

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 15 of 2017

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|-----------------|--|--------------------------|
| <u>BETWEEN:</u> | <u>THE DIRECTOR OF PUBLIC PROSECUTIONS</u> | <u>APPLICANT</u> |
| <u>AND:</u> | <u>AIDONG ZHANG</u> | <u>FIRST RESPONDENT</u> |
| <u>AND:</u> | <u>CHANGHUI LIU</u> | <u>SECOND RESPONDENT</u> |
| <u>AND:</u> | <u>HOME FINANCE COMPANY LIMITED</u> | <u>THIRD RESPONDENT</u> |
| <u>AND:</u> | <u>NEW HOME TRADING COMPANY LIMITED</u> | <u>FOURTH RESPONDENT</u> |
| <u>AND:</u> | <u>YONG CHEN</u> | <u>INTERESTED PARTY</u> |

Before: Hon. Mr. Justice Deepthi Amaratunga

Counsel: Ms. M.Konrote for the Applicant

Mr. Nand S. for the 3rd Respondent

Date of Judgment: 17th June, 2025

Catch words

Proceeds of Crime Act 1997 sections 4(1A), 13, 19C, 19E, 69 - Constitution of Republic of Fiji Sections 3, 6, 7, 12-proportionality basis-Bill of Rights- Right to Property-tainted-intermingled-anyway involved-Protection of third parties-Civil-in Rem

Cases Referred

1. In the Matter of a reference by Cabinet for an opinion from the Supreme Court concerning the interpretation and application of Sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji [2024] FJSC 20; Miscellaneous Action 0001 of 2024 (28 June 2024)

2. R v Waya [2013] 1 All ER 889,

3. Bolkiah v KPMG (a firm), [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215; [1999] 3 LRC 568; [1999] 1 BCLC 1; [1999] NLJR 16; [1999] PNLR 220; (1999) Times, 20 April; 143 Sol Jo LB 35; [1998] All ER (D) 767

4. R v May [2008] 4 All ER 97

JUDGMENT

Introduction

- [1] Plaintiff through originating summons sought civil forfeiture of properties stated in the originating summons in terms of Proceeds of Crime Act 1997 (POCA). Plaintiff is seeking Non-Conviction Base Civil Forfeiture in terms of Section 19C read with Section 19E of POCA.
- [2] First Respondent was charged with an offence of obtaining dishonestly and deception \$1,240,740.74 from the complainant (Interested party). First Respondent was also charged with Money Laundering contrary to Section 69(2)(a) and (3)(a) of POCA.
- [3] Interested Party was deceived through an inflated price for the purchase of a land for a sum of FJD 5.5 million when in fact its price was (offered and paid by first Respondent) FJD 3.3 million. This amount was paid by First Respondent from the funds remitted by interested party, on the belief that its sale price was FJD 5.5 million.
- [4] This property was bought for a commercial venture Bairain Group (Fiji) Ltd (BAIRAIN), where both Interested Party (who is the complainant) and first Respondent were directors and shareholders.
- [5] Second Respondent is the wife of first Respondent and she is also fifty percent shareholder of fourth Respondent and also both of them are the only Directors, of it. Fourth Respondent is the owner of three *tainted* properties subject to confiscation in this action.
- [6] Second Respondent is the account holder of the bank Account held by third Respondent bearing No 9185S2, which was opened from FJD 350,000, which was 'proceeds of crime'.
- [7] Second Respondent is the registered owner of CT25292, and loan account of said land purchased through mortgage was '*intermingled*' with FJD 300,000 from proceeds of crime of first Respondent.

- [8] Properties comprised in CT 25292 and CT9548 were obtained from loans from third Respondent (HFC) Bank, through mortgages of the properties. Both loan accounts were credited with FJD 300,000 and FJD 230,000 of dishonestly obtained money and proceeds of crime *intermingled* with loan accounts.
- [9] HFC Account Number 9185S2 was opened with \$350,000 of dishonestly obtained money and was used only for one transfer of money by its account holder for \$300,000 its balance was \$50,717. This is tainted as there were no credits apart from interest in the said account.
- [10] So this is an account as well as loan account 9185L30 which was credited with said FJD 300,000 by second Respondent were used for Money Laundering and or dissipate illegally obtained funds of Interested Party.
- [11] Only transaction in this account conducted by second Respondent was remittance of \$350,000 at the opening of the account and transfer of \$300,000 from that to loan Account No 9185L30.
- [12] Remaining three properties, subject to confiscation in this action have been registered to fourth Respondent. It is proved that all five properties were '*tainted*' from money dishonestly obtained from the interested party.
- [13] Except Bank account 9185S2, which was opened from proceeds of crime and no deposits were made, making entire sum remaining in it *tainted*, the rest of the properties subject to forfeiture were '*intermingled*' with dishonestly obtained money, making such '*properties*' or '*benefit*' relating to them were mixed with illegally obtained money.
- [14] *Proportionality basis* is recognized in the definition of 'proceeds of crime' in Section 4(1A)(c) of POA when the properties are benefits mixed.
- [15] Bill of Rights Chapter of the Constitution of the Republic of Fiji also recognizes proportionality principle. Bill of Rights Chapter the Right to Property and Freedom from unreasonable seizure, and confiscation of proceeds of crime provisions needs to be interpreted with proportionality principle in order for forfeiture to be reasonable and also being penal and or being abused.
- [16] Supreme Court¹ opined '*proportionality is one of the values underlying the Bill of Rights and Fijian society, the Court must seek to promote it or, put another way, to avoid disproportionality to the extent possible.*

¹ *In the Matter of a reference by Cabinet for an opinion from the Supreme Court concerning the interpretation and application of Sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji* [2024] FJSC 20; Miscellaneous Action 0001 of 2024 (28 June 2024)

