In The Supreme Court of Bermuda

CIVIL JURISDICTION

No. 22 of 2022

IN THE MATTER OF SECTION 28 OF THE PROCEEDS OF CRIME ACT 1997 AS READ WITH SECTION 12 OF SCHEDULE 2 TO THE PROCEEDS OF CRIME (DESIGNATED COUNTRIES AND TERRITORIES) ORDER 1998

AND IN THE MATTER OF ORDER 115A OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

THE ATTORNEY GENERAL

Applicant

And

CARLOS MANUEL DE SÃO VICENTE

First Defendant

And

AAA INTERNATIONAL LIMITED

Second Defendant

RULING

Date of Hearings: 17 April 2024

Date of Judgment: 28 June 2024

Applicant: Mrs. Shakira Dill-Francois (Acting Solicitor General)

First Defendant: No Appearance

Second Defendant: Mr. Ryan Hawthorne (Trott & Duncan Limited)

Restraint Orders and Freezing Orders - Sections 28 and 36H of the Proceeds of Crime Act 1997- Proceeds of Crime (Designated Countries and Territories) Order 1998- Application to Vary or Discharge Interim Restraint Order – Piercing the Corporate Veil - Risk of Dissipation of Assets – Exemption for the payment of reasonable legal fees

JUDGMENT of Shade Subair Williams J

Introduction

1. This is an application by the Second Defendant, AAA International Limited ("AAAIL") and AAA Risk Solutions Limited ("AAARSL" / the "Second Applicant")[1] to discharge or vary the restraint order made by Hargun CJ dated 1 February 2022 (the "Restraint Order") in favor of the Attorney General's Ex Parte Notice of Originating Motion dated 28 January 2022 (the "*ex parte* application").

2. The *ex parte* application, made without notice to the Second Defendant, was supported by the affidavit evidence of Detective Constable 2152 Shannon Trott.

3. Then represented by law firm Appleby (Bermuda) Limited, a summons dated 7 April 2022 for the variation of the Restraint Order was filed on behalf of the Second Defendant. That

[1] AAARSL is not named as an applicant on the Summons before the Court. However, in the supporting affidavit of Mr. Nicholas Millar, his authority to speak for AAARSL and to join in the making of this application is deposed as well as AAARSL's standing as party affected by the Restraint Order is satisfied. No issue arose on this between Counsel.

summons application was disposed of by way of a Consent Order signed by Hargun CJ (as he then was) dated 7 April 2022.

4. A Notice of Change of Attorney dated 17 June 2022 was filed by the attorneys of Trott & Duncan Limited in respect of the Second Defendant.

5. A further summons of 29 September 2022 for a variation of the Restraint Order was filed on behalf of the Second Defendant to which a second Consent Order signed by Hargun CJ followed. That Consent Order is dated 29 September 2022.

6. On 19 May 2023 the Second Defendant filed a third summons (the "third summons") for the variation of the Restraint Order. This was supported by the First Affidavit of Mr. Nicholas Millar, the Director of AAAIL. A Directions Order of 15 June 2023 was made on this summons for the filing of further evidence and a hearing date.

7. The Attorney General filed evidence from Detective Inspector 2210 Paul Ridley sworn on 18 August 2023 in reply to the third summons as provided for in the Directions Order of the Court. In rejoinder, the Second Defendant filed the Second Affidavit[2] of Ms. Sonja Maeder Morvant, the Second Defendant's Swiss attorney.

8. Of note, the following documents were before the Court when the Restraint Order was made by Hargun CJ:

The Requests for Mutual Legal Assistance:

(i) a Letter Rogatory of the Office of the Prosecutor-General National Asset Forfeiture Unit for the Republic of Angola, dated 17 November 2020 (the "Request")

(ii) an "Adendum [sic] Letter Rogatory" dated 6 August 2021 of the Angolan Prosecutor-General (the "August 2021 Addendum")

(iii) an "Adendum [sic] Letter Rogatory" dated 9 November 2021 of the Angolan Prosecutor-General (the "November 2021 Addendum")

(iv) a "Letter Rogatory Addendum" dated 26 January 2021 of the Angolan Prosecutor-General (the "January 2021 Addendum")

The Request for Judicial Assistance:

[2] A First Affidavit from Ms. Morvant was exhibited to the Affidavit of Mr. Nicholas Millar.

