

**IS THE STATE A CONSTRUCTIVE TRUSTEE OR ABSOLUTE OWNER OF
PROCEEDS FROM SUSPECTED MONEY LAUNDERING ACTIVITIES?**

BY

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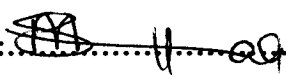
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ABSTRACT

This dissertation considers whether the state is a constructive trustee or absolute owner of proceeds from suspected money laundering activities by looking at a case study of *Seong San Co Ltd v The Attorney General and the Drug Enforcement Commission* (2008)/HPC/0396. In so doing, the research examines the law on money laundering, seizure, forfeiture and then attempts to explain the relationship between money laundering laws and forfeiture laws. The research goes on to evaluate the extent of protection given to third parties when the state implements asset forfeiture laws in suspected money laundering activities.

According to the findings of the research and the case study at hand, it has been found that the law is vague with regard to the protection of third party rights on the occurrence of seizure of proceeds from suspected money laundering activities. Third party rights are not adequately protected. The right procedure to ensure protection of third parties is not adhered to by the relevant wings of the state. A forfeiture order can affect third party interests acquired either before, after, or at the same time that the property becomes subject to forfeiture.

Therefore, this paper makes recommendations to the effect that there is need for the enhancement of effective protection of third party rights in asset forfeiture laws. Individual freedom finds tangible expression in property rights and so individual property rights can be in danger from overzealous enforcement of forfeiture laws. A safeguard of the rights of defendants and third parties can be achieved through basic procedural reforms. Forfeiture laws should not rely primarily upon the unreviewable discretion of law enforcement officials to protect the legitimate interests of property owners. Further, property owners must be able to rely upon their existing legal rights, not on the mercy of law enforcement agents, to protect against unwarranted property loss through forfeiture. Further, forfeiture should be a law enforcement weapon, not a revenue raising device for law enforcement. To that end, the fruits of successful forfeiture prosecutions should be subject to the legislative appropriations process, not left as booty with the seizing agency. Parliament should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government's use of criminal forfeiture as an end run around civil asset forfeiture reforms.

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I thank first and foremost my God, who has brought me this far to be able to write a dissertation in fulfilment of my law degree, and to God be all the Glory. Many thanks also go to my father, Mr Charles Kakoma Changano who inspired me to study law. His love, care and concern has been the backbone of my studies. He is the best daddy of them all. Am also grateful to the rest of my family for their tireless support during my studies, my mother, Rortha Kaiko Changano, my sisters; Eliza, Ivy, Martha and brothers; Manyando, Simataa and Jimmy, I love you all.

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Simataa Majory

The University of Zambia

DEDICATION

To my Father and Mother, Mr and Mrs Changano.

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LIST OF ACRONYMS

PPML Act	Prohibition and Prevention of Money Laundering Act
UNCAC	United Nations Convention Against Corruption
SADC	Southern African Development Community
UN	United Nations
AU	African Union

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CHAPTER ONE

A BACKGROUND AND GENERAL OVERVIEW OF THE LAW ON MONEY LAUNDERING, SEIZURE AND FORFEITURE OF PROPERTY IN ZAMBIA.

1.0 Introduction

Explained in simple terms, money laundering is the ‘washing of dirty money’ into the financial system thereby legitimizing proceeds of illegal activities such as drug trafficking, the objective in general being to disguise the source of ill-gotten wealth so that it cannot be attributed to the predicate criminality.¹ S.E Kulusika remarks on the danger of money laundering when he observes as follows:-

“It is the obligation of a responsible government to protect its citizens and other persons resident in its territory from any sort of harm or criminal activity. Society has the right to defend itself against any crime by the institution of counter measures to suppress and prevent any crime. In today’s world crime can come in different shades. It can be offences against the body, or morality, or property, or money crime such as obtaining money by criminal means, and others. Money obtained as a result of the commission of crime has become a concern to many governments because such money does not end in a shopping mall where it is spent on fanciful goods, but it is employed to further the commission of heinous crimes. As a result, governments have resolved to criminalize money obtained through dubious or criminal means and to describe such money as the “proceeds of crime” and to designate any transaction involving property acquired with the proceeds of crime, handling in any way any property desired or realized from illegal activity as “money laundering”.²

The Prohibition and Prevention of Money Laundering Act³ defines money laundering as following;

“Money laundering” means-

¹ Mwenda Kenneth. *Anti-Money Laundering Law and Practice: Lessons from Zambia*. (Lusaka: UNZA Press, 2005), 3.

² Kulusika S.E. “Money Laundering in Zambia”. *Zambia Law Journal*, volume 33. (Lusaka: UNZA Press, 2003), 120.

³ Act No.14 of 2001

- a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime
- b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity; or
- c) the retention or acquisition of property knowing that the property is derived or realized directly or indirectly from illegal activity.”

Under this definition of money laundering arises very important terms such as proceeds of crime, property and illegal activity. Under the PPML Act, “illegal activity” means “any activity, whenever or wherever carried out which under any written law in the Republic amounts to a crime”.⁴ ‘Property’ includes “money and all other property, real or personal, movable or immovable including things in action and other tangible or incorporeal property wherever situated and includes any interest in such property.”⁵ ‘Proceeds of crime’ means “any property, benefit or advantage within or outside Zambia realized or derived, directly or indirectly from illegal activity.”⁶

All proceeds from money laundering activities are liable to forfeiture by the state. Forfeiture is taken by the courts of law because the civil law has long recognized through the maxim: “*ex turpi causa non oritur action*” as it was stated in the case of *Re Crippen*⁷, where Sir Samuel Evans stated that “....no person can obtain or enforce any right resulting to him from his own crime, neither can his representative claiming under him obtain or enforce any such rights.”

⁴ Section 2 of The Prohibition and Prevention of Money Laundering Act, No. 14 of 2001.

⁵ Section 2 of The Prohibition and Prevention of Money Laundering Act, No. 14 of 2001.

⁶ Section 2 of The Prohibition and Prevention of Money Laundering Act, No. 14 of 2001.

⁷ [1911-13] 1 ALL ER 207

However, proceeds from suspected money laundering activities can only be forfeited after the court has made a determination that indeed the proceeds were derived from money laundering activities. It is at this point that there seems to be a problem because forfeiture cannot be made until a person has been convicted of a money laundering offence. By this time any property the subject of the application will presumably have been seized for some time.

