



Hilary Term
[2012] UKSC 3

On appeal from: [2010] EWCA Civ 137

JUDGMENT

**Stanford International Bank Limited (acting by its
joint liquidators) (Appellant) v Director of The
Serious Fraud Office (Respondent)**

before

Lord Phillips, President

Lord Kerr

Lord Sumption

JUDGMENT GIVEN ON

15 February 2012

Heard on 25 January 2012

Appellant

Clare Montgomery QC
Daniel Bayfield
(Instructed by Lawrence
Graham LLP)

Respondent

Andrew Mitchell QC
Christopher Convey
(Instructed by Philip
Mobedji, Serious Fraud
Office)

LORD PHILLIPS

1. This interim hearing has resulted from a tangled web of statutory provisions in relation to proceeds of crime. It has been held in order to determine whether or not the parties have an absolute statutory right to appeal to this court.

2. Sections 40 and 41 in Part 2 of the Proceeds of Crime Act 2002 (“POCA”) make provision for restraint orders over property in circumstances where a criminal investigation or proceeding is on foot in England and Wales. Section 44 originally made provision for a right of appeal to the House of Lords against a decision of the Criminal Division of the Court of Appeal in relation to a restraint order. Had POCA not provided to the contrary this right would, by virtue of section 33(3) of the Criminal Appeal Act 1968, have been subject to the following requirements of section 33(2) of that Act :

“The appeal lies only with the leave of the Court of Appeal or the House of Lords; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House.

I shall call these the “leave and certification requirements”.

3. Section 90 of POCA provided, however, that section 33(3) of the 1968 Act did not prevent an appeal to the House of Lords. It went on to give the Secretary of State powers, which included the power to make an order imposing, inter alia, leave and certification requirements. The Secretary of State exercised that power when, by article 11 of the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003/82) he imposed leave and certification requirements in respect of an appeal to the House of Lords under, inter alia, section 44 of POCA.

4. Part 11 of POCA makes provision for compliance with external, ie foreign, requests for prohibitions on dealing with property within this jurisdiction. Section 444 provides, inter alia, for the making of Orders in Council that correspond to provisions in Part 2 of POCA in order to cater for such requests. Pursuant to that section the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) (“the 2005 Order”) was made. Many provisions of the 2005 Order corresponded with provisions of POCA. In particular, article 11 of the 2005

Order provided for an appeal to the House of Lords from a decision of the Court of Appeal in relation to a restraint order, mirroring the provision of Section 44 of POCA. Article 48(1) mirrored section 90 of POCA, so that absent an order imposing leave and certification requirements, there were no preconditions to this right to appeal to the House of Lords. No such order was made until the eve of this hearing – see para 8 below.

5. On 25 February 2010 a restraint order was made against the appellant (“SIB”) by the Criminal Division of the Court of Appeal under the 2005 Order pursuant to an application by the Director of Serious Fraud Office (“The Director”) in response to an external request from the United States Department of Justice. That order was made in substitution for an identical order made at first instance, which the Court of Appeal quashed on the ground of non-disclosure. SIB sought from the Court of Appeal a certificate that a point of law of general public importance was involved in the decision and permission to appeal to this Court. The Court of Appeal expressed the view that there was no requirement for such a certificate and the application for this was not pursued. The Court refused permission to appeal. Both the Court and counsel appear to have been under the impression that an appeal lay to the Supreme Court, but only if permission was given either by the Court of Appeal or by the Supreme Court.

6. On 24 March 2010 SIB applied to this Court for permission to appeal. The respondent (“the Director”) applied for permission to cross-appeal in respect of the decision of the Court of Appeal to quash the original order. At that time, no doubt because of an oversight, the statutory provisions that transferred the appellate jurisdiction of the House of Lords to the Supreme Court did not embrace an appeal under article 11 of the 2005 Order. In these circumstances this Court directed that there should be oral submissions on two preliminary issues:

- i) Did the right of appeal to the House of Lords under article 11 of the 2005 Order survive in the form of a right of appeal to the Supreme Court; if so
- ii) Was there a requirement for (a) a certificate from the Court of Appeal that a point of law of general public importance was involved and (b) leave to appeal?