(v) A 1 April 2021 Court Order was made by Trial Court Judge Pedro Faustino Chilicuessue of Angola's Court of Judicial Circuit of Luanda 5th District Court. This Order was made as a request for judicial assistance (the "Judicial Request").

9. At the close of the *inter partes* hearing, having heard Counsel on their oral and written submissions, I reserved my decision which I now provide with these written reasons.

The Impugned Restraint Order

10. The Second Defendant, seeking for it and AAARSL to be discharged entirely from the Order, otherwise takes issue with the prohibition barring both entities from dealing with all of their assets in respect of all of their accounts, whether held at Bank of N.T. Butterfield, HSBC (Bermuda) or elsewhere.

11. By way of an alternative application for a variation of the Restraint Order, the Second Defendant also objects to being formally named as a Defendant in these proceedings. It is argued that this exceeds the scope of the Request.

12. Also, by way of variation, the Second Defendant seeks for the scope of the exclusions applicable to the Restraint Order to include terms permitting it deal with its assets to cover the reasonable costs of legal fees for these proceedings in Bermuda in addition to defending the legal proceedings in Switzerland.

13. In the 7 April 2022 Consent Order the Restraint Order was varied to exclude the sum of $20,000.00 "*for the purpose of the Second Defendant paying for legal expenses incurred by the Defendants in relation to these proceedings*." In the 29 September 2022 Consent Order the Restraint Order was varied to exclude an additional sum of $50,000.00 "*for the purpose of the Second Defendant paying for legal expenses incurred by the Defendants in relation to these proceedings*."

The Alleged Facts for Trial in Angola:

14. The below narrative is my summary of the facts relied on by the Angolan Court, via the Attorney-General, in seeking the Restraint Order and resisting its discharge. In my description of these facts, I make no factual findings which are reserved for the trial process in Angola.

15. It is said that Angola granted sole control over its risk management of petroleum operations to Sonangol EP ("Sonangol"), a State-owned public entity. Mr. de São Vicente is said to have been a pay-rolled employee of Sonangol, serving as a Director of a Sonangol unit termed the Risk Management Department. I shall refer to this as "Sonangol's RMD". Sonangol's RMD purportedly handled the insurance of both the employees and all the petroleum operations of Sonangol.

16. Sonangol established a holding company named AAA Serviços Financeiros which was parent to four State-capital subsidiaries. As the Director of Sonangol Mr. de São Vicente arranged for Sonangol's insurance premiums to be paid in inordinate sums to one of the four subsidiaries, namely AAA Seguros LDA.

17. Sonangol was the sole shareholder of a Bermuda incorporated reinsurance company initially named Mirabilis Insurance Limited ("MIL") with paid-up capital in the sum of US$250,000.00. MIL fit into Sonangol's risk management strategy to generate significant net earnings in order to compete with good standing on the international reinsurance market.

18. MIL was renamed Mirabilis Reinsurance Limited ("MRL") and subsequently, at the behest of Mr. de São Vicente, AAA Reinsurance Limited ("AAARL"). The Angolan prosecution alleged that Mr. de São Vicente used the holding company, AAA Serviços Financeiros, as a vehicle to transfer the entire shareholding of AAARL to himself. Similarly, Mr. de São Vicente is accused of having wrongfully transferred shares in an associated company, AAA Insurance & Reinsurance Brokers Limited, to himself. The alleged result was that he became the owner of companies which were formerly and, by right, property solely of the Angolan State which was left with a mere 10% of the shareholding.