Seizure occurs when the state takes away your property. Forfeiture is when legal title is permanently transferred to the state. There are two types of forfeiture actions; criminal and civil. The criminal forfeiture action is referred to as an in personam action, meaning that the action is against the person, and, that upon conviction, the punitive effect of forfeiture can be used against the convicted offender. The civil forfeiture action is referred to as an in rem action, meaning that the action is against the property. The two actions differ in many ways, including, the burden of proof necessary to forfeit the property and in some cases, the type of property interests that can be forfeited.⁸

There are three theories of forfeiture in money laundering cases: firstly, the forfeiture of the proceeds that the defendant is using to commit the money laundering offense. Secondly, the forfeiture of “subject matter property, “or property other than the proceeds that was part of the financial transaction constituting the money laundering offense. Subject matter property is property, other than the proceeds, that was part of, or integral to, the money laundering transaction. This includes clean money being used to commit a criminal offense in a reverse money laundering transaction; property that is the subject of a purchase, sale or exchange constituting a money laundering offense; and property that is commingled with the proceeds in

⁸ Kathy Bazoian Phelps. *The battle over forfeited assets: Third Party Claims and Cooperation Agreements*. (Los Angeles: LexisNexis 2012), 89.

the course of the money laundering transaction.⁹ The third theory is much broader, permitting the forfeiture of any property used to “facilitate” the money laundering offense. “Facilitating property” includes property that is external to the money laundering offense, that is, property that is not part of the financial transaction itself but is nevertheless “involved” in the transaction in the sense that it makes the offense easier to commit or harder to detect. “Subject matter” property is, by definition, property that is part and parcel of the financial transaction constituting the money laundering offense. Thus, “subject matter” property is forfeitable as “property involved” in the offense whether it makes the offense easier to commit or harder to detect or not.¹⁰

Between the periods of seizure and the court determining whether the property is liable to forfeiture, there have been numerous complaints from suspects alleging abuse of the seized property by officers of the state in disregard of peoples’ right to the property. The state has ended up paying colossal sums of money in damages to the rightful owners after it was found that the suspected property was actually free from money laundering activities. There is therefore need to determine whether the state is merely a constructive trustee or absolute owner of proceeds from suspected money laundering activities.

In terms of Zambia’s domestic laws, in particular, section 18 of the Prohibition and Prevention of Money-Laundering Act,¹¹ section 41 of the Anti-corruption Commission Act,¹² and the

⁹ Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*, (Cambridge: Oxford University Press, 1996), 67.

¹⁰ Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*, (Cambridge: Oxford University Press, 1996), 68.

¹¹ Act No.14 of 2001

¹² Act No.38 of 2010

Forfeiture of Proceeds of Crime Act¹³ specifically provides for forfeiture of tainted property after conviction of the person. It appears in general, forfeiture in Zambia is conviction based. However, note should be taken that the laws in certain circumstances provide for pre-conviction forfeiture like section 29 of the Forfeiture of Proceeds of Crime Act¹⁴ and the Corrupt Practices (Disposal of Recovered Property) Regulations of 2004. Although Zambia has made an effort to enact most of the laws dealing with forfeiture and seizing of proceeds of money laundering, it appears there are still gaps within the law which need to be attended to. Of importance to this study is that the forfeiture laws do not adequately ensure that property rights of third parties are still retained and respected between the time of seizure and forfeiture of the seized property.

This study endeavors to establish whether the state is a constructive trustee or absolute owner of proceeds from suspected money laundering activities by looking at a case study of *Seong San Co Ltd v The Attorney General and The Drug Enforcement Commission*.¹⁵ In that case the issues before the court were *inter alia* how the second defendants were to treat seized funds from suspected money laundering activities pending the determination by the court as to whether seized funds were indeed liable to forfeiture. The judgment of this case highlights that there is either a lacuna or the law is vague with regards the duty of the second defendants as to how they should handle property during the periods between seizure and forfeiture.

¹³ Act No.19 of 2010

¹⁴ Act No.19 of 2010

¹⁵ (2008)/HPC/0396

1.1 Statement of the problem

In today's world crime comes in different shades including money laundering. When there are suspected money laundering activities and the State seizes the funds, it becomes important to find out in what capacity the state holds the seized funds: as a constructive trustee or owner of those proceeds.

There have been a number of complaints against the state from suspects regarding the misuse of the seized property pending court determination and also the blatant disregard of the appropriate procedure in determining who the rightful owner of the seized funds belongs to before the state disposes of them. Thus the State is losing out in paying colossal sums of money in damages to the rightful owners when the court finds that the property was actually free from money laundering.

In *Roy Chilumanda and Namwala Lodge & Car Hire v The Attorney General*,¹⁶ the plaintiff was conducting business of hiring out motor vehicles. The Drug Enforcement Commission alleging that the plaintiff was involved in money laundering seized 22 vehicles physically and 4 vehicles by way of walking possession belonging to the plaintiff. Pending the determination of the case by the court, the vehicles which were held by the State were being driven and cannibalized with no regard to the plaintiff's rights. The Attorney General was held vicariously liable for the damages caused to the plaintiff by servants of the Government.

In *The Attorney General v St George Fisheries*¹⁷, where it was contended by the respondent that his property was wrongly advertised for seizure as it did not fall within the circumstances

¹⁶ (2006) /HP/O797

¹⁷ (2004) Unreported

outlined in the statutory instrument.¹⁸ He was therefore seeking damages arising from loss of business occasioned by the restriction notice, embarrassment of being associated to the plunder of national resources and the invokement of the wrong legislation by the taskforce in its quest to recover his property. The Attorney General was held liable.

The purpose of the study is to give a general overview of money laundering activities in Zambia and try to establish how the State should treat seized property from suspected money laundering activities pending determination by the court. This includes the relevant procedures in determining who the rightful owner is before the State disposes off the property. The study will further determine whether the State is an absolute owner or constructive trustee of suspected money laundering activities. An analysis of the extent of protection given to third parties by the recently passed Forfeiture of Proceeds of Crime Act¹⁹ will also be given then recommendations and measures for improvement where appropriate will be put forward.

Money laundering is a crime and forfeiture (confiscation) is a remedy. Forfeiture laws for money laundering can be very powerful law enforcement tools. All property, real or personal involved in a money laundering offense can be made subject to forfeiture. The control of property pending confiscation is achieved by means of a seizure power at section 15 of Prohibition and Prevention of Money Laundering Act²⁰. It requires authorized officers to seize property which that officer has reasonable grounds to believe is derived or acquired from the money laundering. Section 17 of the said Act makes any property that has been seized in accordance with section 15, and which is in the possession or under the control of a person who is convicted of a money laundering offence, and which is derived from proceeds of the crime liable to forfeiture by a court order.

¹⁸ S I No.13 of 2006

¹⁹ Act No.19 OF 2010

²⁰ Act No. 14 of 2001

Clearly, a forfeiture application cannot be made until a person has been convicted of a money laundering offence.

This study is useful in that it is important for the law to be clear as regards how the state should handle seized property from suspected money laundering activities. The complaints against the State as regards the abuse of seized property from suspected money laundering activities pending court determination are draining the State of colossal amounts of money in damages to the rightful owners of the property. Even after the court has found that the seized property is indeed subject to forfeiture, the Forfeiture of Proceeds of Crime Act²¹, does not vest automatic ownership of such property in the state as section 12 (3) of Forfeiture of Proceeds of Crime Act,²² requires that right procedures have to be followed before the state can dispose off the property. This is clearly not the case as can be seen in the ongoing investigations into the now famous ‘Gold Scam Case’ of *The People v Ross Ernest Moore and Hassel Shalime*,²³ would suggest. In this case, the respondents were charged with one count of unlawful possession of gold contrary to Section 22 of the Gold Trade Act,²⁴ as they had no licence to deal in the gold. The Supreme Court found them liable and ordered the forfeiture of the gold to the State. However, as at the time of writing this essay investigations were underway by the Task Force on the sale of the gold pertaining to procedural impropriety because it is alleged that the Drug Enforcement Commission did not follow the right procedure in disposing off the gold.