7. Since that direction was given, subordinate legislation has been passed which has clarified the position. On 6 June 2011 the Constitutional Reform Act 2005 (Consequential Amendments) Order 2011 (SI 2011/1242) came into force. This amended, inter alia, article 11 of the 2005 Order so as to substitute “Supreme Court” for “House of Lords” wherever the latter appeared. It is common ground,

rightly in the view of the Court, that the effect of this provision is to enable appeals to be made to this Court in respect of relevant decisions of the Court of Appeal that predate 6 June 2011. The first question posed by this Court can thus be answered “it does now”. It remains to consider whether this right of appeal is subject to a certification or leave requirement.

8. On 19 January 2012 the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (England and Wales) (Appeals under Part 2) Order 2012 (SI 2012/138) (“the 2012 Order”) was made. It was laid before Parliament on 24 January, the day before this hearing. It makes the right to appeal under, inter alia, article 11 of the 2005 Order, conditional upon the leave and certification requirements. The 2012 Order will come into force on 29 February 2012. It is rightly common ground that when it does so it will not apply to the appeal with which this hearing is concerned. This is because the Order cannot retroactively place restrictions upon the right of appeal that currently exists – see *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 at p 372.

9. For the Director Mr Convey accepted that he could point to no provision currently in force that requires the SIB to obtain a certificate that a point of law of general public importance is involved as a condition of seeking permission to appeal. He did not suggest that this was needed. In his written submissions he contended, however, that SIB required leave to appeal from this Court, leave having been refused by the Court of Appeal. This submission was founded on provisions of the Criminal Procedure Rules 2011 (SI 2011/1709).

10. Section 446 of POCA provides that rules of court may make such provision as is necessary or expedient to give effect to an Order in Council made under that Part of the Act. Rule 57.15 of the Criminal Procedure Rules 2011 stipulates rules that apply “with the necessary modifications” to proceedings under the 2005 Order in the same way that they apply to corresponding proceedings under Part 2 of POCA. These rules include 71.10. This provides:

“(1) An application to the Court of Appeal for leave to appeal to the Supreme Court under Part 2 of the Proceeds of Crime Act 2002 must be made-

a) orally after the decision of the Court of Appeal from which an appeal lies to the Supreme Court; or

b) in the form set out in the Practice Direction, in accordance with article 12 of the Proceeds of Crime Act 2002

(Appeals under Part 2) Order 2003 and served on the Registrar”.

11. Mr Convey’s point is that it is implicit in this provision that the application to the Court of Appeal for leave to appeal that has, since 2003, been required in relation to an appeal under section 44 of POCA, applies equally to the corresponding provision of article 11 of the 2005 Order.

12. To this submission Miss Montgomery QC for SIB has the following answers:

i) Rule 71.10 does not purport to impose an obligation to obtain leave to appeal from the Court of Appeal. It simply provides the manner in which any obligation to seek leave takes effect. It cannot be read as imposing an obligation, particularly having regard to the requirement in rule 57.15 that the rules are to apply “with the necessary modifications”

ii) In any event the power to make rules is procedural. It could not validly be exercised so as to impose a restriction on a previously unrestricted right of appeal.

13. I consider that both these submissions are correct. It would not surprise me if those who drafted rule 71.10 were, as were the members of the Court of Appeal, under the impression that leave to appeal was required. Alternatively they may have anticipated the imposition by the Secretary of State of leave and certification requirements. Whatever their understanding, however, the rule could not impose the leave requirement that, on 29 February, will validly, but not retroactively, be imposed by the 2012 Order.

14. It is for these reasons that this Court declared at the end of the hearing that permission to appeal from the order of the Court of Appeal was not required.