature of the contractual relationship between the parties, it only demonstrates that the Appellant had devoted more time to his private clients than to the 3rd Respondent.

- [10] It is pertinent at this point to draw attention to the grounds handling contract, which states under clause 2.1- contract fee:

“The Licensee shall pay the contractor a fee of 18% net of all expenses or costs relating to the handling of each aircraft. The fee shall only be payable upon receipt of the funds into the company’s bank account.”

This clause signifies that Sunflower Aviation Ltd did not intend any other person except the company to charge fees for or on behalf of the company. Any payments due to contractors would only be paid after the company receives its fees. Although the **“GROUND HANDLING CONTRACT”** was not signed by the Appellant, and notwithstanding the issue of whether it is binding on the Appellant or not, the above clause reflects the intention of the 3rd Respondent, Sunflower Aviation Ltd, which was to have all fees due to it credited into the company’s bank account and to no other person.

- [11] The appellant in his written submissions at 4.18 has expressed his surprise regarding the amount to be forfeited stated in the originating summons in the following terms: *“There is no explanation how the DPP arrived at this figure. It appears that the figure was plucked out of thin air.”*

- [12] At first glance, the disparity between the amount mentioned by the DPP in its originating summons which is a sum of \$320,304.16 and the amount given at paragraph 26 of the 3rd Respondent’s affidavit, which is \$520,898.76, is stark. However, a careful reading of paragraph 26 of the affidavit will dispel any doubt in this regard. It states that *“the appellant has stolen from Sunflower Aviation Ltd and some of the money is kept in his*

personal bank account...." The assertion is that only some of the stolen money is kept in his personal bank account and not all the money he had allegedly stolen from Sunflower Aviation Limited. The Westpac Bank statements further confirm the veracity of this assertion as those reflect an amount identical to the amount contained in the originating summons.

- [13] The 3rd Respondent argues that the nature of the contractual relationship between it and the Appellant is irrelevant, as the Appellant was not granted any legal authority to direct Sunflower Aviation's clients to pay monies directly in to his personal bank account. In the absence of cogent evidence to prove or even suggest otherwise, a reasonable suspicion of mala fides on the part of the Appellant is unavoidable when he requested the clients of the 3rd Respondent to pay fees into his personal account.
- [14] In light of the above reasoning, there is no evidence to suggest that the DPP had acted outside legally permissible limits in applying for a forfeiture order of tainted property even when the appellant is yet to be convicted of an offence. Section 19C of the Proceeds of Crimes Act empowers the DPP to apply for a non-conviction based forfeiture order, with which the DPP has complied.
- [15] I also find no merit in the Appellant's contention that the learned High Court Judge has failed to consider the requirements of Sections 3, 4, and 19E of the Proceeds of Crime Act. 'Tainted property' is interpreted in Section 3 of the Proceeds of Crime Act as follows:
- "tainted property in relation to a serious offence or a foreign serious offence means:*
- (a) property used in, or in connection with, the commission of the offence;*
 - (b) property intended to be used in, or in connection with, the commission of the offence;*
 - (c) proceeds of crime;"*

The property in question falls under (c) above- 'Proceeds of crime'. Sections 3 and 4(1A) together interpret and define "proceeds of crime" in relation to a serious offence or a foreign offence as,

"property or benefit that is:

(a) wholly or partly derived or realized directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;

(b) wholly or partly derived or realized from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or

(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence,

and includes, on a proportional basis, property into which any property derived or realized directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realized from the property at any time after the offence."

[16] The above definition does not require a conviction of an offence for proceeds derived from criminal conduct to be considered 'proceeds of crime'. Section 72 of the Proceeds of Crime Act requires only proof on a balance of probabilities to decide any question of fact by the court. Hence, sufficient evidence of the commission of a serious or foreign serious offence and a reasonable suspicion that the property or benefit is derived or acquired through such criminal activity is sufficient for such to be earmarked proceeds of crime.

[17] Section 19E provides for the issuance of a non-conviction based order of forfeiture if the court is satisfied on a balance of probabilities that the property is tainted property. The discretion to issue an order lies with court, if the burden of proof is satisfied. The appellant has not suggested nor demonstrated an abuse of discretion by the learned High Court Judge, which may have had a bearing on the outcome of this appeal.

- [18] For purposes of completeness I also advert my attention to the claim of the Appellant that the learned High Court Judge has not considered certain Constitutional provisions, namely Articles 27 and 33 of the Constitution in his decision. Article 27(1) of the Constitution guarantees non-deprivation of property by the State other than in accordance with a written law, which in turn should not permit arbitrary acquisition or expropriation of any property. Article 12(3) (c) of the Constitution is however unequivocal that no law which makes provision for the acquisition of property for purposes of confiscation of the proceeds of crime is inconsistent with Article 27. Since the present appeal falls comfortably within the ambit of Article 27(3) (c), the Appellant's failure to appreciate the lack of ambiguity of these constitutional provisions baffles me. At the same time, I find the Appellant has not sufficiently or convincingly demonstrated any violation of Article 33 to his detriment.
- [19] Having dealt with the foregoing, for reasons stated above, I do not find any legitimacy in interfering with the findings and order of the learned High Court Judge. Therefore, I cumulatively answer grounds of appeal 1-11 in the negative and disallow the appeal. Responding to Grounds of appeal 12-13 thus becomes redundant.
- [20] Further, I order costs of \$2,500.00 each payable to the 1st, 2nd and 3rd Respondents.

Guneratne, JA

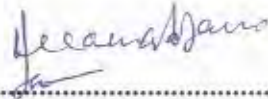
- [21] I agree with the reasoning and the proposed orders in the judgment of Lecamwasam, JA.

The Orders of the Court:

1. *Appeal is dismissed.*
2. *Appellant to pay \$2,500.00 each as costs to the 1st, 2nd and 3rd Respondents.*



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Hon. Justice E. Basnayake
Justice of Appeal



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Hon. Justice S. Lecamwasam
Justice of Appeal



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Hon. Justice A. Guneratne
Justice of Appeal