As a result of these investigations, in *The People v Aaron Zulu and others*,²⁵ former DEC Commissioner, Aaron Zulu is together with others charged with the misappropriation of the gold.

²¹ Act No.19 of 2010

²² Act No.19 of 2010

²³ SCZ Judgment No.7 of 2010

²⁴ Chapter 396 of The Laws of Zambia.

²⁵ Case at the writing of this essay was in the principal Magistrates Courts in Lusaka.

The case at the time of writing of this essay was at the principal magistrate's Court in Lusaka. Therefore, changes in the law are needed to give clear guidance and procedure to the relevant wings of the state.

1.2 Conclusion

This chapter has dealt with the basic aspects of the research and given a prelude to the subject matter at hand. It has given a general overview of the legal and institutional frameworks governing money laundering, seizure and forfeiture of proceeds from money laundering activities and outlined the statement of the problem which has necessitated this study. The chapter has also stated the objectives that the research sought to achieve.

CHAPTER TWO

THE CONSTRUCTIVE TRUST

2.0 Introduction

The trust in England was inspired by the desire of equity to give legal protection in those cases where persons had conveyed property to others on the understanding that the latter would use the property in certain ways or hold it for the benefit not of themselves but of third parties. Difficulty has been found in providing a comprehensive definition of a trust but various attempts have been made. Perhaps the best definition of a trust was given in *Re Sott*²⁶, where it was stated that the word trust refers to the duty or aggregate of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him or under his control, which property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking in accordance with equitable principles. As a consequence, the administrator will be in such a manner that the consequential benefits and advantages accrue, not to the trustee but to persons called *cestuis que trust* or beneficiaries, if there be any; if not, for some purpose which the law will recognize and enforce.

2.1 Zambian legal framework on constructive trusts

In Zambia, there are two legal provisions governing the establishment of trusts being; the Administration of Estates (Trust Corporations) Act²⁷ and the Restriction of Trusts Act²⁸. There

²⁶ [1948] S.A.S.R 193 at 196

²⁷ Chapter 62 of The Laws of Zambia

are some requirements which need to be met when creating a trust whether it is one by will or contract. In our *Zambian statutes*, it is not outlines in detail the formalities that have to be followed by a founder intending to establish a trust but simply provides for the effects of a trust upon disposition under section 5(1) (b) of the *Restriction of Trusts Act*²⁹ which provides that “subject to the provisions of section four, and notwithstanding anything to the contrary contained in any other law, after the commencement of this Act-a trust shall have effect as a disposition in fee simple or absolutely, as the case may be, to the beneficiary.”

The subject matter of a trust may be real or personal property. Furthermore the trust may be not only of a legal estate but also of an equitable interest in property. The essentials of a trust were given in Lord Langdale’s judgment in *Knight v Knight*,³⁰ it was held that in order to create a trust that is valid, first, the words must be imperative, secondly, the subject matter must be certain and thirdly, the object must be as certain as the subject. There are various types of trusts which include implied trusts, resulting trusts and contrastive trusts. This study places particular importance on the constructive trust.

The notion of a constructive trust is a form of a legal fiction. All legal systems make use of fictions, including presumptions, maxims and constructive notions. A legal system involves the legitimization of falsehood by treating the falsehood as source of legal truth.³¹ Constructive notions are a part of legal fictions and are generally resorted to by the law for a variety of purposes. A constructive notion exists in the form of an assertion that a given state of affairs exists whereas in actual fact it does not exist. As a legal term, the word ‘constructive’ is used

²⁸ Chapter 63 of The Laws of Zambia

²⁹ Chapter 63 of The Laws of Zambia

³⁰ [1840] 3 Beav 148

³¹ Anyangwe Carlson. *An Outline of the Study of Jurisprudence*. (Lusaka: UNZA Press,2005), 43.

where the law infers or implies (construes) a right, liability or status without reference to intention of the parties, or that a transaction or operation has not taken place, but that some equivalent has. A constructive notion may thus exist in the form of an assertion that a given state of affairs exists whereas in actual fact it does not exist.³² Examples of constructive notions include the constructive trust and constructive trustee.

According to Parker and Mellows, a constructive trust is one which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention.³³ Halsbury's Laws of England³⁴ states in paragraph 585 of volume 48 that "A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property."

Although there are two clear categories of constructive trusts, that is those involving profits made by fiduciaries and those created by the intermeddling of strangers, the categories of constructive trusteeship are not closed. Constructive trusts arise

- a) When some person holding a fiduciary position has made a profit out of the trust
- b) When someone fraudulently or unconscionably attempts to take advantage of statutory provisions or other fundamental legal principles and perhaps when someone has acted inequitably or unfairly in the courts opinion.
- c) When someone, neither being a trustee nor authorized by the trustee intermeddles with the trust property or has trust property received by him with notice that it was trust

³² Anyangwe Carlson. *An Outline of the Study of Jurisprudence*. (Lusaka: UNZA Press, 2005), 44.

³³ Parker & Mellows. *The Modern Law of Trusts*. (London: Sweet & Maxwell, 1975), 16.

³⁴ Lord Haliham of St Marylebone, *Halsbury's Laws of England*. 4th ed. Volume 48. (London: Butterworths, 1984)

property, transferred to him in breach of trust or when an innocent recipient of such property first learns that it is trust property.

d) When a vendor has entered into a specifically enforceable contract of sale.

Other types of constructive trust not relating to unconscionable dealings are constructive trusts over property, mutual wills, and arguably secret trusts. Where property is sold or transferred, the signing of an agreement to do so automatically transfers the equitable interest to the buyer or transferee; until the property itself is transferred, it is deemed to be held on constructive trust for the recipient. Mutual wills are irrevocable wills made by multiple people to come into force at the writer's death; similarly, these are also considered constructive trusts. Secret trusts are the subject of much debate over their classification, but one theory holds them to be constructive in nature. Related to constructive trusts are constructive trustees, or trustees *de son tort*; these are where "one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee".³⁵ Where their actions are reckless or dishonest, the court makes that person a constructive trustee, forcing them to account to the beneficiaries for any loss suffered and look after the trust property in their possession.

Where a person in a fiduciary office earns unauthorized profits as a result of their position, this money will be held on constructive trust. This principle originated with *Keech v Sandford*³⁶ and the rule was first fully defined in *Bray v Ford*,³⁷ where Lord Herschell said that:

“ It is an inflexible rule of the court of equity that a person in a fiduciary position...is not, unless otherwise [authorized,] entitled to make a profit; he is not allowed to put himself in a position where his interest and duty

³⁵ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish, 2009), 512.

³⁶ [1726] 2 Eq Cas Abr 741

³⁷ [1896] AC 44

conflict. It does not appear to me that this rule is, as had been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.”