19. It is said to be the prosecution's case that Mr. de São Vicente colluded with other senior officials by setting up a series of companies, being, *inter alia*, the Second Defendant, AAAIL and AAARSL, the other applicant for the variation of the Restraint Order. The prosecutor's case, on the First Letter of Request, is that Mr. de São Vicente embezzled the income from these businesses, which would otherwise be public money, through AAAIL and AAARSL. More so, the prosecution says that in 2003 the shares held by the holding company, AAA Serviços Financeiros, were transferred as a "gift" to AAAIL. Mr. Nick Millar is described by the Angolan Prosecutor-General's office as one of a number of Mr. de São Vicente's accomplices.

20. The estimated loss caused by Mr. de São Vicente is alleged to be in excess of US$4 Billion. This resulted in the prosecution's pursuit of a wholesale seizure of Mr. de São Vicente's assets and an investigation and indictment on charges of embezzlement, money laundering

and a charge of profiting from economic interest in business and influence peddling. Mr. de São Vicente was also remanded into custody for these offences.

The Terms Requested for a Restraint Order and the stated Grounds for the Request

21. In the opening paragraphs of the Request, the principle of 'reciprocity' is relied on:

"*This request for mutual legal assistance is submitted pursuant to the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, to which the Republic of Angola and the United Kingdom are parties;*

The cooperation request takes into account the principle of reciprocity enshrined in Article 5 of Law No. 13/15 of 19 June, the Law on International Judicial Cooperation in Criminal Matters."

22. From the Request the Court was made to understand that criminal proceedings against Mr. de São Vicente, an Angolan national, were underway.

23. In the August 2021 Addendum, the "blocking" of AAAIL's two Butterfield Bank accounts is pleaded "as a matter of urgency". Further to the August 2021 Addendum is the November 2021 Addendum where it is stated that AAAIL is the holder of an investment account with Butterfield Bank. The request is for the sums held in that account (US $42,725,755.23) to be frozen. In the January 2021 Addendum a request is made for the freezing of a further Butterfield Bank investment account (GBP £ 687,000.00) held by the Second Defendant.

24. In the Judicial Request, there are requests made for assistance from the judiciaries of Singapore, Switzerland, Bermuda, Luxembourg, Portugal and the United Arab Ermirates for the seizure of all funds and personal property owned by Mr. de São Vicente and a specified list of all individuals related to him in addition to all funds and personal property owned by the Second Defendant and the Second Applicant. At [39] of the Judicial Request it states:

"*In this specific case, there is strong indication that the above-mentioned crimes have been committed, as substantiated by the evidence mentioned above, including the bank records and further documents showing that such amounts as those owned by the State were illegally transferred from AAA Seguros, AAA Serviços Financeiros and AAA Pensões to the overseas-based accounts of AAA Seguros S.A., AAA Activos LDA, AAA Risk Solutions Ltd* [the Second

Applicant], *AAA Insurance & Reinsurance Brokers Ltd*, *AAA International Ltd* [the Second Defendant] *and AAA Reinsurance Limited*."

25. The Angolan Trial Court Judge also confirmed his finding on the evidence of the requirements for making a 'preventative confiscation' order. He said at [42]-[43] and [45]:

"*42. As an assumption for implementing a preventative confiscation, this fumus commissi delicti* [i.e. requirement for proof of commission of the crime(s)] *shall be twofold: tackling the indication of crimes that were committed and tackling the indication that unlawful benefits were ripped as a result of such crimes and determine the extent or amounts involved.*

43. It is therefore determined that the requirements for fumus boni iures [likelihood of success on the merits of the case] *are inequivocably* [sic] *met, precisely because there is strong indication that crimes have been committed and of the amount that the defendant may have obtained as a result of having committed such crimes*.