- [17] Non-Conviction Based Civil Forfeiture (NCBCF) under POCA, should not be used as a penal provision though deterrence² as a result of deprivation of gains from criminal activities is consequence, and also an objective of NCBCF.
- [18] UK House of Lords³ under recovery of assets through civil forfeiture, even after conviction held, '*confiscation order is not an additional fine*'. *A fortiori*, NCBCF cannot be used unreasonably against any person irrespective of criminality involved.
- [19] The basis of forfeiture is 'remedial' measure to deprive assets obtained from illegal or criminal activity⁴ it can also be considered as 'restitution' or removal of economic benefit derived from criminal activity.
- [20] Accordingly, the forfeiture should be proportionate when a property or benefit subject to forfeiture is 'intermingled' with acquired 'proceeds of crime'.
- [21] This calculation of proportional confiscation need not be precise or mathematical, depending on the type of evidence before court, but where possible, a calculation of proportionate confiscation of the asset is made from the amount of money 'intermingled' with suitable adjustments, if required. Reasonable and proportional confiscation is required in the exercise of discretion granted to court in terms of Section 19(c) of POCA.
- [22] NCBCF under POCA is not geared for Equivalent Value Base (EVB)⁵ forfeiture, which allows recovery of money, based on the value of the proceeds of crime, which can address difficulty in trace of proceeds specially when Money Laundering through more sophisticated methods utilized.
- [23] Applicant could not trace total amount of proceeds of crime. This may be due to gaps in the investigation or due to methods deployed in Money Laundering by first Respondent using bank accounts of his wife second Respondent and legal person equally owned by both of them, forth Respondent. Such inability to trace all proceeds of crime, is not a reason to disregard proportionate

² Brun, Jean-Pierre, Anastasia Sotiropoulou, Larissa Gray, Clive Scott, and Kevin M. Stephenson. 2021. *Asset Recovery Handbook: A Guide for Practitioners*, second edition. Washington, DC: World Bank. doi:10.1596/978-1-4648-1616-1. License: Creative Commons Attribution CC BY 3.0 IGO1.3.2 Non-Conviction Based Confiscation p 16

[Asset Recovery Handbook: A Guide for Practitioners, Second Edition | Stolen Asset Recovery Initiative \(StAR\)](#) (17.6.2025)

³ *R v Waya* [2013] 1 All ER 889,

⁴ Ibid footnote 2

⁵ Stefano Betti, Yael Bitton Neha Maryam Zaigham (ed.) *From Loss to Gain Unlocking the Potential of Equivalent Value-Based Measures in Asset Recovery*

<https://star.worldbank.org/publications/loss-gain-unlocking-potential-equivalent-value-based-measures-asset-recovery> (17.6.2025)

confiscation of the properties or benefit partially derived or intermingled, under POCA.

FACTS

- [24] The Plaintiff filed Originating Summons with affidavit in support on 24.01.2017 seeking forfeiture orders against the properties outlined in the Originating Summons in terms of Proceeds of Crime Act 1997. They are
- a. Home Finance Company Limited Account No 9185S2 in the name of second Respondent.
 - b. Freehold Land described as CT 9548, Lot 3 on DP No2272
 - c. Freehold land and house constructed on CT25292, Lot 19 on DP No 5774
 - d. Vehicle Registration number HS 550, Range Rover Evoque
 - e. Vehicle Registration number HT 558, Chevrolet Sonic,
- [25] First Respondent is charged with dishonestly obtaining money and for Money Laundering. None of the above properties under first Respondent's name . Properties (a) and (b) above are in the name of second Respondent , who is wife of first Respondent and (c) (d) and (e) are registered with fourth Respondent.
- [26] The First Second and Forth Respondent filed their response jointly by way of an affidavit on 15 .2. 2017. First and second Respondents are husband and wife respectively and they both are the equal shareholders of forth Respondent.
- [27] On 11.5.2017 second Respondent had changed the solicitors
- [28] On 19.5.2017 first Respondent filed an application for stay of this action till conclusion of criminal action. This application was made on the basis that there will be prejudice to first Respondent and Rights of an accused in criminal proceeding. This was based on Australian High Court decision , but Fiji has a clear statutory provision that prevents such stay of proceedings pending criminal action.
- [29] On 14.6.2017 second Respondent filed summons (Second Application) for;
- a. Strike out of this action
 - b. Alternatively, a declaration of the nature estate and value of the Second Respondent's interest to the following property, (Second Application)

(i). Freehold Land comprised in Certificate of Title No 25292 being Lot 19 on Deposited Plan No 5774.

[30] Second Application was made on the following grounds;

- a. Originating summons is abuse of process.
- b. Second Respondent is the owner of the property.
- c. There is no allegation against Second Respondent that she was involved in the commission of the alleged offence for which second Respondent had been charged.
- d. Second Respondent acquired the property on 8.10.2014 for fair value at which time the property was not and could not be classified as tainted property.

[31] First Respondent's application for stay was refused *inter alia* in terms of Section 27D of POCA .

[32] Second Respondent's summons for strike of this action was based on abuse of process. Alternatively second Respondent sought declaration in terms of Section 13 or 19 E of POC and this alternative request was deferred for the final hearing considering circumstances of the case.

LAW

[33] This action filed by way of originating summons, and it is based on Non Conviction based Civil Forfeiture in terms of Section 19C and 19E of POCA. They read.

“[PC 19C] Application for a non-conviction-based forfeiture order for tainted property

19c The Director of Public Prosecutions may apply to court for an order forfeiting to the State all or any of the property that is tainted property.”