Where acts lead to profit and are illegal, under either criminal law or an established legal principle, equity puts any property acquired through these acts into a constructive trust. The most common type of trust here is one resulting from bribery; where somebody in a fiduciary office makes unlawful profit, that money will be held on constructive trust for the beneficiaries of his office.³⁸ In *Attorney General for Hong Kong v Reid*,³⁹ the Director of Public Prosecutions in Hong Kong accepted bribes to not prosecute certain people. The court held that this was a violation of fiduciary duty, and put the money on constructive trust. An issue with this principle is that the position of Director of Public Prosecutions is not normally understood to be a fiduciary one. Rather, the courts are using fiduciary duties as a method of punishing the defendant; Alastair Hudson writes that they are "as concerned to punish the wrongdoer as to protect rights in property"⁴⁰

Whether or not someone is a fiduciary depends on their position. Trustees, company directors, agents and business partners are all fiduciaries, as in *Yugraneft v Abramovich*,⁴¹ but other positions may be recognized by the court if the misuse of powers in a particular circumstance renders them so, as in the *Attorney General* case. In *Brinks v Abu-Saleh (No. 3)*,⁴² a security guard who was bribed to give information on a company's security systems, allowing a gang of armed robbers to burgle their warehouse, was found to be in a fiduciary position. While a

³⁸ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish,2009), 517

³⁹ [1994] 1 AC 324

⁴⁰ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish,2009), 518

⁴¹ [2008] All ER 299

⁴² [1996] CLC 133

security guard would not normally be a fiduciary due to not holding a senior enough role, in relation to security arrangements the guard would be found to be acting in a fiduciary capacity.⁴³ Bribes may also be synonymous with "secret commissions", where somebody is given an undisclosed "kickback"⁴⁴

When the owner of property deals with it in such a way as to deny or impede the rights of some other person over that property, the courts will order that owner to hold it on constructive trust. For trusts of real property, constructive trusts may arise in one of three situations. First, when the parties form an agreement to buy the land, or show "common intention" by jointly contributing to the price or mortgage of a property, as in *Lloyds Bank plc v Rosset*.⁴⁵ Second, when a contract to transfer rights is agreed to, the equitable interest is automatically transferred, something that also applies to personal property. Third, a constructive trust may be created where there are several parties interested in commercially exploiting land, and some refrain from doing so due to an agreement with the defendant, as in *Pallant v Morgan*⁴⁶. In *Banner Homes Group plc v Luff Development Ltd*,⁴⁷ it was decided that this principle applies even when no binding contract has been signed, and the claimant has refrained due to ongoing negotiations with the defendant.

Another "more contentious" form of constructive trust is in a situation where the claimant has "done everything necessary". Where the owner of property intends to transfer property to another completes their side of the transfer and the transfer then fails, this property will be held on constructive trust as in *Re Rose*.⁴⁸ In relation to personal property, a constructive trust will be

⁴³ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish,2009), 521.
⁴⁴ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish,2009), 522.
⁴⁵ [1990] 1 All ER 1111
⁴⁶ [1953] Ch 43
⁴⁷ [2000] Ch 372
⁴⁸ [1952] 1 All ER 1217

created over a fund created to protect pre-payments to a company in the event of that company going into insolvency. In several situations, companies, knowing they are in dire financial straits, have put money paid to them by customers for products not yet delivered in a separate bank account to protect it in the event of insolvency. This causes theoretical problems; it is "difficult to square the conscionability of holding the money on trust for the customers with the *pari passu* principle in insolvency law that no unsecured creditor should be given an advantage over any other unsecured creditor".⁴⁹

A trustee is always a fiduciary. A fiduciary relationship exists wherever there is a relationship of trust and confidence such that equity imposes duties or disabilities upon the person in whom the confidence is reposed (the fiduciary) in order to prevent possible abuse of the confidence.⁵⁰ A perusal of paragraph 631 of Halsbury's Laws of England⁵¹ confirms this position. It states

"Equity has employed two methods to compel restitution of that which is regarded as rightfully belonging to another. First there is a broad general principle of equity that neither a trustee nor any other person in a fiduciary position may retain a profit made in the course of, or by means of, his office; and where there has been a breach of this principle, which extends to constructive trusts, the remedies provided by the law of trusts are available to enable a beneficiary to recover what was due to him. Secondly, equity has employed the mechanism of the tracing order wherever a fiduciary relationship exists to enable property to be recovered from third parties into whose hands it has passed. Like all equitable remedies for the recovery of property, these remedies may be defeated where the legal interest to that property passes into the hands of a purchaser in good faith without notice of the equities."

Thus treating a person as a constructive trustee is merely a formula for imposing an equitable personal liability to account. In *Selangor United Rubber Estates Ltd v Cradock (a bankrupt)*⁵² Thomas, J stated as follows at page 1097: "It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship is nothing more than a formula for equitable relief. The court of equity says that a defendant shall be liable in equity as

⁴⁹ Hudson, Alastair. *Equity and Trusts*, 6th ed. (London: Routledge-Cavendish, 2009), 515.

⁵⁰ David J Hayton. *Underhill's Law of Trusts and Trustees*. 13th ed. (London: Butterworths, 1985) P28

⁵¹ Lord Hailham of St Marylebone, *Halsbury's Laws of England*. 4th ed. Volume 9. (London: Butterworths, 1984)

⁵² (No.3) [1968] 2 ALL ER 1073

though he were a trustee. This is done because in accordance with equitable principles applied by the court of equity, it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.”

Goulding J, held as follows in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*⁵³

“One of the most common cases in which a court of equity acts upon the ground of implied trusts in invitum is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked, that the receiving of money which consistently with conscience cannot be retained is, in equity, sufficient to raise a trust in favour of the party for whom or on whose account it is received. This is the governing principle in all such cases. And therefore, whenever any controversy arises, the true question is not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex oequo et bono, retain it. Illustrations of this doctrines are familiar in cases of money paid by accident, or mistake or fraud and the difference between the payment of money under a mistake of law, in its operation upon the conscience of a party, presents the equitable qualifications of the doctrine in a striking manner. It is true that courts of law now entertain jurisdiction in many cases of this sort where formally the remedy was solely in equity.”

Failure to comply with any of the duties of a trustee whether by a positive act or a failure to act constitutes a breach of trust for which the trustee will be held liable. The liability extends to all loss thereby caused directly or indirectly to the trust estate and even where no loss can be shown, to any profit which has accrued to the trustee. It is equally a breach of trust whether committed fraudulently by a trustee for his own benefit of the trust estate and ignorant of the fact that it was a breach of trust.⁵⁴ It may be noted that in considering the liability of trustees it is immaterial how the trust was created and whether it was for valuable consideration or by the voluntary gift of the very trustees who are now being sued.

It would be undesirable to attempt an exhaustive list of circumstances in which a breach of trust can be committed but the following are examples: paying trust property to the wrong person and failure to exercise a proper discretion with regards to trust decisions.

⁵³ [1979] 3 ALL ER 1024

⁵⁴ Parker & Mellows. *The Modern Law of Trusts*. (London: Sweet & Maxwell, 1975), 310.

2.2 Conclusion

A constructive trust is one which arises by operation of law. It can arise in a wide variety of circumstances. It is often assumed that a constructive trust, like any other trust, is a situation in which specific property is vested in a trustee on trust for ascertained beneficiaries. This is not always so; there are many differences between constructive trusts and other trusts. A constructive trustee may not know that he is a trustee. It is sometimes difficult to see the distinction between a constructive trust and a duty to account. Where an agent has obtained illegal profits, or taken bribes, should we say that he is a constructive trustee, or that he is under a duty to account? The former involves a proprietary claim by the plaintiff, the latter a personal claim. The difference may be considerable, but the terminology is indiscriminate.

