



BEFORE

DISTRICT JUDGE (MC) EZZAT

IN THE WESTMINSTER MAGISTRATES' COURT

NATIONAL CRIME AGENCY (NCA)

V

PACNET SERVICE LIMITED (PNUK)

Hearing : 14, 15, 16 December 2020
and 5 January 2021

Representation:

Mr. Andrew Bird (QC) for the NCA

Mr. Kennedy Talbot QC and
Miss. Rachel Barnes for PNUK.

Application

1. This is an application brought by the NCA under section 303Z14 (4) of the Proceeds of Crime Act 2002 (POCA).
2. The application relates to funds initially held in a Barclays Bank account (account ending 4344) in the name of PNUK to the sum of \$2,447,769.99.

PNUK's Business

3. This is helpfully set out in Mr. Bird's opening note. PNUK was a 'Payment Services Provider' or 'Payment Facilitator', registered and regulated by the Financial Conduct Authority (FCA). It offered payment processing services to its clients, who were said to be 'merchants', in the business of selling items to 'consumers'. Some of the business was conducted by companies which operated under the umbrella of the named 'merchant' but were in fact 'sub-merchants' of whom PNUK was aware, but with whom it had no direct contractual relationship. These sub-merchants were also described by PNUK as 'payees' or 'MIDS' (Merchant ID). The business model was as follows:
 - a. The consumer provides their debit or credit card details to the merchant or the sub-merchant who the consumer thinks is selling the product or service;
 - b. The merchant or sub-merchant gives instructions to debit those cards via a 'principal member' who has the preferred status to enable it to receive funds from Visa and Mastercard. The principal member was Secure Trading Financial Services (STFS), (based in Malta); It is also known as an 'acquirer'. Another acquirer was CashFlows Limited.
 - c. STFS mandated debits to the consumers' cards and made transfers of funds to credit PNUK's account at Barclays.
 - d. Thus, the funds credited to the Barclays account derived from debits made to the credit or debit cards of numerous consumers. The cards were debited on the instructions of the merchants or sub-merchants who dealt with the consumers, and those instructions were first processed by STFS.
 - e. Having received the funds from STFS into the Barclays account, PNUK would then make payment to (or on the instruction of) the merchants, who were PNUK's clients; or to third parties, rather than to the clients themselves.
 - f. PNUK retained a proportion of the funds received as its commission. It would also retain part of the funds collected in case of any chargebacks or refunds demanded by STFS.
4. The NCA's case is that PNUK processed payments obtained through fraud and then laundered the money. The NCA alleges that most of the payments made through PNUK were fraudulent. The NCA adopts the description of PNUK from Prosecutors in America, *'PacNet was the payment processor of choice for fraudulent mass mailers in the United States and around the world...'*

The Test

5. Section 303Z14 (4) states:

- (4) The court of sheriff may order the forfeiture of the money or any part of it if satisfied that the money or part –
 - (a) Is recoverable property, or
 - (b) Is intended by any person for use in unlawful conduct
6. The burden of proof is on the NCA, the standard being, on the balance of probabilities.
7. 'Recoverable property' is property that is obtained through unlawful conduct.

The NCA's Case

8. This is succinctly set out in paragraph 14 of the Mr. Bird's opening note.

'Put shortly, the allegation of the NCA is that the PacNet Group and PNUK agreed to facilitate the transfer of funds obtained through fraud by its "merchant" clients, and in some cases their numerous "sub-merchants" or "payees" as they were described by PacNet. These "sub-merchants" are in many cases not the clients of PacNet, but are described as "payees" in spreadsheets naming companies (typically shell companies registered in the UK) that operate under the umbrella of the named clients. It seems probable that the consumers would have known only the name of the "payee" or "sub-merchant" and not necessarily the name of PacNet's client who was actually receiving the money debited to their cards.'

9. The success of the NCA's application is dependent on establishing that the funds held by PNUK were monies obtained through fraud. This being the unlawful conduct required to make the funds recoverable property.

Prosecution in The United States of America and the Office of Foreign Assets Control (OFAC) Designation

10. On 22 September 2016 OFAC designated 12 individuals and 24 entities as a 'significant transnational criminal organisation'. Two of those individuals were Robert Davis and Rosanna Day. Rosanna Day initially being the sole shareholder in PNUK and Robert Davis was the self-styled General Counsel to the PACNET Group.
11. As a result of the designation PNUK was no longer able to operate and ceased trading. There has currently been no finding of wrong doing against PNUK, Mr. Davis or Miss. Day.
12. The underlying material in relation to a prosecution of Mr. Davis and Miss. Day has not been served in these proceedings. Therefore, little if any weight can be given to the allegations as there is no basis on which this court can consider the strength of them.

