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# **Privy Council rules that trial judge properly made \$13.9million confiscation order against convicted drug dealer**

*The Attorney General of the Commonwealth of the Bahamas  
v. Samuel Knowles Junior & A1 Car Rentals Limited  
[2017] UKPC 5*

**Article by David Bowden**

### **Executive speed read summary**

Mr Knowles, a drug dealer, was convicted in the US and had a confiscation order made against him there. The Attorney General with the support of a US federal prosecutor, sought to have the confiscation order registered in The Bahamas under the Bahamian Proceeds of Crime Act ('PoCA') in order to enforce the order there. In August 2011 Senior Justice Longley in the Supreme Court of the Bahamas registered the preliminary order and judgement in the sum of US\$13.9million. This order was overturned on 2 narrow technical grounds by the Court of Appeal. The Judicial Committee of the Privy Council had to interpret whether the Bahamian PoCA required a formal application to the Attorney General by a foreign state, before he applied to the Supreme Court to register a foreign state's confiscation order. The Privy Council overturned the Court of Appeal ruling and restored the trial judge's ruling. A failure to comply with an order's precise terms would not render its registration invalid. Registration of an order was not the making of an order against other parties who claimed to be entitled to assets. The effect of registration is not to deprive others of their interests in any assets they claim. The foreign judgements registration procedure is distinct to the procedure for the enforcement of a confiscation order. All that registration can do is create an equitable charge over the interest which the judgment debtor holds in any property. Lord Hughes JSC cautioned that the issue of ownership could only be determined on fuller evidence to include evidence of the source of legitimate funds from which the assets were acquired.

*The Attorney General of the Commonwealth of the Bahamas v. Samuel Knowles Junior and A1 Car Rentals Limited*

[2017] UKPC 5

20 March 2017

Judicial Committee of the Privy Council (Lords Mance, Kerr, Sumption, Reed & Hughes JJSC)

### **What are the facts?**

Mr Knowles, a drug dealer, was convicted in the US and had a confiscation order made against him there. The Attorney General with the support of a US federal prosecutor, sought to have the confiscation order registered in The Bahamas under the Bahamian Proceeds of Crime Act ('POCA') in order to enforce the order there. The assets frozen included a dozen different parcels of real property (several of them condominium units), 9 bank accounts and the assets of a car rental business at the airport (A1 Car Rentals Ltd). However the prosecution of the defendant was '*hard-fought at every stage*' and initial attempts to extradite him to the US for trial were '*hotly contested both in the USA and in The Bahamas*'. The judgement records that '*the evidence before the jury was of the defendant shipping drugs in industrial quantities across the Caribbean from Jamaica via The Bahamas and into Florida, of receiving very large sums which represented their proceeds of sale there, and of repatriating this money in cash to The Bahamas*'.

### **What happened in the US courts?**

Mr Knowles was convicted of various offences of drug trafficking on 5 March 2008. He did not give evidence on his own behalf. He was given a long jail sentence. The jury which convicted him in Florida also returned a special verdict of forfeiture in the sum of \$13.9million.

### **What is the procedure for registering a foreign judgment or order in The Bahamas?**

The US Attorney General has been designated by under the Proceeds of Crime (Designated Countries and Territories) Order 2001 ('*the 2001 Order*') to make applications on behalf of the USA. Article 7 provides:

*'7(1) Where the Attorney General receives a written request from the appropriate authority of a designated country to register an external confiscation order under section 50 of the Act, and that request is accompanied -*

*(a) by two copies of the external confiscation order with a translation into English where necessary; and*

*(b) by a certificate issued by or on behalf of the appropriate authority stating -*

*(i) that the order is in force and not subject to appeal; and*

*(ii) where the person affected by the order did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them,*

*the Attorney-General, if he is of the opinion that enforcing the order in The Bahamas would not be contrary to the interests of justice, shall lodge a copy of the request, the order and the certificate with the Registrar of the Supreme Court for registration in accordance with section 50 of the Act.'*

The US Attorney-General duly applied to register the forfeiture order made by the US jury in the Supreme Court of the Bahamas. An order was duly made *ex parte* on 1 November 2001.

### **What application did Mr Knowles make to the Supreme Court?**

Mr Knowles applied to discharge the order obtained by the US Attorney General and this was listed for a contested hearing in the Supreme Court of the Bahamas.

### **What happened when this case came before Senior Justice Longley?**

On 9 August 2011 Senior Justice Longley sitting in the Supreme Court of the Bahamas dismissed Mr Knowles application. This meant that the preliminary order and judgement issued on 23 June 2008 by the US District of Southern Florida for the judgement sum of US\$13.9million remained valid.

### **What ruling did the Court of Appeal of the Commonwealth of the Bahamas make?**

On 13 September 2013 the Bahamas Court of Appeal (Mrs Justice Allen P, Justices of Appeal John and Adderley) allowed Mr Knowles appeal from the Supreme Court - [www.courtsofappeal.org.bs/download/017007100.pdf](http://www.courtsofappeal.org.bs/download/017007100.pdf). The Court of Appeal overturned the registration on these 2 bases:

- a procedure set out in subsidiary legislation had not been followed, and
- Mr Knowles' family members and A1 Car Rentals had not had an opportunity to defend the US proceedings.