A constructive trust is imposed not because of the intention of the parties but because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. A constructive trust is imposed upon a person in order to prevent his unjust enrichment. Therefore, where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises. The plaintiff has a right to his proprietary remedy if he can show a constructive trust.

CHAPTER THREE

THE RELATIONSHIP OF MONEY LAUNDERING LAWS AND FORFEITURE LAWS

3.0 Introduction

Asset forfeiture is confiscation, by the State, of assets which are either (a) the alleged proceeds of crime or (b) the alleged instrumentalities of crime, and more recently, alleged terrorism. Instrumentalities of crime are property that was allegedly used to facilitate crime.⁵⁵ Forfeiture is important. It seems obvious that the state should do its best to ensure that crime does not pay. Asset forfeiture is often portrayed simply as a means of reclaiming what has been wrongfully gained by criminals. In this sense, it is merely the state claiming the fruit of crime on behalf of society. Further, asset forfeiture removes wealth from the criminals. It has been discovered that criminals can take a risk engage in any illegal activity knowing that their property is intact. They would rather spend years in jail sentences knowing they can still manage to survive using their untouched property.⁵⁶

But there is a clear sense of unease that surrounds the idea of asset forfeiture. Arbitrary and capricious deprivation by governments of the private property of individuals who have not been convicted of a crime is generally not permissible in rights-based societies. There is a significant

⁵⁵ Kathy Bazoian Phelps. *The battle over forfeited assets: Third party claims and Cooperation Agreements*. (Los Angeles: LexisNexis, 2012), 23.

⁵⁶ Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*. (Cambridge: Oxford University Press, 1996), 56.

incentive for agencies to abuse forfeiture as the proceeds ultimately accrue to the agency bringing the forfeiture application.⁵⁷

Money laundering is a crime and forfeiture (confiscation) is a remedy. In money laundering cases, in the appropriate circumstances, the government can recover the money being laundered, the money or other property that is commingled with it or obtained in exchange for it when the money laundering transaction takes place, and other property that facilitates the money laundering offense. Forfeiture statutes for money laundering can be very powerful law enforcement tools. All property, real or personal, involved in a money laundering offence can be made subject to forfeiture.⁵⁸

3.1 Zambia's asset forfeiture legal framework

Zambia has a number of legislation dealing with money laundering, corruption, asset forfeiture and mutual legal assistance. At present this legislation consists of the following; the Anti-Corruption Act⁵⁹, the Prohibition and Prevention of Money Laundering Act (PPML)⁶⁰, the Narcotic Drugs and Psychotropic Substances Act,⁶¹ the Forfeiture of Proceeds of Crime Act,⁶² the Financial Intelligence Centre Act⁶³ and the Mutual Legal Assistance in Criminal Matters Act.⁶⁴

⁵⁷ Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*. (Cambridge: Oxford University Press, 1996), 78

⁵⁸ Mwenda Kenneth. *Anti-Money Laundering Law and Practice: Lessons from Zambia*. (Lusaka: UNZA Press, 2005), 33

⁵⁹ Act No. 38 of 2010

⁶⁰ Act No. 14 of 2001

⁶¹ Chapter 96 of The Laws of Zambia

⁶² Act No. 19 of 2010

⁶³ Act No. 46 of 2010

⁶⁴ Chapter 98 of The Laws of Zambia

On the international front, Zambia is a party to the following international instruments: the 1961 UN Convention on Narcotic Drugs, the 1971 UN Convention on Psychotropic Substances, the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the UN Convention Against Transnational Organized Crime, the UN Convention Against Corruption, the SADC Protocol Against Corruption and the AU Convention on Preventing and Combating Corruption. It is not necessary to discuss the above legislation in detail, only those parts of it which explain the relationship of money laundering laws and forfeiture laws.

The purpose of the Prohibition and Prevention of Money Laundering Act (PPML Act) is self explanatory from the title. The Act provides for the prohibition and prevention of money laundering activities in Zambia. It provides for the disclosure of information by the supervisory authorities and regulated Institutions on the suspicion of money laundering activities, it provides for the forfeiture of property belonging to persons convicted of money laundering offences. The Act also puts in place other legal processes of preventing money laundering activities in Zambia.

Under the Prohibition and Prevention of Money Laundering Act (PPML Act), ⁶⁵civil liability of money launderers arises mainly in regard to statutory provisions dealing with the seizure and forfeiture of property. That said caution should be exercised when applying concepts of civil liability to cases of money laundering. The law under section 15 of the PPML Act provides for seizure of property by an authorized officer where he has reasonable grounds to suspect that the property is derived from or acquired from money laundering. Section 17 (1)(b) of the same Act proceeds to provide for forfeiture of property derived or acquired from proceeds of crime if it has been in possession or under the control of a person convicted of the offence of money laundering and which property is derived or acquired from the proceeds of crime. Although the provision

⁶⁵ Act No. 14 of 2001

discusses property which is derived or acquired from the proceeds of the crime as being liable for forfeiture, it does not specifically provide for the forfeiture of income, profits and other benefits accruing from the proceeds of crime. This is compounded by the limits created in the definition of property as it does not include income, profits or other benefits arising out of proceeds of crime.

Forfeiture as provided for in section 17 of the PPML Act seems to be limited to proceeds of crime which will have been in the possession or under the control of the person convicted of money laundering activities. This section does not extend to cover forfeiture of proceeds of crime relating to the same offender but in the possession of another third party. Currently the PPML Act does not cover proceeds of crime relating to the same offender but in the possession of a third party. Section 18 (1) makes provision for the forfeiture of property where there is no claim made for the return of the seized property provided that notice provisions of section 18(2) have been complied with. The procedure may be utilized if: no prosecution for any offence is instituted with regard to the property; no claim in writing is made for the property; and no proceedings are commenced within six months of seizure for the forfeiture of property.

Generally where property is seized under the PPML Act⁶⁶, the authorized officer who effected the seizure may at any time before it is forfeited under the Act order the release of the property to the person from whom the property was seized if the officer is satisfied that the property is not liable to forfeiture under the PPML Act. This is contained in section 18 of the Act. The officer who effected the release or the state will not be liable to civil proceedings by any person unless it is proved that the seizure and the release were not done in good faith.

⁶⁶ Act No. 14 of 2001

Good faith has been compared with unconsciounability, fairness, reasonable standards of fair dealing, decency, community standards of fairness and honesty in fact, indicating that good faith is an extremely versatile concept. Commenting on good faith, Aristotle stated that “good faith is not an obligation to act altruistically. Regretfully, one must leave the universal adoption of such noble motive to some far distant and more enlightened age. Good faith does not require the abandoning of self interest as the governing motive in contractual relations. However it may prevent a party from abusing a legal right.”⁶⁷

The Forfeiture of Proceeds of Crime Act⁶⁸ as the name suggests provides for the forfeiture of all proceeds of crime including money laundering activities. This statute supplements the provisions of The Prohibition and Prevention of Money Laundering Act,⁶⁹ as regards seizure and forfeiture of tainted property. The Forfeiture of Proceeds of crime Act⁷⁰ has provisions which give third parties who claim interest in the forfeited property to apply to court before the end of six months commencing on the day the forfeiture order was made. Protection of third party rights is provided for in section 12 of the Act.