…

45. In this specific case, it has been determined that the defendant has been acting towards concealing the assets that he has acquired, by distributing them through his relatives, with several bank accounts being opened overseas, including Switzerland, Luxembourg, Singapore, Dubai, Portugal and Bermuda. Therefore, it is our understanding that there is a risk of decrease in the payment of guarantees for the benefits obtained through criminal activity."

26. In his concluding statements, the Angolan Trial Court Judge said:

"*In view of the above request made by the State Prosecutor, it is believed without reasonable doubt that there is strong evidence to endorse such preventative seizure*."

Analysis of the Relevant Law

The Applicant for a Restraint Order to assist a Foreign Authority

27. The purpose for making a restraint order is to preserve the assets representing the Defendant's benefit *obtained* (not necessarily *retained* (see *R v Rees* (unreported) 19 July 1990 per Auld J)) from criminal proceeds for possible subsequent seizure by the Court in exercise of its statutory jurisdiction to make under a final order of confiscation. A restraint order is thus, by its nature, a protective order.

28. This point is elucidated by Laws LJ's characterization of section 77 of the UK 1988 Act in *Jennings v CPS* [para 43]:

"It is obvious that restraint orders and confiscation orders fulfil different functions. The confiscation order constitutes a final judgment, subject to appeal, of what should be taken from a defendant as representing, in essence, the proceeds of his crime. By contrast the restraint order is pre-emptive and provisional…"

29. Section 28(4) provides that "*a restraint order may be made only on an application by the Director of Public Prosecutions*". The term "defendant" is defined in the Interpretation section as "*a person against who proceedings have been instituted for an offence (whether or not he has been convicted).*"

30. Generally speaking, civil recovery applications by an enforcement authority (as designated by the Minister of Justice) are distinguishable from applications which can only be brought by the Director of Public Prosecutions, such applications relating to a confiscation order, a restraint order, a charging order and a realization of property order. Applications for the making of any of these orders are governed by Parts II and III or the POCA. Ordinarily, only the Director of Public Prosecutions is entitled to bring these applications because such applications directly relate to a criminal prosecution, whether in its current or imminent stage or whether it is post-conviction. Thus, a Defendant's acquittal from all of the relevant offences will invariably draw an end to the continuation or prospect of any of these Part II or Part III orders.

31. Part IIIA of the POCA, on the other hand, applies to the civil recovery of the proceeds of unlawful conduct. Section 36A governs civil recovery proceedings. Under that section the enforcement authority may recover property obtained through unlawful conduct within the scope of civil proceedings before the Supreme Court. Section 36.1J(1) defines 'recoverable property' as property obtained through unlawful conduct. "Enforcement authority" is defined under section 36F of the POCA as a public officer designated by the Minister of Justice by order subject to the negative resolution procedure.

32. Pursuant to section 36A(2) civil recovery powers under Part IIIA are exercisable in relation to any property whether or not proceedings have been brought for an offence in connection with the property. This may be contrasted to the position for orders made on the application of the Director of Public Prosecutions under Parts II and III.

33. In this case the application for the Restraint Order obtained was made pursuant to section 28(4) of the POCA as read with section 12 of Schedule 2 to the Proceeds of Crime (Designated Countries and Territories) Order 1998 (the "1998 Order"). Operating as an

exception to the ordinary domestic position whereby only the Director of Public Prosecutions is empowered to make applications for a restraint order, the 1998 Order confers an exclusive power on the Attorney General to make an application for a restraint order where the application is being made pursuant to the request of an appropriate authority of a designated country or territory.

34. The present application was made in support of a Request for Mutual Legal Assistance dated 19 November 2020 from the Attorney General's Chambers of the Republic of Angola, a listed appropriate authority under Schedule 2 of the 1998 Order.

The Procedural Requirements for the making of a Restraint Order

35. Order 115A of the Rules of the Supreme Court 1985 ("RSC") govern the procedural requirements for confiscation and forfeiture applications in relation to criminal proceedings. Rules 3-6 apply specifically to the various stages of an ordinary application for a charging order and a restraint order.