[34] Applicant can accordingly use its discretion to make an application for order for forfeiture of any ‘*tainted property*’ to the state. The applicable provision for such forfeiture is Section 19E of POCA which reads,

“[PC 19E] **Non-conviction based forfeiture order for tainted property**

19E (1) Subject to subsection (2), where the Director of Public Prosecution applies to the Court for an order under this section

and the court is satisfied on a **balance of probabilities** that **the property is tainted property**, the court **may order** that the property, or such of the property as is specified by the court in the order, be forfeited to the State.” (emphasis added)

- [35] Burden of proof is civil burden which is *balance of probability*. There is no requirement for obtaining a conviction against any person relating the properties subject to forfeiture in terms of Section 19E of POCA.
- [36] NCBCF requires only civil burden of proof which is lower than in Criminal Action for proof of an offence . Similarly, safeguards for an accused such as right to silence, doctrine of double jeopardy etc are not available in civil proceedings.
- [37] The action for NCBCF is *in rem* , against '*tainted property*' despite notice given for '*persons interested*' in the properties subject to forfeiture. This is to prevent unreasonableness and application of proportionality principles under Bill of Rights Chapter of the Constitution. This also allows any named or unnamed party to make application in terms of Section 13 or 19E(2) of POCA for an order for '*Protection of Third Parties*'.
- [38] Procedurally NCBCF has obvious advantages in recovery of Proceeds of Crime. Some of them are lower burden of proof , ease or speedier method for institution of civil action and speedier method for obtaining interim orders , flexibility in litigation, availability of judgment in default (when service is proved or acknowledgement filed), proceedings against third parties(who are not subject to prosecution) etc.
- [39] When the illegality of funds are subjected to an offence of Money Laundering , the low threshold for confiscation of such dissipated funds is effective in the recovery of benefit or property derived from such money.
- [40] In such instances third party who seeks an order for protection of the rights to the property , has to prove that such third party was not in 'any way involved' in the illegal act where money derived.
- [41] So there is no requirement for even charges being made against third party as long as the property is tainted and there is some 'involvement' by third party for an offence. Money Laundering is an offence and involvement of ones accounts, alone, without further evidence, in

relation to tainted property, is sufficient for forfeiture of benefit or property tainted.

- [42] NCBCF is also an avenue for obtaining information through discoveries, from any party named such as financial institutions (e.g. Banks and KYC information), including from the wrongdoer, though for obvious reasons such information cannot be used for prosecution and sufficient protection for such information eg. *Chinese Wall*⁶ must be maintained if such information.
- [43] NCBCF '*shares common objectives with criminal confiscation, namely the recovery and return of the proceeds and instrumentalities of crime*', but it may differ as the goals of NCBCF are equity, and deterrence and restitution⁷. For these reasons there are procedural as well as substantive laws, different from criminal action.
- [44] Non Conviction Base Civil Forfeiture is an essential part of combatting criminal activities, including organized crimes such as human and drugs trafficking, terrorist finance, bribery and corruption, Money Laundering and other illegal activities. It is important to recover economic gains derived from such activities, independent of conviction or even charges being made, for such offences due to various factors (eg. death of wrongdoer).
- [45] Considering human ingenuity and access to various financial tools at hand and the speed on which such transactions can be executed due to advancements in technology, POCA should be flexible enough for the NCBCF, even when 'benefit' and or 'property' are converted, fully or partially and or intermingled with other properties.
- [46] The use of word 'may order' in Section 19(c) of POCA, and also being 'satisfied' with evidence, also gives court discretion as to the forfeiture of assets under NCBCF. A court can even refuse NCBCF application, depending on circumstances in the exercise of discretion.
- [47] In the exercise of discretion, the court can consider the merits and arrive at a reasonable order that is proportionate. So in my mind exercise of discretion against NCBCF should not be made lightly, considering lapses or gaps in investigation, without considering option of reasonable and proportionate order. Rules used for the

⁶ *Bolkiah v KPMG (a firm)*, [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215; [1999] 3 LRC 568; [1999] 1 BCLC 1; [1999] NLJR 16; [1999] PNLR 220; (1999) Times, 20 April; 143 Sol Jo LB 35; [1998] All ER (D) 767

⁷ P16

protection of accused are not fully applicable for civil litigation hence lapses on that cannot be a reason for denial of NCBF. One salient feature is NCBCF is an action in rem against the *tainted property or benefit*.

[48] So reasonableness and proportionality and discretion of the court are principles that are being applied jointly and or severally in an application for forfeiture. Legislation had allowed a wide power for NCBF, considering the need for such wide application, but court's discretion and reasonableness and proportionality is required to be applied in order to protect rights enshrined in Bill of Rights Chapter in the Constitution.

[49] UK Supreme Court, dealing with UK Proceeds of Crime Act 2002, dealt with propose of confiscation of 'proceeds of crime' in forfeiture after conviction of a person who obtained finance providing some incorrect information, in R v Waya [2013] 1 All ER 889 at 595 held,

"[2] The 2002 Act is concerned with the confiscation of the proceeds of crime. Its legislative purpose, like that of earlier enactments in this field, is to ensure that criminals (and especially professional criminals engaged in serious organized crime) do not profit from their crimes, and it sends a strong deterrent message to that effect. In *R v Rezvi* [2002] UKHL 1 at [14], [2002] 1 All ER 801 at [14], [2003] 1 AC 1099, Lord Steyn stated:

'It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the [Criminal Justice Act 1988] are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy.'

These observations have been cited and followed many times, although Lord Steyn's reference to punishment needs some qualification. Despite the use of the term 'confiscation', which is a misnomer, orders under Pt 2 of the 2002 Act are made in sums of money (value-based) rather than being directed, as are civil

recovery orders under Pt 5 of the 2002 Act, at the divestment of specific assets. Nevertheless, a **confiscation order is not an additional fine.**”(emphasis added).