3.2 International instruments on asset forfeiture

International asset recovery is a term used to describe efforts by governments to repatriate the proceeds of corruption hidden in foreign jurisdictions. Often used to emphasize the multi-jurisdictional or cross-border aspects of a corruption investigation, international asset recovery

⁶⁷ Keily T. *Good Faith and The Vienna Convention on Contracts for the International Sale of Goods*. *Journal of International Commercial law*. Vol 3 (July 1999), 46.

⁶⁸ Act No. 19 of 2010

⁶⁹ Act No.14 of 2001

⁷⁰ Act No. 19 of 2010

includes numerous processes such as the tracing, freezing, confiscation and repatriation of proceeds stored in foreign jurisdictions. Mutual legal assistance is vital to this process, as mutual legal assistance requests can generate vital information in the early stages of an investigation in tracing, identifying and temporary freezing the accounts linked to corruption.

The United Nations Convention Against Illicit Traffic In Narcotic Drugs

It is important to note that forfeiture is not something novel embarked upon by most countries. Indeed, a 1988 UN Convention requires states party to the convention to adopt forfeiture provisions. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted by the UN Conference at its 6th plenary meeting on 19 December 1988. On 28th May 1993, Zambia ratified this convention. Most countries, including Zambia, that have adopted laws against organized crime reflect the provisions recommended by the convention, but have extended them to cover criminal activities other than drug offences. The Transnational Convention against Organized Crime, finalized in Vienna, can also be seen to some extent as an extension of the provisions of the convention.

The treaty focuses on stopping organized crime by providing for international cooperation in apprehending and convicting gangsters and starving them of funds through asset forfeiture, asset freezing and other methods. It also establishes a system for placing precursors to scheduled drugs under international drug control. Under article 37, any drugs, substances and equipment used in or intended for the commission of any of the offences listed in the treaty shall be liable to seizure and confiscation. The convention requires that signatories criminalize money laundering and make it an extraditable offense. The convention also requires that signatories facilitate the

identification, tracing, seizure and forfeiture of the proceeds of narcotics trafficking and money laundering.

United Nations Convention against Corruption (UNCAC)

UNCAC which came into force in 2005 lays out a comprehensive framework of legal instruments to support international asset recovery. The asset recovery process consists of four steps: identification; investigation, tracing and freezing; confiscation or forfeiture; and return. Identification of the underlying criminal activity or the suspected proceeds of corruption triggers an investigation. The investigation gathers evidence of the corrupt activity and simultaneously traces the location of the proceeds of corruption.

Timely freezing of the assets as they are discovered is essential to prevent the dispersion and loss of the assets. In order to recover the assets a definitive court judgment has to be secured through proceedings in criminal or civil (private) law. Assets are returned through a court order assigning ownership to or between the state and states, victims and, in some cases, third parties. Section 54 of the convention provides that: “ Each state party will take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another state party.”

The return of assets is as a fundamental principle of the convention. Chapter four of the convention against corruption deals with the recovery of assets. The chapter specifies measures to be taken for the direct recovery of assets and the machinery for doing this by means of international co-operation on confiscation. The establishment of a financial intelligence unit, the signing of bilateral and multilateral agreements to enhance the effectiveness of international co-operation are also called for.

African Union Convention on Preventing and Combating Corruption and related offences

This treaty came into force in 2006. In recognizing that corruption cannot be fought singularly, member states of the African Union agreed upon the formulation of The African Union Convention on Prevention and Combating Corruption. The African Union calls for the need to promote and protect human and peoples' rights, consolidate democratic institutions and foster a culture of democracy and ensure good governance and the rule of law. It entered into force on 5 August 2006. Zambia signed the African Union Convention on Preventing and Combating Corruption on 3rd August, 2005.

SADC Protocol on Mutual Legal Assistance in Criminal Matters

The objectives of this Convention are to: Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent. Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.⁵ Establish the necessary conditions to foster transparency and accountability in the management of public affair

The relevant provisions on forfeiture are articles 21 and 22 which state as follows; Article 21, "The Requested State shall upon request initiate proceedings for forfeiture or confiscation of any

proceeds of crime. Requests shall be executed in accordance with the laws of the Requested State.” Article 22, the Requested State shall, to the extent permitted by its laws, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the Requesting State or take other appropriate action to secure or transfer of the proceeds following a request by the Requesting State. The States shall ensure that the rights of bona fide third parties and victims shall be respected in the application of this Protocol.

Zambia also signed a SADC Protocol on combating illicit drug trafficking in 1996 and ratified this protocol in 1998. Under article 4 of this protocol, member states are urged to promulgate and adopt domestic legislation which provides for offences of money laundering including provisions for tracing, freezing, seizure and forfeiture of proceeds of crime. Zambia is also a member of the Southern and Eastern Africa Anti-Money Laundering Group which is headquartered in Dar-es-salaam, Tanzania.

Scheme Relating to Mutual Legal Assistance in criminal Matters within the Commonwealth.

The purpose of the commonwealth scheme on mutual legal assistance in criminal matters is to increase the level and scope of assistance rendered between commonwealth governments in criminal matter including mutual legal assistance and extradition and to provide legal and information necessary to the authorities in their own country and commonwealth member states wishing to invoke international co-operation. A mutual legal assistance treaty is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public laws or criminal laws. This assistance may take the form of examining and identifying people, places and things, custodial transfers, and providing assistance with the

immobilization of instruments of criminal activity.⁷¹ Thus mutual legal assistance is the provision of assistance on a formal legal basis, usually in the gathering and transmission of evidence by an authority of one country to an authority of another, in response to a request for assistance. “Mutual” simply denotes the fact that assistance is usually given in the expectation that it would be reciprocated in like circumstances, although reciprocity is not always a precondition to the provision of assistance.⁷²

The Commonwealth and all states government have introduced laws to enable the confiscation of the proceeds and instruments of crime or substitute property. Other Commonwealth legislation like the Commonwealth proceeds of crime Act 2002 is most relevant to international asset recovery cases. First, it contains the mechanisms for the identification, restraint and forfeiture of the proceeds of a foreign indictable offence where there is no investigation, criminal proceeding or conviction. To ensure the effective tracing, freezing, seizure, confiscation and return of assets full use must be made of the availability of mutual legal assistance schemes so that mutual legal assistance can be rendered.

3.3 Conclusion

Forfeiture is important. It seems obvious that the state should do its best to ensure that crime does not pay. Asset forfeiture is often portrayed simply as a means of reclaiming what has been wrongfully gained by criminals. In this sense, it is merely the state claiming the fruits of crime

⁷¹ Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*, (Cambridge: Oxford University Press, 1996), 34.

⁷² Heather J. Garretson. *Federal Criminal Forfeiture: A Royal Pain in the Assets*, (Cambridge: Oxford University Press, 1996), 35.

on behalf of society. The development of the law regarding asset forfeitures in money laundering cases is not yet complete, but it is clear that the statutes authorizing forfeiture in money laundering cases are among the broadest and most powerful forfeiture provisions. Zambia has a number of statutes that deal with forfeiture of assets from proceeds of crime. Zambia is also a party to a plethora of international instruments on forfeiture.