36. Rule 3 provides that an application for a restraint order may be made by *ex parte* originating motion to the Court. The filing of supporting affidavit evidence is mandatory. The supporting affidavit must contain the grounds of the application and full particulars of the realizable property in respect of which the order is sought, specifying the person(s) holding such property.

37. The above procedural outline applies to applications for restraint orders, absent a request for assistance by a foreign authority. The position in the context of mutual legal assistance is not much different as a supporting affidavit is mandatory and it must provide particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property. As for the grounds to be relied on, the supporting affidavit must state the reasons for belief that an external confiscation order has been or may be made in the proceedings instituted or to be instituted in the designated country concerned. If there has not yet been the commencement of a criminal prosecution in the overseas Court, then the affidavit should indicate when it is intended that criminal proceedings should be instituted in the designated country concerned.

38. It should also be explained in the supporting affidavit evidence that the underlying criminal proceedings in the designated country are ongoing and entail (a) charge(s) for either a drug trafficking offence or a 'relevant offence'. The Court will also need probative evidence that either an external confiscation order has been made in the foreign proceedings or that there are reasonable grounds for believing that such an order may be made in them.

39. Rule 4 equally applies to the purely domestic application for a restraint order and the Attorney General's application for assistance by way of a restraint order. Rule 4 empowers the Court to impose conditions and exceptions to a restraint order. This may include an indemnification of third parties against expenses incurred in complying with the order and exceptions relating to a Defendant's living and legal expenses. However, under Rule 4(1) the Crown "*shall not be required to give an undertaking to abide by any order as to damages sustained by the defendant as a result of the restraint order*." Once an order is made, copies of the order and supporting evidence must be served on all affected persons and bodies.

40. Rule 5 provides for an application for variation or discharge of the order to be made upon the service of a summons which may be supported by affidavit evidence. Under section 28 of the POCA any person affected by the making of an ex parte restraint order has standing to bring an application for a discharge or variation. In this case, that would include AAA Risk Solutions Limited ("AAARSL"). The summons application must be served not less than two clear days before the date fixed for the hearing of the summons under Rule 5(2). This is also the case in respect of a restraint order made out of assistance to another Court. The 1998 Order contains express provision for the Court's power to discharge or vary an order in relation to any property and a restraint order will cease to have lawful effect when the proceedings in relation to which the order was made are concluded.

The Restraint Order under the Domestic Regime

41. Sections 27 and 28 of the POCA provides:

Cases in which restraint and charging orders may be made

27. (1) The powers conferred on the Supreme Court by section 28 to make a restraint order and by section 29 to make a charging order are exercisable where—

(a) proceedings have been instituted against the defendant for a drug trafficking or relevant offence or an application has been made in respect of the defendant under section 17, 18, 20 or 22;

(b) the proceedings have not, or the application has not been concluded;

(c) the court is satisfied that there is reasonable cause to believe—

(i) in the case of an application under section 18 or 20 of this Act, that the court will be satisfied as mentioned in section 18(3) or 20(2); or

(ii) in any other case, that the defendant has benefited from drug trafficking or from any relevant offence (as the case may be).

(2) The court shall not exercise those powers if it is satisfied that there has been undue delay in continuing the proceedings or application in question, or that it is not intended to proceed with the prosecution.

(3) Those powers are also exercisable where the court is satisfied—

(a) that a person is to be charged with a drug trafficking or relevant offence or an application as mentioned in subsection (1)(a) is to be made; and

(b) the court is satisfied as mentioned in subsection (1)(c).

(4) For the purposes of sections 28 and 29, at any time when those powers are exercisable before proceedings have been instituted—

(a) references in this Act to the defendant shall be construed as references to the person referred to in subsection (3)(a); and

(b) references in this Act to realisable property shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (2) for a drug trafficking or relevant offence.