[50] Section 3 of the Constitution states;

Principles of constitutional interpretation

“3.—(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

(2) If a law appears to be inconsistent with a provision of this Constitution, **the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution.**”(emphasis added)

[51] Bill of Rights Chapter states

“CHAPTER 2—BILL OF RIGHTS

Application

6.—(1) This Chapter binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.

(2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter.

(3) A provision of this Chapter binds a natural or legal person, taking into account—

(a) the nature of the right or freedom recognised in that provision; and

(b) the nature of any restraint or duty imposed by that provision.

(4) **A legal person has the rights and freedoms recognised in this Chapter, to the extent required by the nature of the right or freedom, and the nature of the particular legal person.**

(5) The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by—

(a) limitations expressly prescribed, authorised or permitted (whether by or under a written law) in

- relation to a particular right or freedom in this Chapter;
 - (b) limitations prescribed or set out in, or authorised or permitted by, other provisions of this Constitution; or
 - (c) limitations which are not expressly set out or authorised (whether by or under a written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law.
- (6) Subject to the provisions of this Constitution, this Chapter applies to all laws in force at the commencement of this Constitution.
- (7) Subject to the provisions of this Constitution, laws made, and administrative and judicial actions taken, after the commencement of this Constitution, are subject to the provisions of this Chapter.
- (8) To the extent that it is capable of doing so, this Chapter extends to things done or actions taken outside Fiji.
- Interpretation of this Chapter
- 7.—(1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—
- (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and
 - (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter. Freedom from unreasonable search and seizure”(emphasis added)

[52] Bill of Rights Chapter in the Constitution recognizes Right to Property and also ensures against unreasonable seizures . Section 12 of the Constitution states,

- “12.—(1) Every person has the right to be secure against unreasonable search of his or her person or property and **against unreasonable seizure of his or her property.**
- (2) **Search or seizure is not permissible otherwise than under the authority of the law**”(emphasis added)

- [53] In the Matter of a reference by Cabinet for an opinion from the Supreme Court concerning the interpretation and application of Sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji [2024] FJSC 20; Miscellaneous Action 0001 of 2024 (28 June 2024) Supreme Court held,

“proportionality is one of the values underlying the Bill of Rights and Fijian society, the Court must seek to promote it or, put another way, to avoid disproportionality to the extent possible”

- [54] UK Supreme Court in the interpretation of UK law regarding confiscation under its Proceeds of Crime Act 2002⁸, in R v May [2008] 4 All ER 97

“It requires the court, before making a confiscation order, to address and answer three questions: see R v Johnson [1991] 2 All ER 428 at 430–433, [1991] 2 QB 249 at 252–255; R v Dickens [1990] 2 All ER 626 at 628, [1990] 2 QB 102 at 105–106. The first question is: has the defendant (D) benefited from the relevant criminal conduct? If the answer to that question is negative, the inquiry ends. If the answer is positive, the second question is: what is the value of the benefit D has so obtained? The third question is: what sum is recoverable from D? In some cases (such as R v Chrastny (No 2) [1992] 1 All ER 193, [1991] 1 WLR 1385, R v Walls [2002] EWCA Crim 2456, [2003] 1 WLR 731 and R v Ahmed [2004] EWCA Crim 2599, [2005] 1 All ER 128, [2005] 1 WLR 122) there may be no dispute how one or more of these questions should be answered, but the questions are distinct and the answer given to one does not determine the answer to be given to another. The questions and answers should not be elided.

[9] Although 'confiscation' is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the state. Where, however, a criminal has benefited financially from crime but no longer

⁸ These UK provisions have been subjected to several amendments to UK POCA and also through other statutes) and not identical to POCA, but the general principles stated can be applied despite the differences in the legislation.

possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained. 'Confiscation' is, as Lord Hobhouse of Woodborough observed in *Re Norris* [2001] UKHL 34 at [12], [2001] 3 All ER 961 at [12], [2001] 1 WLR 1388, a misnomer."

[55] Accordingly provisions of POCA is interpreted in application of it in proportionate to the funds 'intermingled'.

[56] Section 4 (1A) defines proceeds of crime in exclusive manner as it uses 'means' to defined property or benefit derived from proceeds of crime in following manner

"(1A) In this Act, in relation to a serious offence or a foreign offence, "proceeds of crime" means **property or benefit** that is-

- (a) wholly or partly derived or **realised directly** or indirectly by any person from the commission of a serious offence or a foreign serious offence;
- (b) wholly or partly derived or **realised 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 realised 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 realised** from the property at any time after the offence."

[subs (1A) insert Act 7 of 2005 s 3, effective 1 September 2005]

[57] Section 4(1A) of POCA defines 'proceed of crime' in exclusive manner by use of word 'means'. It is comprehensive and covers all forms of economic gains derived from 'serious offence'.⁹

[58] Both charges against first Respondent including Money Laundering are 'serious offence' in terms of POCA.