CHAPTER FOUR

THE STATE AS CONSTRUCTIVE TRUSTEES OF PROCEEDS FROM SUSPECTED MONEY LAUNDERING ACTIVITIES.

4.0 Introduction

In *Seong San Co Ltd v The Attorney General and The Drug Enforcement Commission*,⁷³ the plaintiff, a company incorporated in South Korea had contacted one Duncan Malie in Zambia and signed a memorandum of understanding on the importation of copper from Zambia based on payments by way of bank guarantee. The plaintiff duly remitted the sum to Duncan Malie's account in Zambia. Duncan Malie never sent the shipping documents of the copper as agreed. The plaintiff reported the matter to the South African Police who in turn reported to the Zambian police and later effected a notice of seizure on Duncan Malie's account. Criminal proceedings were brought against Duncan Malie and during those criminal proceedings he died. The DEC without determining through due process who the frozen funds were supposed to have been released to, released the funds to the deceased's estate. The plaintiff took a considerable period of time to claim the money and to commence proceedings; however, the proceedings were not brought out of time. The second defendants claimed that the seized money was not held in trust for the plaintiff but was being held as an exhibit in the criminal proceedings. The court held that what was material was that the defendants had notice that the plaintiff had transferred funds into Duncan Malie's account, a portion of which they had seized. The seized funds which they suspected to be the product of money laundering were in actual fact the property of the plaintiff.

⁷³ (2008)/HPC/0396

In exercising their power of seizure under the relevant statute, they were holding the funds as constructive trustees on trust for the true and rightful beneficiaries of the funds, such that in the event of there being no true beneficiary, they would then forfeit the property to the state. The Attorney General was held vicariously liable for the actions of the DEC.

The judgment of this case highlights that the law is vague with regard to the protection of third party rights on the occurrence of seizure of proceeds from suspected money laundering activities. Third party rights are not adequately protected. The right procedure to ensure protection of third parties is not adhered to by the relevant wings of the state. The foundation of criminal forfeiture is punishment of the guilty defendant; therefore, only property belonging to the defendant is subject to forfeiture. A forfeiture order can affect third party interests acquired either before, after, or at the same time that the property becomes subject to forfeiture.

It was not until the mid-1990s that case law regarding third-party rights began to emerge; unfortunately, its emergence has shown that third-party rights are little more than an afterthought. Criminal forfeiture should not extend to the interference with the rights of innocent third parties, an effect that is counter to its very objective. Putting the rights of innocent third parties in a predictable light will also give third parties the knowledge they need to protect their rights.⁷⁴

Section 18 (3) of the Prohibition and Prevention of Money Laundering Act,⁷⁵ provides for the protection of third party rights in cases of forfeiture. It states that where a claim in writing is made by any person that is lawfully entitled to the property seized under this Act the

⁷⁴ Kathy Bazoian Phelps. *The battle over forfeited assets: Third Party Claims and Cooperation Agreements*. (Los Angeles: LexisNexis ,2012),23.

⁷⁵ No.14 of 2001

Commissioner may order release of the property to the claimant if satisfied that there is no dispute as to ownership of the property and that it is not liable to forfeiture.

The Forfeiture of Proceeds of Crime Act,⁷⁶ also provides for the protection of third parties in section 12. The sections (1) and (2) provide that where an application is made for a forfeiture order against any property, a person who claims an interest in the property may apply to the court, before the forfeiture order is made, for release of the property. If the court is satisfied that the applicant has an interest in the property; the applicant was not in any way involved in the commission of the offence in respect of which the forfeited property is sought; and the applicant had the interest before the serious offence occurred or acquired the interest during or after the commission of the offence, *bona fide* and for fair value and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property; the court may make an order declaring the nature, extent and value, as at the time when the order is made, of the applicant's interest.

A succinct overview of the process is provided in *United States v. Gilbert*.⁷⁷ The case shows how the procedure should be carried out. First, at the criminal proceeding, the government establishes the defendant's interest in the forfeitable property. Second, the forfeiture order effectively puts the government in defendant's shoes, and the government succeeds to any interest the defendant had in the property. Third, the ancillary hearing is conducted to provide third parties the opportunity to file claims and establish their interest in the forfeited property. If a third party is successful, the court releases those interests and amends its order of forfeiture accordingly.

⁷⁶ No 19 of 2010

⁷⁷ 603 F.2d 387, 396 (2d Cir. 1979).

If a third party's interest in the property vested before the Government's, the property cannot be forfeited. Additionally, if the third party's interest was superior to the defendant's at the time of the crime, the third party will prevail. An appropriate use of forfeiture can destroy criminal organizations, while its inappropriate use can destroy the lives of innocent people. As was stated in *United States v. Lazarenko*⁷⁸, the appropriate use of criminal forfeiture would get a boost from uniform application that is driven by the recognition of criminal forfeiture's putative purpose. In establishing more uniform criminal forfeiture jurisprudence, courts should be mindful that, at its essence, criminal forfeiture exists to punish a criminal defendant.

4.1 Assertion of a constructive trust

Courts find that property is not forfeitable where it was taken from a third party by fraud and the criminal defendant therefore only held it in constructive trust. These courts hold that, therefore, the property impressed with the trust is not subject to forfeiture. The Eleventh Circuit held in *United States v. Shefton*⁷⁹ that a constructive trust is a cognizable "legal interest" sufficient to assert an interest under the forfeiture statutes. Several other circuits have similarly found that where property was taken from a third party by fraud, a constructive trust is imposed over the property held by the criminal defendant and the property is therefore not subject to forfeiture.

Between the periods of seizure and forfeiture, the state holds the seized property as constructive trustees. Halsbury's Laws of England⁸⁰ states in paragraph 585 of volume 48 that "a constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.

⁷⁸ 504 F. Supp. 2d 791, 800 (N.D. Cal. 2007) (noting that criminal forfeiture is a punitive sanction against the defendant)

⁷⁹ F. Supp. 2d 1084, 1096 (D. Haw. 2011).

⁸⁰ Lord Halsbury of St Marylebone, (1984). Halsbury's Laws of England. 4th ed. Volume 48. London: Butterworths

Thus treating a person as a constructive trustee is merely a formula for imposing an equitable personal liability to account. In *Selangor United Rubber Estates Ltd v Cradock (a bankrupt)*⁸¹ Thomas, J stated as follows: “It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship is nothing more than a formula for equitable relief. The court of equity says that a defendant shall be liable in equity as though he were a trustee. This is done because in accordance with equitable principles applied by the court of equity, it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.”

Before tempering with the seized funds in any way, the State must comply with section 16(2)(b) of the Prohibition and Prevention of Money Laundering Act⁸² which requires the officer effecting the release to specify in detail the circumstances of, and the reasons for the release. Section 18(4) of the same Act (PPML Act) requires the commissioner in cases where there is a dispute as to the ownership of the property, or there is insufficient evidence to determine the ownership of the property or where the Commissioner is unable to ascertain whether the property is liable to forfeiture or not to refer the matter to the High Court

Section 355 of the Criminal Procedure Code⁸³ makes provision for the disposal of exhibits. It states:“(1) Where anything which has been tendered or put in evidence in any criminal proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after final disposal of such proceedings or any appeal entered in respect thereof, such a thing may be sold, destroyed or otherwise disposed of in

⁸¹ (No.3) (1968) 2 ALL ER 1073 at page 1097

⁸² No.14 of 2001

⁸³ Chapter 88 of The Laws of Zambia

such manner as the court may by order direct, and the proceeds of any such sale shall be paid into the general revenues of the Republic.”