(5) Where the court has made a restraint or charging order by virtue of subsection (3), the court shall discharge the order if proceedings in respect of the offence are not instituted, or if the application is not made, within such time as the court considers reasonable.

Restraint orders

28 (1) The court may make a restraint order to prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may apply-.

(a) to all realisable property held by a specified person, whether the property is described in the order or not; and

(b) to realisable property held by a specified person, being property transferred to him after the making of the order.

(3) This section shall not have effect in relation to any property for the time being subject to a charge under section 29 of this Act or under section 19 of the Drug Trafficking Suppression Act 1988.

(4) A restraint order—

(a) may be made only on an application by the Director of Public Prosecutions;

(b) may be made on an ex parte application to a Judge in chambers; and

(c) shall provide for notice to be given to persons affected by the order.

(5) A restraint order—

(a) may, on the application of any person affected by the order, be discharged or varied in relation to any property; and

(b) shall be discharged when proceedings for the offence are concluded.

(6) Where the court has made a restraint order, the court—

(a) may at any time appoint a receiver—

(i) to take possession of any realisable property; and

(ii) in accordance with the directions of the court, to manage or otherwise deal with any property in respect of which he is appointed,

subject to such exceptions and conditions as may be specified by the court; and

(b) may require any person having possession of property in respect of which the receiver is appointed under this section to give possession of it to the receiver.

(7) For the purposes of this section, dealing with property held by any person includes (without prejudice to the generality of the expression)—

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from Bermuda.

(8) Where the court has made a restraint order, a police officer may seize any realizable property for the purpose of preventing its removal from Bermuda; and property so seized shall be dealt with in accordance with the directions of the court.

42. Under subsection (6) the Court is empowered to appoint a receiver to take possession of any realizable property subject to the restraint order made.

Restraint Orders with Statutory Modifications for Assistance to Foreign Courts

43. The following provisions under Schedule 2 of the 1998 Order import the following modifications to the POCA:

12 After section 30 there shall be inserted—

"***Applications for restraint and charging orders***

30A An application under section 28(4) or 29(3) shall be supported by an affidavit which shall—

(a) state, where applicable, the grounds for believing that an external confiscation order has been or may be made in the proceedings instituted or to be instituted in the designated country concerned;

(b) to the best of the deponent's ability, give particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property;

(c) in a case to which section 27(3) of this Act applies, indicate when it is intended that proceedings should be instituted in the designated country concerned,

and the affidavit may contain statements of information or belief with the sources and grounds thereof."

RESTRAINT AND CHARGING ORDERS

Cases in which restraint and charging orders may be made

27 (1) The powers conferred on the Supreme Court by section 28 to make a restraint order and by section 29 to make a charging order are exercisable where—

(a) proceedings have been instituted against the defendant in a designated country for a drug trafficking or relevant offence;

(b) the proceedings have not been concluded;

(c) either an external confiscation order has been made in the proceedings or it appears to the Supreme Court that there are reasonable grounds for believing that such an order may be made in them.

(2) The powers mentioned in subsection (1) are also exercisable where it appears to the Supreme Court that proceedings are to be instituted against the defendant in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them.

(4) [Omitted]

(5) Where the court has made a restraint or charging order by virtue of subsection (3), the court shall discharge the order if the those proceedings are not instituted within such time as the court considers reasonable.

Restraint orders

28 (1) The court may make a restraint order to prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may apply—

(a) where an application under subsection (4) relates to an external confiscation order made in respect of specified property, to property which is specified in that order, and

(b) in any other case—

(i) to all realisable property held by a specified person, whether the property is described in the restraint order or not; and

(ii) to realisable property held by a specified person, being property transferred to him after the making of the restraint order.

(3) This section shall not have effect in relation to any property for the time being subject to a charge under section 29 of this Act.