⁹ Section 4 of POCA defines

serious offence means an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 6 months or a fine of not less than \$500;

- [59] Section 4(1A) (c) of POCA includes properties or benefits 'acquired' from such criminal offence, when they are intermingled , converted, transformed. In such a situation entire property cannot be considered as 'proceeds of crime'. Only on proportionate basis such property can be considered as 'proceeds of crime' and this also any income or capital or other economic gain from them after the commission of the offence.
- [60] If proportional basis is not applied the word '*proportional basis*' in Section 4(1A)(c) becomes meaningless. All the words in a statute have a meaning. Text *Maxwell on the Interpretation of Statutes* (12th Edi) p36 stated
- “Every word in a statute to be given meaning
- A constitution which would leave without effect any part of the language of a statute will normally be rejected.”
- [61] Apart from that, proportionality principle under Bill of Rights in the Constitution and also reasonableness in the exercise of discretion of the court are grounds to confiscate a property in proportionately to the 'tainted' benefit to such property.
- [62] It may be sometimes difficult to find exact benefit without calculation from the available evidence. At the same time investigation may not be able to trace all the funds at the time of NCBCF. There is no prohibition for making a subsequent application if tainted assets are recovered later.
- [63] It will be rare and difficult to recover all proceeds of a crime unless the detection was prompt, but that is not a reason to confiscate property in disproportionate manner, without application of proportionality principle in Bill of Rights Chapter of the Constitution and also disregarding word '*proportional basis*' in Section 4(1A) (c) of POCA.
- [64] Applicant was unable to trace all the money dishonestly obtained, but that is not a reason to deviate from application of proportional basis as stated in Section 4 (1A) of POCA. At the same time if the Applicant is unable to prove the exact proportion, nevertheless had proved , intermingling , conversion, and or transformation of proceeds of crime same proportionality principle can be utilized for forfeiture in the exercise of broader discretion in reasonable and proportionate

manner on the evidence available. Proportionate basis is not a technical word but being fair and reasonable on the evidence available to the court when the property or benefit is tainted.

- [65] So any economic gain derived from proceeds of crime can be forfeited on proportional basis.

What is Proportionate Basis?

- [66] NCBCF is one of many options available for recovery of 'proceeds of crime'. As stated earlier there are clear advantages in this method due to lack of safeguards available to an accused person, in criminal action as opposed to an action in rem NCBCF cannot be abused, and not a short cut or substitute for proper investigation as to the trail of funds and trace such funds depending on the circumstances.
- [67] Deprivation of proceeds of crime is a deterrence or preventive measure but its limits should not be exceeded and proportionate recovery of 'benefit' or 'property' is vital, when they are mixed with proceeds of crime, in terms of section 4 (IA) of POCA.
- [68] This is to prevent administrative overreach for forfeiture of the property in unreasonable or penal manner by way of civil forfeiture specifically in instances described in Section 4(1A) of POCA.
- [69] According to Section 4(1A) of POCA if a 'property or benefit' derived from commission of an offence 'wholly or partially' , it is within the definition 'proceeds of crime', but such partial derivative can be proportionately forfeited . The intermingling of funds and how proportionate needs to be calculated considering all the factors and court can order partial confiscation in terms of that.
- [70] Interested party had transferred FJD 1,240,740.74 on 3.9.2014 to Ostanding Fiji Limited bearing Account No 11779946, and BAIRAIN Account No 12137828 of ANZ another FJD 4,037,620.00 . Both accounts' authorized signatory for the cheques was first Respondent.
- [71] As the purchase price of the land was FJD 3.3 million from the sum transferred on 3.9.2014 was entirely used dishonestly thus making ANZ account 11778846 'tainted' . So any benefit derived for the value of FJD 1,240,740.74 from the said account are tainted. On the balance of probabilities first Respondent charges are proved.

- [72] Applicant was able to trace some of funds originated from said account with ANZ account 11779946 and except for bank Account No 9185S2 with HFC bank belong to second Respondent , rest of the properties were 'intermingled' with proceeds of crime. So proportional basis recovery orders made through confiscation.

Bank Account No 9185S2 is held by HFC in the name of second Respondent

- [73] This account was opened with \$350,000 on 9.9.2014 by second Respondent whereas first Respondent by cheque withdrew FJD 350,000 from ANZ account 11779946 of Ostanding which is tainted.
- [74] On the balance of probability it is proved that \$350,000 deposited and opened HFC Account 9185S2, is tainted due to identical withdrawal from ANZ account no 11779946 by first Respondent and his inability to explain the purpose of the said withdrawal by cheque and utilization of such funds.
- [75] Second Respondent had also failed to describe the source of funds and on the balance of probability it is proved this FJD 350,000 was tainted as it had derived from first Respondent's withdrawal of the same from tainted account of ANZ 11779946.
- [76] So HFC Bank Account No 9185S2 is entirely derived from proceeds of crime of first Respondent.
- [77] After deposit of opening FJD 350,000 on 9.9.2014 the next and the only transaction on said account was recorded on 8.10.2014 for transfer of FJD 300,000 by second Respondent to her loan account with HFC 9185L30, thus making said loan account reduced by the same account and also making it tainted.
- [78] It is noted that purchase of property comprised in CT 25292 was entirely funded from mortgage of it through a loan and on the same day \$300,000 credited to said loan account 9185L30 reducing its balance on the day of the transfer of the property. So this is a method used to 'intermingle' tainted money for the purchase of said property.
- [79] So the remaining amount in HFC Account No 9185S2 is entirely proceeds from the crime as there were no deposits other than \$350,000 which was proceeds of crime.
- [80] So the Account No 9185S2 of HFC is forfeited including accrued interest, which was FJD 50,717.49 , at the time of the application.

Property Comprised in CT25292 subject to mortgage of third Respondent.