13. I consider the OFAC designation and the possible pending prosecution of individuals of no real assistance in deciding the matter before me. It appears to me that one of the significant drivers in proceedings being brought by the NCA are the views expressed by the American authorities. The suspicions of the American authorities without the disclosure of the material they are relying on, does not assist me in reaching a decision.

Distribution of Monies

14. The NCA identifies payments from the 4344 account or lack of payments as an indication that money is being laundered through PNUK. It identifies that only two clients received payments back out of the 4344 account, those being Xclusive London and Longtraders.

15. The suggestion from the NCA is that this practice (receiving payments in from one account and making payments out from another) has been undertaken to break the banking audit trail. It may be that a consequence of this practice was to cause a break in the banking audit trail, but there may well be good commercial reasons for undertaking such a practice too. In any event, once an investigation was commenced by the NCA in relation to the funds held in the 4344 account, PNUK provided the data to show that money was paid out from accounts other than the 4344 account.

16. That monies were not paid out of accounts from which they were received could be evidence of money laundering. That money was paid in from one company and was paid out to another company could also be evidence of money laundering. However, there could also be good commercial reasons for the practice. Without further supporting evidence these practices do not amount to sufficient evidence to conclude on the balance of probabilities that the money in the 4344 account is recoverable property or that money laundering is occurring.

17. Mr. Leong on behalf of PNUK provided a breakdown of funds that were held in the 4344 account. This breakdown has not been challenged by the NCA and therefore I adopt this as the starting point for looking at the funds.

The Attribution of Funds

18. The attribution is set out below.

PNUK Client	Amount	%age (approximately)
Dextonus Holdings Ltd	\$1,114,182.72	44.9%
Etillem LLC	\$510,627.45	20.8%

HCS Healthcare Consumer Services Ltd	\$353,830.35	14.4%
Matrix Mail Services Limited	\$212,936.82	8.7%
Xclusive London Limited	\$154,623.76	6.9%
Nordic Clinical Center Limited	\$41,862.01	1.7%
BB Opportune Services	\$16,981.31	0.7%
Materials Building MBC Limited	\$16,850	0.7%
New Van Products Limited	\$15,313.27	0.6%
Phoenix Online Holdings Limited	\$3,879.57	0.2%
The Orb Factory Limited	\$2,157.96	<0.1%
Melchior Tremblay Limited	\$1,962	<0.1%
Longtraders Limited	\$1,818.13	<0.1%
Mile High Madison Group Limited *	\$1,609.35	<0.1%
Social Lottery Limited	\$15.00	<0.1%
TOTAL	\$2,448,649.70	

19. The NCA limited its investigation to the first 8 entities on the table above. I have therefore taken the view that provided I form the same view on the 8 entities I am being asked to consider, I will treat the balance based on the same findings, as it will be more likely than not that they will be the same as the other 8.

20. I have considered each of the 8 entities below. I have addressed each of the points raised by the NCA and responded to by PNUK. I have then set out my conclusion in relation to each entity as to whether the monies attributable to them are more likely than not recoverable property.

a. Dextonus – Source of \$1.14m.

- **Main contact details for the company were in America however the beneficial owners are based in Cyprus** – This does not demonstrate any criminality. In an international and interdependent world there are many reasons why such a structure may be adopted.
- **Payments were made to Crede LLC rather than to an account in Dextonus’s name.** – There may be any number of reasons why such a practice would be undertaken, both legitimate and illegitimate.

- **The sole member of Crede LLC is Scott Roix who was indicted in America for fraud between 2015 and 2018. He pleaded guilty in 2018 as did Healthright LLC.** – That the money is being paid to a company that is controlled by someone who has previously pleaded guilty to fraud does raise suspicions. Those suspicions would need to be supported by additional evidence were a finding that the money attributable to Dextonus was recoverable property.
- **Kristyn Dow is listed as a controller of Healthright LLC.** – Kristyn Dow is said to be ‘behind’ Dextonus though she is not said to be the beneficial owner. She is also listed as a controller for Healthright. Miss. Dow’s connection to Healthright LLC does raise some suspicions of impropriety, but again such suspicions need to be supported by some other evidence.
- **Dextronus has 7 websites associated with healthcare** – This is not evidence of anything.
- **There were several ‘payees’ or ‘MIDS’** – I have not heard evidence that would persuade me that this is an indicator of criminal activity. There may be commercial reasons for doing this.
- **PNUK stated that Dextonus’s Anti Money Laundering (AML) risk was high.** – Given that the NCA’s case is that PNUK are engaged in money laundering on a significant scale, it is unclear how the designation of Dextronus as posing a high risk in terms of money laundering would assist them in this endeavor.
- **PNUK had details of 15 payees or sub-merchants, 6 were registered at the same address in Watford, and none completed Corporation Tax Returns** – PNUK point to what they say were industry norms at the time that only required minimal presence and not meaningful presence from sub-merchants. With sub-merchants often conducting little or no business. The NCA have not called evidence to contradict this.
- **The products marketed by the sub-merchants were subject to complaints. The details of 6 Canadian customers are referred to.** There is no evidence to show that these customer’s payments went through PNUK. Moreover, 6 complaints out of hundreds of transactions that were processed, does not suggest a significant problem.

