

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES AT VICTORIA

Miscellaneous Cause No. 2 of 2012

FINANCIAL INTELLIGENCE UNIT===== APPLICANT

VERSUS

CYBERSPACE LTD=====RESPONDENT

Mr B. Galvin for the Applicant

Mr F. Elizabeth for the Respondent

RULING

Egonda-Ntende, CJ

- 1 This is a ruling in respect of an application seeking an interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act (hereinafter referred to as POCA) to prohibit the Respondent or another person that this court may order having notice of this order from disposing of or otherwise dealing with the whole or any part of the property which is the sum of money United States Dollars 235,933.18 in the respondent's bank account with an offshore bank in Seychelles, or from disposing of the whole or any part of the said property.
- 2 The applicant further seeks an order under section 8 of POCA for this court to appoint a receiver of the said property. The applicant further seeks an order of

this court for the applicant costs of these proceedings. This application is supported by an affidavit sworn by Mr Liam Hogan, Director of FIU who holds the belief that the respondent is in possession or control of specified property that constitutes directly or indirectly benefit from criminal conduct.

- 3 The grounds for this application are stated to be the said belief of Mr Hogan that the respondent is running the following websites illegally, www.torrentreactor.com and www.torrentprivacy.com which are described in the written statements of Mr Paul Warren, James Mullen and Claire Sugrue. The application is further supported by an affidavit sworn by Mr Paul Warren of the International Federation of Phonographic Industry. In addition there are witness statements of Mr James Mullen, Mr Michael Smith and Ms Claire Sugrue representing different business entities which offer copyright material to the public. These entities include world famous names like Sony and Emir.
- 4 It is contended that the overall activity of these websites is to profit by facilitating the illegal downloading of material subject to international copyright and other legal restrictions thereby defrauding the owners of the intellectual property in the material and all others where they spend monies in its production and distribution. This amounts to criminal conduct in almost all developed countries. In the UK it amounts, *inter alia*, to the common law offence of conspiracy to defraud which is punishable on conviction by a fine and/or 10 years imprisonment.
- 5 The respondent has vigorously opposed this claim. He filed an affidavit in opposition and was extensively cross-examined. Mr Paul Warren who was a witness for the applicant was also cross-examined by the respondent in this matter.
- 6 The respondent's affidavit sworn by Mr Dmitri Fakhrudinov stated that the respondent is the owner of the site www.torrentreactor.net and www.torrentreactor.com but not www.torrentprivacy.com and www.toretreactor.net. He stated that both their websites have been in operation

in the UK for the last 9 years and they are not involved in any illegal activity. He stated that their websites do not hold any content whatsoever and nor have they ever claimed that they hold any copyright licenses from the companies whose officers have given statements in support of this action against them. He stated that these officers have never complained against the operations of the respondent in the UK and no action has been brought against them by law enforcement officers in the UK. He asserts that the applicant's affidavit have failed to show that there is any criminal conduct by the respondent which justifies the orders the applicant seek.

- 7 He states that the terms of use of their websites are very clear and does not support copyright infringement. The terms of service state that this service is designed to help people find files that are publicly available over the internet via the torrent. Torrent reactor is not a torrent tracker and does not host any torrent or media files. There is an admonition in the terms of use and I quote

“you are prohibited from submitting or transmitting to/or from the site any unlawful threatening labels, defamatory, obscene or pornographic materials that would violate any law or the rights of others including without limitation laws against copyright infringement, violation of these restrictions may result in restricting or limiting your access or use of the site”.

- 8 I have examined the evidence adduced in this matter by both parties. The affidavit of Mr Liam Hogan, the affidavit and viva voce evidence of Mr Paul Warren during cross-examination and the various statements that were attached to the affidavit of Mr Liam Hogan. The origin of this matter seems to have been suspicious transactions report that was notified to the Financial Intelligence Unit about 2 years ago. The Unit got in contact with the respondent who supplied information that they did not think was credible in relation to the source of funds that was coming into its account. The respondent has consistently stated that they received this money from Darton Software Corporation for advertising services.

9 The applicant directed the respondent's bankers to freeze the respondent's account and initially took the position that the respondent was engaged in tax evasion from the Republic of Russia. Subsequently a year down the road they took another position which is now clear on this application in which they allege that the respondent is engaged in a conspiracy to defraud certain companies.

10 The respondent's web site (s) is basically a search engine. What is clear is that through the website the respondent has set up it could be possible for users to access non copyright infringing material as well as copyright infringing material on other websites or portals or computers that exist on the web. The respondent offers advertising space on its web site and one of its clients is Darton Software Corporaton that runs the website www.torrentprivacy.com .