- [81] From this opening balance of FJD 350,000 second Respondent had transferred \$300,000 from HFC Account No 9185S2 on 8.10.2014 to her loan account 9185L30 . This loan was obtained for the purchase of a land comprised in CT25292 , by way of mortgage of the same on 8.10.2014 .
- [82] CT 25292 including the house on it was purchased through a loan from third Respondent Bank by way of mortgage for the sale price of \$830,000.
- [83] There is no allegation against third Respondent or evidence to show it was involved in the offences charged against first Respondent.
- [84] First and second Respondents were customers of third Respondent Bank
- [85] Second Respondent had purchased CT 25292 on 8.10.2014 but sale and purchase agreement was entered by her husband, first Respondent on 11.7.2014 and according to that sale price was FJD 830,000.
- [86] For the purchase of said land third Respondent provided finance through mortgage of it .
- [87] A loan from account of HFC No 9185L30 provided finance for the purchase of the land comprised in CT 25292 in the name of second Respondent.
- [88] There is no evidence to show the acquisition of CT25292 was funded from proceeds of crime on 8.10.2024. Second Respondent in her Account No 9185S2 had credit balance of \$350,000 strangely this was not used by direct payment of said amount to the purchaser .
- [89] This is more significant as a sum of FJD 300,000 was paid from the purchase price of FJD 830,000 on the same day but this was after HFC band had provided FJD 505,388.85 out of price of FJD 830,000 for the purchase of the property comprised in CT 25292.
- [90] According to loan account 9185L30, disbursements for the total value FJD 505,388.56 was debited to loan account 9185L30 but on the same day FJD 300,000 credited from HFC Account no 9185S2.
- [91] Plaintiff was unable to trace the source of remaining sum paid by second Respondent for property comprised in CT 25292.
- [92] After this property was purchased , the loan account balance as at 8.10.2014 was FJD 505,388.85 so technically purchase of CT 25292 was from loan granted by third Defendant and payment of remaining sum which could not be traced.

- [93] The total effect of this method of dealing with the payment is that Applicant had failed to prove purchase of CT 25292 even partially funded by proceeds of crime. These are *modus operandi* of Money Laundering.
- [94] On the same day \$300,000 was transferred from the HFC account no 9185S2 . This was a tainted money. This reduced the balance of the said loan account by \$300,000. So in effect the purchase of CT 25292 was partially funded by 'tainted' money for sum of FJD 300,000.
- [95] This was tainted for the reasons stated earlier(i.e transfer of FJD 350,000 from ANZ bank Account No 11779946).
- [96] So said loan account was 'tainted' due to 'intermingling' of proceeds of crime for the FJD 300,000 . Loan account utilized for the purchase of CT2529 was reduced by FJD 300,000, and by doing that proceeds of crime 'intermingled' with the purchase amount in the loan by reduction of it .
- [97] So CT 25292 is tainted with 'intermingle' of the proceeds of crime by FJD 300,000 due to reduction of loan account 9181L30 for the same amount.
- [98] Apart from \$300,000 that was tainted , further proceeds invested on the same and for renovation of a house on it. This was from cheques for total value FJD 60,000 paid by second Respondent from Ostanding bank account with ANZ no 11779946. There was no evidence that sum paid were not invested through refurbishments to house on CT25292.
- [99] So this would have added value to said property by same amount as there is no evidence to calculate the benefit in proportionate manner for said \$60,000 .This amount is also recoverable as separate value addition from the sale price of the property comprised in CT 25292.
- [100] There is no requirement for application of proportional basis for forfeiture due to value addition of equal amount to said property due to further investment and this should be deducted in order to apply proportional basis from the sale value .
- [101] Accordingly in my mind it is not proportionate and penal in nature to forfeiture of entire property comprised in CT 25292 as proceeds of crime was not the entire purchase price of the said property. So after deduction of value addition of \$60,000 remainder is forfeited proportionately 300,000 /830,000 to the state through sale. The sale of the property is subject to mortgagees rights as Protection of Third Pary in terms of Section 13 of POCA.

- [102] So from Sale of properly comprised on CT 25292 a sum of FJ \$60, 000 forfeited and after deduction of said amount, proportionally 30/83 forfeited to state.

Protection of Third Party Application in terms of Sections 13 or 19 E (2) of POCA

- [103] Second Defendant along with first and fourth Defendants filed the 'Acknowledgment of Service of Originating Summons' on 21.2.2017. First Respondent had sworn an affidavit in Response on behalf of second and fourth Respondents.
- [104] So second Respondent proceeded to hearing of this action and hearing was partially completed when it was brought to the notice of the court that there were some documents in Chinese language and required translation. Since both parties requested translation of such documents both parties were allowed to file supplementary affidavit including second Respondent and continuation of hearing adjourned .
- [105] On 11.5.2017, second Respondent file 'notice of appointment of solicitors' indicating change of representation. Second Respondent had already filed a 'Notice of Appointment of Solicitors', 'along with first and fourth Respondents and an affidavit in response was also filed on behalf of second Respondent when the hearing commenced.
- [106] As an alternate remedy second Respondent sought an order in terms of Section 13 of POCA, regarding property comprised in CT 25292 including the refurbished for FJD 60,000 on the hose on it by first Respondent using funds from tainted ANZ Account 11779946.
- [107] Second Respondent had made this application as an interim measure but considering that she was wife of first Respondent and also 50% shareholder of forth Respondent which had obtained substantial amounts from proceeds of crime to purchase two vehicles subject to forfeiture in this action, this issue was differed to determination at final hearing of the originating summons. This would also prevent this matter being dealt in piecemeal manner .
- [108] When Money Laundering is an offence of first Respondent issue of 'involvement' of third party cannot be determined in interim.
- [109] At the time of interim hearing third Respondent also made submissions partly associating with second Respondent, but its application needs to be considered separately as there is no evidence or allegation relating to its involvement in Money Laundering.
- [110] Section 13 of POCA states,

“13. Protection of third parties

“(2) If a person applies to the Court for an order under this subsection in respect of the person's interest in property and the **Court is satisfied:**

(a) the Applicant had an interest in the property;

(b) that the applicant was not in **any way involved in the commission of an offence** in respect of which forfeiture of the property is sought, or the forfeiture order against the property was made; **and**

(c) the applicant

(i) had the interest before the serious offence occurred; or

(ii) acquired the interest during or after the commission of the offence bona fide for fair value, and did not know or could not reasonably have known at the time of acquisition that the property was tainted property’

The **court may** make an **order declaring the nature, extend and value** (as at the time when the order is made) of the applicant’s interest.” (Emphasis added)

[111] Similar provision is found in Section 19 E(2) of Proceeds of Crime Act 1997, and this provision allows the court to exercise its discretion, to make an order upon being satisfied of certain facts and they are;

- a. Has an interest in the property.
- b. was not in any way involved in the commission of an offence in respect of which forfeiture of the property is sought;
- c. Had an interest before commission of offence; or
- d. Purchased it bona fide at any time without reasonable knowledge that it was tainted property.