In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* ⁸⁴ as a response to the unjust enrichment of the defendant caused by its receipt of the mistakenly paid US\$2m. As to the heading ‘miscellaneous other events’, by far the majority of constructive trusts fall within it. So, for example, a contract to sell a title to land turns the seller into a trustee of that title for the purchaser, even though there is no declaration of trust, no wrongdoing, and no unjust enrichment, the crucial question in all cases of constructive trusts is whether the courts are right to create trusts in these instances.

Constructive trusts can be sub-divided into ‘institutional’ and ‘remedial’ trusts. Unfortunately, these terms do little to explain the idea behind them. In truth, the division is one between courts applying on the one hand the rule of law and the rule of man on the other, the man in question being the individual judge. Thus, institutional constructive trusts arise because of the application of legal rules, albeit rules developed incrementally by courts, whereas remedial constructive trusts arise because an individual judge thinks it ‘fair’ that it should, despite the fact that the rules developed by the courts say that on the particular facts there should be no trust.

4.3 Conclusion

In conclusion, there is a difference between suspected money laundering activities and actual money laundering activities proved to be such by the Courts of Law. There is therefore need for caution by the relevant wings of the state when dealing with suspected money laundering activities between the periods of seizure and forfeiture. Clearly, during this period, the state

⁸⁴ 1979) 3 ALL ER 1024

holds the seized funds or property from suspected money laundering activities as a constructive trustee implying that it must respect the owners right to property or the state will be required to account for any loss or damaged occasioned to the property whilst it was in the state's custody..

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

The focus of this study has been to highlight the importance of the protection of third party rights in asset forfeiture by looking at a case study of *Seong San Co Ltd v The Attorney General and The Drug Enforcement Commission*.⁸⁵ This case has shown that third party rights are not adequately protected when there is seizure and asset forfeiture of proceeds from suspected money laundering activities. Innocent property owners can be deprived of their property without due process; highlighting concern that individual property rights were in danger from overzealous enforcement of forfeiture laws.

The case of *Seong San Co Ltd v The Attorney General and The Drug Enforcement Commission*⁸⁶ also established that in exercising their power of seizure under the relevant statute, the state were holding the funds as constructive trustees on trust for the true and rightful beneficiaries of the funds, such that in the event of there being no true beneficiary, they would then forfeit the property to the state. Courts find that property is not forfeitable where it was taken from a third party by fraud and the criminal defendant therefore only held it in constructive trust. The courts hold that, therefore, the property tainted with the trust is not subject to forfeiture.

At the same time, forfeiture can play an important role in taking the financial incentive out of crime, especially so-called financial crime. Forfeitures directed at the true "profits of crime," for example, can reduce the lure of criminal opportunities. If forfeiture laws are narrowly targeted toward that end, with a commensurate effort to eliminate adverse collateral damages to innocent property owners, they can play a constructive role in criminal law enforcement.

⁸⁵ (2008)/HPC/0396

⁸⁶ (2008)/HPC/0396

5.0 RECOMMENDATIONS

Safeguard the rights of defendants and third parties with basic procedural reforms

For asset confiscation legislation to be effectively implemented law enforcement authorities need to have the requisite knowledge and skills. Zambia as a Commonwealth country, with support from the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice. The Commonwealth Secretariat should continue with and enhance its programme for placement of prosecution and law enforcement mentors within Commonwealth countries and regions to assist with ongoing asset confiscation and money laundering cases and contribute to capacity building. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. The direct enforcement system should allow for innocent third parties to challenge a restraint order or the enforcement of a confiscation order in both the requesting and requested state.

Forfeiture laws should not rely primarily upon the unreviewable discretion of law enforcement officials to protect the legitimate interests of property owners. Many existing forfeiture laws leave the task of discriminating between property owners deserving of forfeiture to the largely unguided discretion of law enforcement officials. Property owners must be able to rely upon their existing legal rights, not on the mercy of law enforcement agents, to protect against unwarranted property loss through forfeiture.

Forfeiture of assets is a form of punishment and not a remedy against criminal activities

Forfeiture should be a law enforcement weapon, not a revenue raising device for law enforcement. To that end, the fruits of successful forfeiture prosecutions should be subject to the legislative appropriations process, not left as booty with the seizing agency. This will perhaps encourage greater public accountability. More importantly, however, it will remove the actual or potential financial incentives that forfeiture offers law enforcement agencies to distort the exercise of enforcement discretion. As a federal judge noted, in *U.S. v. James Good Real Property*,⁸⁷ the vast quantities of assets seized under the forfeiture laws "leads some observers to question whether we are seeing fair and effective law enforcement or an insatiable appetite for a source of increased agency revenue." In addition, subjecting the fruits of forfeiture to legislative control, as opposed to the exclusive use of law enforcement agencies, will eliminate the irrationalities that can easily occur when the funds generated have no necessary economic relationship to legitimate enforcement needs.

To formally recognize that forfeiture is considered punishment for all purposes and normal standards of due process should apply. Contingent to such a reform would be the elimination of civil *in rem* forfeiture. Property could only be forfeited upon a showing of guilt commensurate with that required in a criminal trial. The presumption should be against the state. With such a reform, there should be the formal elimination of the archaic legal fiction which personifies property. Property does not have rights; people have rights. Likewise, property cannot commit a bad act; people commit bad acts. Eliminating the legal fiction and instituting all forfeiture proceedings *in personam* will afford owners the rights of persons. When combined with the

⁸⁷ 510 U.S. 43 (1993)

recognition of punishment, the rights afforded the owners should become the same as those afforded to individuals threatened with punishment in the criminal justice system.

Lack of pre-seizure planning to avoid protracted litigation against innocent third parties

Because there have not been instituted, pre-seizure planning procedures, which could avoid unnecessary risk of becoming involved in protracted litigation" against third parties with interests in the seized assets, the government has assumed responsibility for assets with significant liabilities that constrain the ability of the government to dispose of those assets. This lack of pre-seizure planning also constrains those innocent third parties with interests in seized assets from using or disposing of their interest in seized assets without "becoming involved in protracted litigation.

Legislative

Parliament should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government's use of criminal forfeiture as an end run around civil asset forfeiture reforms. Innocent owners should not be harmed by forfeiture laws. The laws should be modified where necessary to ensure that innocent property owners are not injured by their application and that the burden of justifying forfeiture rests squarely on the government.

5.1 Conclusion

The ability to target the proceeds of criminal activity is what makes forfeiture particularly attractive. Innocent property owners can be deprived of their property without due process; making individual property rights in danger from overzealous enforcement of forfeiture laws. If the law does

not protect property owners from unjust confiscation of their property, it is but a short step to unjust acts against their persons. There is therefore need for procedural safeguards to be enacted so that third party rights are adequately protected in asset forfeiture against suspected money laundering activities.

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