11 Mr Paul Warren's affidavit states in part,

'2. That I have been assisting the Financial Intelligence Unit of Seychelles with of its investigations into the legal operations of the company cyberspace Limited through its registered websites www.torrentreactor.com, www.torrentreactor.net and www.torrentprivacy.com (the said websites) and the proceeds arising from those operations.

3. I say that the associated website www.torrentprivacy.com generates revenue by offering to conceal the identity of persons unlawfully downloading materials. I beg to refer to a page, which I was referred to upon accessing www.torrentreactor.com demonstrating this process upon which marked "PWM1", I have signed my name prior to the swearing hereof.

4. That I refer to my statement exhibited as "LHM 6" and its exhibits, of the affidavit of Liam Hogan filed herein and I aver that the statement is true and correct.

5. I aver that the said websites are involved in online piracy and that this amounts to criminal conduct in the United Kingdom, including the offence of conspiring to defraud punishable on conviction by a fine of or 10 years imprisonment.'

- 12 In cross examination Mr Warren conceded that he did not establish who was the owner of the website www.torrentprivacy.com . He also conceded that no copyright infringing material was kept on the site of the respondent which he visited. In his affidavit he asserts that www.torrentprivacy.com makes revenue by offering to conceal the identity of persons unlawfully downloading materials.
- 13 Anonymising software or software that conceals the identity of web surfers may be used to protect one's privacy, without necessarily infringing any law or engaging in copy right infringement. Indeed there may be good reasons to why a web surfer may want to be anonymous. Repressive regimes may harass people who visit certain sites on the web. Users of search sites may wish to surf the same anonymously.
- 14 The United Kingdom has a Copyright Designs and Patents Act of 1998 which applies to protect copyright. The Act under Chapter 6 provides remedies for infringement of copyright and this is mainly in the form of damages. It is a civil action. There is also provision for criminal liability but the applicants do not rely on those provisions to allege that the respondent committed a crime.
- 15 The respondent has asserted that its income which is the specified property was paid for advertising space for advertising provided to Darton Software Corporation. This remains largely un-refuted save for suggestions from applicant's counsel that the evidence of the respondent is not credible. There is nothing unlawful, in my view, in operating a search engine website, and offering advertising space on the same website.
- 16 It may be possible that that Darton Software Corporation through its website www.torrentprivacy.com makes revenue by offering to conceal the identity of persons unlawfully downloading material from the internet or computers connected to the internet. That website does not belong to the respondent. The respondent denied ownership and in fact produced evidence attached to the

affidavit of Dmitry Fakhruddinov that shows that the site is owned by Darton Software Corporation.

- 17 No action has been taken in the United Kingdom against respondent in respect of its 2 websites. No criminal action has been brought by authorities against it alleging that it has committed any criminal offence including conspiracy to defraud. Neither have any of the companies that claim that their copyright has been infringed in respect of the materials that were downloaded by Mr Warren commenced any legal action in the United Kingdom against the respondent. In any case the infringing material was not downloaded from the websites owned by the respondent.
- 18 Conspiracy to defraud must mean that two or more persons have an agreement to defraud a third party. As was noted in Scott v Metropolitan Commissioner [1975] A C 819 the essence of the offence is an agreement by two or more people, to dishonestly prejudice the rights of another.
- 19 No agreement has been alleged or shown to exist between the respondent with another person to perpetuate the fraudulent intention on the application and supporting affidavits save to say that certain websites are engaged in piratical or illegal activity. It is not enough in my view to establish that the respondent has a website with a search engine that may lead a person to all manner of sites on the internet or computers connected to the internet including those bearing copyright infringing material.
- 20 I am satisfied on the evidence before me that the applicant has not established the existence of an agreement by the respondent and another or more persons to defraud any other person. On a balance of probability the applicant has failed to show that the respondent engaged in the crime of conspiracy to defraud the persons or companies that are alleged to be the victims in this matter.

21 In the circumstances I find that this application fails and it is dismissed with costs. I order the applicant immediately to defreeze the respondent's account in question.

22 Before I take leave of this matter I find it somewhat odd that no report was made to the Serious Fraud Office in the United Kingdom by the Financial Intelligence Unit to report what they perceive to be a serious offence committed in the United Kingdom. At least the Financial Intelligence Unit has not notified this court of the results of any such report if it was made. What we have is a situation where the FIU appears to be investigating a crime committed in the UK by using private non law enforcement personnel like Mr Warren who represent interests that have an interest in the outcome of the investigation.

23 I would have thought it prudent for the Financial Intelligence Unit to deal with sister government or statutory law enforcement agencies in other jurisdictions where it asserts that the criminal law of that jurisdiction has been violated. And if it did report to such sister agencies to disclose to this court the results of such contacts in proceedings of this nature.

Signed, dated and delivered at Victoria, this 28th day of September 2012.

FMS Egonda-Ntende

CHIEF JUSTICE