### **What does the Bahamian Proceeds of Crime Act 2000 provide?**

Section 49(4) defines that an '*external confiscation order*' as follows:

- '49(4) "*external confiscation order*" means an order made by a court in a designated country for the purpose
- (a) of recovering property, or the value of such property, obtained as a result of or in connection with
    - (i) drug trafficking; or
    - (ii) any offence listed in the Schedule to this Act; or
  - (b) of depriving a person of a pecuniary advantage so obtained; ...'

Section 50 of the Proceeds of Crime Act 2000 provides:

- '50(1) On an application made by or on behalf of the Government of a designated country, the Supreme Court may register an external confiscation order made there if -
- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
  - (b) it is satisfied, where the person affected by the order did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him, to defend them; and
  - (c) it is of the opinion that enforcing the order in The Bahamas would not be contrary to the interests of justice.'

### **What was the issue for the Privy Council?**

There was only 1 issue on this appeal. This is whether the Bahamian POCA requires a formal application to the Attorney General by a foreign state, before the Attorney General applies to the Supreme Court to register an external confiscation order made in the foreign state.

### **What other submissions did Mr Knowles make?**

These were the submissions that Mr Knowles made to resist the appeal:

- There had been no valid request for registration from the USA,
- Registration was prevented by a lack of notice to A1 Car Rentals and others,
- The judge in making the order was making an order against other parties, and
- The effect of registration was to deprive the other parties of their interests in the assets named in the order.

### **What ruling did the Privy Council give?**

The Privy Council allowed the Attorney-General's appeal and dismissed all submissions made by Mr Knowles' counsel.

On whether there had been a valid registration request, Lord Hughes JSC said '*there clearly has been a request for the US Attorney General*' and that Article 7 of the 2001 Order only provided '*one possible evidential route to registration*' and that it did not '*mandate it as the only one*'. Even if he were wrong on this, Lord Hughes ruled that '*it would not follow that a failure to comply with its precise terms would render registration invalid*'. He noted that '*on the facts of this case, there can be no unfairness to a defendant or to anyone else if the order is registered without there having been 2 copies of it or a certificate in the precise form*'.

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Lord Hughes observed that *'whilst the restraint order did indeed freeze defined assets, the order made by the US trial court after conviction did not. It was an order for payment of a sum of money and nothing more'*. He agreed with both the trial judge and the Court of Appeal that they *'were plainly correct to hold that the order did not operate on any interest in any asset which anyone other than the defendant enjoyed'*. Going on he ruled that the US order *'did not affect (or cover) any property in which the other respondents claim an interest. It was an order made exclusively against the defendant, and was that he pay \$13,900,000'*. On this he said section 50(1)(b) of PoCA *'bites on "the person affected by the order". That was, in this case, the defendant and no one else'*.

The trial judge when he ordered registration *'was not making an order against the other respondents, except to the extent that he rejected their argument that registration should be refused. He was simply maintaining the registration of the external order'*.

Finally the effect of registration was not *'to deprive the other respondents of their interest (if any) in the assets which they claim'*. There is a separate procedure for the enforcement of a Bahamian confiscation order in sections 27 onwards of PoCA. This includes the appointment of a receiver to realise assets held by the defendant. Even if such an order could be considered a judgment of the Supreme Court within section 63 of the Supreme Court Act, then Lord Hughes ruled that this section *'only creates an equitable charge over the interest which the judgment debtor holds in any property; it does not purport, and could not purport, to charge a beneficial interest held by a third party'*.

**Did Lord Hughes sound any warning bells?**

Yes.

Lord Hughes noted at the start of his judgement that there had *'not been any trial of the question of the ownership of the restrained assets, nor of the source of the funds from which they were acquired, despite the passage of some 16 years since the first order was made'*. From the bundle prepared for the hearing, he said that *'neither side has grappled properly with the issues of ownership or source of funds, and that the evidence filed consists very largely of mere assertion on each side'*.

His view was that it seemed *'unlikely that the issue of ownership can be determined, if it has to be, without much fuller evidence'* and that if the other parties *'wish to assert that they own the assets beneficially, it is likely that they will have to produce evidence of the source of legitimate funds from which they were acquired'*.

**Are there any wider implications from this ruling?**

It was always going to be tempting for the Judicial Committee to restore the first instance ruling and not allow Knowles to succeed (as he did in the Court of Appeal) on highly technical points. If they had not done otherwise, the danger was that it would send out the wrong messages in relation to international law enforcement in relation to confiscating the proceeds of serious crimes.

**20 March 2017**

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| David Bowden is a solicitor-advocate and runs <a href="http://DavidBowdenLaw.com">David Bowden Law</a> which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at <a href="mailto:info@DavidBowdenLaw.com">info@DavidBowdenLaw.com</a> or by telephone on (01462) 431444. |
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