[112] From the title of CT 25292, second Respondent is the proprietor of said property. There is a house on the property. First and second Respondents are husband and wife respectively. There is no issue that second Respondent has an interest in CT25292. There is no denial that first Respondent through Outstanding account had added value to FJD 60,000 after through repair to the house.

- [113] Third Party needs to show that such party was not in any way involved in the offence.
- [114] First Respondent is husband of second Respondent . First Respondent is charged with dishonestly obtaining a sum stated in the charge and also for Money Laundering.
- [115] There is no direct evidence to show second Respondent had in ‘any way’ involved in the commission of offence of dishonestly obtained money of Interested Party, but on the balance of probabilities from the undisputed evidence, there are more than one way second Respondent was ‘involved’ in the commission of the offence of Money Laundering.
- [116] The word ‘involved’ need not prove intention or knowledge about Money Laundering depending on the circumstances of the case. The ‘involvement’ threshold such as tacit silence when such inquiry is required such as in this case is sufficient, though this is not the only instance where involvement can be inferred from the evidence.
- [117] Money Laundering is defined in Section 69(3) of POCA and accordingly;
- “(c) the person converts or transfers money or other property derived directly or indirectly from a serious offence or a foreign serious offence, with the aim of concealing or disguising the illicit origin of that money or other property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof; or
- (d) the person conceals or disguises the true nature, origin, location, disposition, movement or ownership of the money or other property derived directly or indirectly from a serious offence or a foreign serious offence; or
- (e) the person renders assistance to a person falling within paragraph (a), (b), (c), or (d),.....”
- [118] So a person who assists in dissipation of proceeds of crime who ought to have known such funds are from illegal activity commits ‘Money Laundering’. Second Respondent was not charged with Money Laundering, and this is not a requirement for confiscation under NCBCF.
- [119] Burden is with third parties such as second Respondent to prove that she was not ‘any way involved’ in Money Laundering and short answer to that is that she had not done so and evidence show her ‘involvement’ in Money Laundering through assistance to dissipation of tainted money through her husband first Respondent.

[120] The transactions in this case which involved second Respondent, are for substantial amounts according to account statements provided. First and second Respondents are husband and wife and first Respondent had provided a joint affidavit in opposition to second and fourth Respondent. On the balance or probability from the undisputed evidence it is proved that second Respondent had opened a bank account with HFC from first Respondent for FJD 350,000 and from that FJD 300,000 transferred to her loan account and this is the only transaction of second Respondent in said account, for more than nine months , till it was 'frozen' by interim order. It can be imputed.

[121] On the balance of probability second Respondent is involved in Money Laundering charge of first Respondent , due to one or more of following acts;

- i. Opening of bank account no 9185 S 2 with HFC on 9.9.2014 with a cash deposit of \$350,000 and on or around this time first Respondent had withdrawn \$350,000 from account No 11779946 of Ostanding maintained by ANZ bank. It is admitted fact that Interested party had transferred FJD1,240,740.74 said account. This was one of two fund transfers in order to purchase a property for BAIRIN through deception. So the said account held by ANZ was tainted, and HFC bank account held in the name of second Respondent was also tainted by opening account No 9185S2 from tainted money. This is the only credit to said account of HFC 9185S2 for more than nine months, apart from monthly interests added.
- ii. Second Respondent had used FJD 300,000 from HFC bank Account No 9185S2 to reduce loan account of the same bank under her name relating to mortgage of CT25292. So due to trail of 'tainted' money derived from HFC bank account no 9185S2 loan account9185L30 for mortgage of CT 25282 was tainted with reduction of its outstanding loan amount from similar amount out of total outstanding FJD 505,388.85 at the date of purchase of the property comprised in CT25292.
- iii. Sale and Purchase Agreement for CT 25292 was entered between first Respondent and vendor on 11.7.2015 and the transfer of the said property in the name of second Respondent was on 8.10.2014 and the mortgage for the said property was also registered on the title , on the same day. HFC Bank loan account 9185L30 was opened on 1.10.2014 and with no balance and all transactions on the said account on 8.10.2014 relate to loan for purchase from mortgage of CT25292 .

- iv. From the above transfer of money obtained by deception by first Respondent to a new account of second Respondent opened and credit of FJD 350,000 and from that transfer of FJD 300,000 to loan account of second Respondent 9185L30 and this is loan for purchase of CT25292 through mortgage with HFC , shows that 'tainted' money is 'intermingled' in terms of Section 4(1A) of POA. In this manner not only CT2529 is 'tainted' though intermingling of proceeds of crime, but also proves on balance of probability that second Respondent was very much involved in the commission of offence of Money Laundering relating to purchase of CT25292.
- v. First Respondent had also funded repair of a house on the abovementioned tainted property For FJD 40,000 , and FJD 20,000 trough cheques from tainted account of Ostanding held by ANZ. This is the account which first Respondent obtained funds from Interested Party through deception and dishonesty by inflating price of the land.
- vi. Above actions were done by first Respondent and second Respondent. The fact that second Respondent was not charged in the criminal action is not material for this action which is based on civil forfeiture which is based on non-conviction.. When above actions taken together , individually or in combination Money Laundering is proved, on balance of probability that second Respondent was more than one way 'involved' in the commission of Money Laundering offence with her husband.
- vii. Second Respondent is also two equal shareholding directors of fourth Respondent who had also benefitted from proceeds of crime. As a director second Respondent has corporate responsibility not to allow legal entity being used as vehicle for money laundering, as in this case. This is discussed separately, but suffice to state this also proves that second Respondent more than one way involved in the commission of one or more of the charges for which first Respondent was charged.