There is no proper basis for concluding on the balance of probabilities that the money attributable to Dextonus is recoverable property. The factors raised above whether individually or taken collectively are insufficient to discharge the burden.

b. Etillem LLC Source of \$510,626

- **Etillem is an American company registered in Delaware, the director however lives in Twickenham, U.K. and is French** – This is not evidence of anything.
- **There are 4 Doing Business As (DBA) names suggestive of healthcare products** – This is not evidence of anything.
- **Its AML risk was described as 'high'** – I make the same observation as I did with Dextonus.
- **The beneficial owner and bank details were missing from the application form and prospect assessment** – This information was ultimately provided. There is no evidence to suggest that the initial absence of this information demonstrates any impropriety.
- **PNUK's records linked Etillem to 54 different payee id's.**
– There is no evidence to conclude that such practices have been used in the pursuit of criminal activity. There may be commercial reasons for adopting this approach.
- **Two sub-merchants filed no accounts and dissolved** – This is not evidence of criminal activity undertaken by Etillem.
- **There are a number of consumer complaints about products** – Given what the NCA allege about the companies doing business with PNUK, it should be expected that there would be a considerably higher number of complaints than have been made.

There is no proper basis for concluding on the balance of probabilities that the money attributable to Etillem is recoverable property. The factors raised above whether individually or taken collectively are insufficient to discharge the burden.

Before consideration is given to the remaining companies, it is worth stating for the avoidance of repetition that:

- I do not find that a company being registered in one place but having a director or owner based elsewhere is on its own evidence of suspicious or criminal behaviour. That is not to say that it could not be, but in the relation to the 8 companies that I am being asked to consider, I can see no evidence to support that conclusion.
- Deficits in the paperwork relating to the applications of these companies that were subsequently rectified, do not support a conclusion that criminal activity was being undertaken.
- Deficiencies in processes at PNUK are not evidence of criminality of the merchant.

- Multiple DBA's are not evidence in and of themselves of criminal activity.
- That a small number of complaints (compared to the overall number of transactions) is not evidence of fraud – certainly not the mass fraud that is being alleged
- A designation of a merchant as being a 'high' AML risk by PNUK is not evidence that supports this application.

c. HCS Healthcare Consumer Services - \$353,830

- **No trading turnover was declared for 2015 or 2016 to HMRC** – PNUK did not process payments for HCS until 16 March 2016. That accounts were not filed is not evidence in itself that the activities of HCS were fraudulent.

There is no proper basis for concluding on the balance of probabilities that the money attributable to HCS is recoverable property. The factors raised above whether individually or taken collectively are insufficient to discharge the burden.

d. Matrix Mail Services - Source of \$212,936

- **Matrix is associated with Bruce Cran, he is director of a U.K company called Strong Current Enterprises Limited, that has filed dormant accounts and has attracted numerous complaints** – This is not evidence of criminal activity by Matrix Mail Services. Strong Current Enterprises Limited was not at client of PNUK. There is no evidence before me that would allow me to reach the conclusion that Matrix Mail Services were engaged in fraud.

There is no proper basis for concluding on the balance of probabilities that the money attributable to Matrix Mail Services is recoverable property. The factors raised above whether individually or taken collectively are insufficient to discharge the burden.

e. Xclusive London Limited – Source of \$154,623.76

- **Dylan Gill owner of Xclusive London declared no income from it.** No explanation is given for this and it does raise suspicions as to what Dylan Gills involvement in Xclusive was.
- **The onboarding documents suggest that the main contact at the company was David Bruno. Rosanna Day**

had not heard of David Bruno. An explanation is provided by Mr. Harding that it appears David Bruno's involvement with Xclusive went no further than appearing on the Account Information Questionnaire. This query and response does not assist matters one way or the other

- **Dormant accounts have only ever been submitted for Xclusive.** PACNET suggest that there are alternative business structures and entities that can be used and that are used, and that overseas associated companies may be liable for the declaration or filing of accounts. The lack of accounts in my view does raise suspicions. It is possible the absence of accounts is reflective of criminal activity.
- **From 21 March 2016 PACNET paid out funds of \$2,017,205 to Xclusive from account 4344 to an account held in the name of Xclusive at the Bank of Cyprus.** Xclusive initially provided bank details in the U.K. with Metro Bank and subsequently then with Bank of Cyprus. There is nothing innately suspicious about that.

The activities of Xclusive raise greater suspicions of criminal activity than some of the other companies. While it is quite possible that some criminal activity may have been undertaken by Xclusive, I do not find that possibility to be as high as a likelihood. The NCA have therefore failed to discharge the burden.

f. Mile High Madison Group and Nordic Clinical - Source of \$43,471

- **In April 2020 the US Federal Trade Commission brought civil proceedings for a permanent injunction and a monetary judgment on the basis that Mile High Madison Group Inc and Nordic Clinical Inc (and other associated companies) "participated in deceptive acts or practices in violation of [US law] in the marketing and sale of products with purported health benefits (A/836). An Order was made by consent prohibiting the making, without scientific evidence, of representations about any "Covered Product" which meant any dietary supplement, food or drug including Neurocet, Regenify and Resetigen-D (A/838). The companies were ordered to pay equitable monetary relief of \$38.1 million of which \$1.3 million was to be paid within 9 months and the balance suspended (A/846).**
- Initial consideration of the actions of the US Federal Trade Commission and the order made by consent would suggest that it is more likely than not that Mile High Maddison Group have been engaged in criminal actions. Specific

consideration needs then to be given to whether the money held by PNUK amounted to recoverable property.

- It was asserted by PNUK and not contradicted by the NCA that:
 1. That PNUK did not process any payments for the 'Covered Products'
 2. The Civil Complaint was filed in 2020, 3 years after PNUK stopped trading
 3. No payments from the named websites were processed by PNUK
 4. For Mile High Group, PNUK processed 89 payments with only 1 charge back.
 5. For Nordic Clinical, PNUK processed 895 payments with no chargebacks and only 24 refunds.
- Taking all these factors into account, while it is certainly possible that some of the funds came from criminal activity, it is not more likely than not that they did.

g. Longtraders Limited – Source of \$1,818

- **Under the “AML Risk” heading PNUK noted that Ms. Georgiou was a “possible nominee director” connected to a previous client who had a bad debt written off, and that “3rd party is connected to company fined by FTC for deceptive marketing practices for diet pills. Contact information for Authorized person is a toll-free number and email address is a generic yahoo”. The AML Risk category was “high”. This suspicion about Ms. Georgiou would clearly be of concern. While it may warrant further investigation, it does not give rise to the conclusion that it is more likely than not that the monies held associated to Longtraders Limited is recoverable property.**

Conclusion

21. The NCA's application is driven either wholly or in part because of the actions and suspicions of the American authorities. The NCA has a theory in relation to PNUK's activities and rather than carrying out a review of all the evidence and reaching an objective view, they have gone looking for evidence to support that theory.
22. The evidence to support the theory is not present in this case. When the scale of PNUK's operation is considered, had their prime purpose been the processing and laundering of the proceeds of fraud, one would have expected a high level of complaints against the merchants. There was not a high volume of complaints in relation to any of the merchants. Millions of dollars of transactions passed through PNUK from multiple merchants, and

the most the NCA can do is point to complaints from a few individuals and a number of messages of internet forums.

23. It is inconceivable that if mass frauds were being carried out in the way envisaged by the NCA that there would not be some evidence to support that. There is no real evidence in this case of fraud being committed on any scale other than perhaps the ordinary amount one would expect within the volume of transactions handle by PNUK.
24. I have given consideration looking across the 8 companies whether there is sufficient evidence cumulatively to conclude that the monies in the 4344 account are recoverable property or that PNUK was engaged in money laundering. There is insufficient evidence to reach either conclusion.
25. I am not satisfied on the balance of probabilities that the funds that were held in the 4344 account are recoverable property.
26. If the funds that are held in the 4344 account are not recoverable property then the money cannot be being laundered by PNUK. Having made the finding that I have, I must conclude that PNUK was not engaged in money laundering.
27. I therefore order the return of the funds.

District Judge Ezzat
12 February 2021