[122] According second Respondent's active involvement in the Money Laundering is proved on balance of probability. So property comprised in CT 25292 cannot be subject to a declaration sought by second Respondent.

Application of Third Respondent

[123] Third Respondent had not made a separate application in terms of Section 13 or 19 of POCA, but at the hearing made an oral application. In the hearing of interim order sought by second Respondent third Respondent also sought

such orders and I have deferred determination of at hearing. Applicant does not dispute third Respondent's interest being declared as commercial bank.

- [124] There is no evidence in this action that third Respondent was in 'any way' involved in the two charges made against first Respondent considering that it is a commercial bank and second Respondent was a customer of the bank.
- [125] Accordingly forfeiture of CT 25292 and CT9548 (which is dealt below in this judgment), are made subject to mortgagees rights in terms of Section 13 of POCA. So sale of them are subject to rights of third Respondent as mortgagee.

Property Comprised in CT9548.

- [126] First Respondent had entered in to Sale and Purchase Agreement regarding property comprised in CT9548 on 3.11.2014 for FJD 450,000 out of this sum FJD 230,000 paid from tainted money derived from ANZ bank Account 11779946 which was the remaining money paid for the solicitors to purchase the property worth FJD 3.3 million for the joint venture BAIRAIN
- [127] This property is again mortgaged to third Respondent.
- [128] Purchase Price of the said property in terms of Sale and Purchase Agreement entered between vendor and first Respondent on 3.11.2014, for FJD 450,000.
- [129] Out of total price only FJD 230,000 is traced as tainted origin from BAIRAIN account for which again first Respondent is the signatory .
- [130] Property comprised in CT 9548 was transferred to fourth Respondent a legal entity where first and second Respondents are 50% shareholders and only Directors.
- [131] As stated earlier this property is forfeited proportionately as it was partially funded 230,000/450,000 from the sale of the said property subject to mortgagee's interest as third party not involved in the illegal conduct. The property is seized to the state and from the sale of it subject to mortgagee's rights , proportionate amount (i.e 23/45) is forfeited to the state .

Vehicle Registration HS 550 Range Rover Evoque

- [132] This vehicle was registered in the name of fourth Respondent entity.
- [133] Applicant was able to trace only FJD 10,000 out of sale price of FJD\$165,000.

- [134] Said sum of FJD 10,000 paid through Ostanding Account No 11779946 which is tainted for the reasons given earlier partially. So from the sale of said property a proportionate amount to the contribution in the purchase can be forfeited to the state. (i.e 10/65 from sale of the said vehicle)

Vehicle Registration HT 556

- [135] This property is registered in the name of fourth Respondent.
- [136] The value of it was FJD\$44,000 and out of that only FJD\$32,500 paid from tainted account of Ostanding with ANZ bearing account no 11779946.
- [137] Applying the proportionate principles stated in Section 4(1A) of POCA read with the discretion granted in Section 19 of POCA from the sale of such property relevant proportionate portion is forfeited .
- [138] So the vehicle registration HS 550 is forfeited to the state and sale of that from the proceeds a proportionate 33/44 (approximated) is forfeited to the state.

CONCLUSION

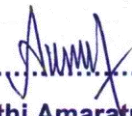
- [139] First and second Respondents who are husband and wife had filed a joint acknowledgment. Second Respondent had even filed an affidavit in response on behalf of second Respondent. First Respondent, dishonestly obtained a sum of money stated in the charge against him. He and his wife second Respondent through her bank account and also through a legal entity owned solely by them equally had dissipated such illegally obtained money. Applicant was able to trace some of the money obtained illegally by first Respondent. All money held in HFC Bank Account 9185S2 is forfeited to the state . Rest of the properties stated in the originating summons are intermingled with illegally obtained money and tainted. So the said properties are to be sold and proportionate amounts forfeited to the state. Since two of the properties are subjected to mortgages to third Respondent sale proceeds are subject to the rights of third Respondent . Cost of this action summarily assessed at \$4,000 to be paid by first Respondent within 21 days.

FINAL ORDERS;

- a. Forfeiture to the state, Home Finance Company Limited Account No 9185S2 in the name of second Respondent (all money remaining including any interest accrued upto the time of forfeiture.)
- b. Following assets are forfeited in proportionate manner subject to mortgage rights of third Respondent;

- i. Freehold Land described as CT 9548, Lot 3 on DP No2272 is seized and to be sold (subject to mortgagee rights) and sale proceeds forfeited to state proportionately 23/45.
 - ii. Freehold land and house constructed on CT25292, Lot 19 on DP No 5774 is seized and from the sale (subject to mortgagee rights) First, \$60,000 is forfeited for the value addition and from the remaining sum proportionately 30/83 is forfeited to state.
 - iii. Vehicle Registration number HS 550, Range Rover is seized and from the sale of it proportionately 10/165 forfeited to the state.
 - iv. Vehicle Registration number HT 558, Chevrolet Sonic is seized and from the sale 33/44 is forfeited to state proportionately.
 - v. Remainder of an amount from above proportionate confiscation to be paid to registered owners of such assets above (i to iv).
- c. Cost of this action is summarily assessed at \$4000 to be paid by first Respondent within 21 days.




.....
Deepthi Amarapura
Judge

At Suva this 17th day of June, 2025.