(4) A restraint order—

(a) may be made only on an application by the Attorney-General; and

(b) may be made on an ex parte application to a Judge in chambers; and

(c) shall provide for notice to be given to persons affected by the order.

(5) A restraint order—

(a) may, on the application of any person affected by the order, be discharged or varied in relation to any property; and

(b) shall be discharged when the proceedings in relation to which the order was made are concluded.

(6) Where the court has made a restraint order, the court—

(a) may at any time appoint a receiver—

(i) to take possession of any realisable property; and

(ii) in accordance with the directions of the court, to manage or otherwise deal with any property in respect of which he is appointed,

subject to such exceptions and conditions as may be specified by the court; and

(b) may require any person having possession of property in respect of which the receiver is appointed under this section to give possession of it to the receiver.

(7) For the purposes of this section, dealing with property held by any person includes (without prejudice to the generality of the expression)—

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from Bermuda.

(8) Where the court has made a restraint order, a police officer may seize any realisable property for the purpose of preventing its removal from Bermuda; and property so seized shall be dealt with in accordance with the directions of the court.

Applications for restraint and charging orders

30A An application under section 28(4) or 29(3) of this Act shall be supported by an affidavit which shall—

(a) state, where applicable, the grounds for believing that an external confiscation order has been or may be made in the proceedings instituted or to be instituted in the designated country concerned;
(b) to the best of the deponent's ability, give particulars of the realisable property in respect of which the order is sought and specify the person or persons holding such property;
(c) in a case to which section 27(3) of this Act applies, indicate when it is intended that proceedings should be instituted in the designated country concerned,

and the affidavit may contain statements of information or belief with the sources and grounds thereof.

POCA and the English Statutory Regime

44. The provisions in Parts II and III of the POCA setting out the statutory position on confiscation orders and restraint orders compare to those in Part II of the Proceeds of Crime Act 2002 in the UK ("the UK 2002 Act").

45. In Bermuda, a confiscation order under section 9 of the POCA may be made at the sentencing stage of a criminal trial in relation to a drug trafficking offence or a 'relevant offence' on the application of the Director of Public Prosecutions or of the Court's own motion. Before a confiscation order may be made, the Court shall first determine in accordance with section 9(2) whether the defendant has benefitted from criminal conduct.

46. Before a restraint order may be made under the POCA, the Court must be satisfied that proceedings have been (or will be)[3] instituted against a defendant for a drug trafficking offence or a 'relevant offence' and that those proceedings have not been concluded. The Bermuda Court must also be satisfied that there is reasonable cause to believe that the defendant has benefitted from drug trafficking or from any relevant offence, as the case may be. These are the conditions expressly stated under section 27(1) of the POCA. Section 27(2) bars the Court from making any such order where it is satisfied that there has been undue delay in continuing the proceedings or application in question, or where the Court is satisfied that there is no intention to proceed with the prosecution. Section 27(5) empowers the Court to discharge a restraint order where proceedings have not commenced within a reasonable timeframe.

47. Sections 27 and 28 of the POCA are materially similar in substance to sections 40 and 41 of the UK 2002 Act for the making of a restraint order. Under sections 40(2) and 40(3) it must be shown to the Court that either a criminal investigation has been started and there is reasonable cause to believe that the alleged offender has benefited or that proceedings for an offence have been started but not concluded & there is reasonable cause to believe that the defendant has benefited. Also, procedurally speaking, the two regimes compare in that a restraint order may be made on an *ex parte* application to a judge in chambers under section 42(1)(b) of the UK 2002 Act. Equally, the Court may vary or discharge the Restraint Order under section 42(5).

48. The provisions in the UK 2002 Act materially reflect the repealed provisions in Part VI of the Criminal Justice Act 1988, save that the Crown Court, as opposed to the English High Court, now has the jurisdiction to make restraint orders. (So the right of appeal against the making of restraint orders is now vested in the Criminal Division of the Court of Appeal.) The concordance is relevant as the Court of Appeal in *Jennings v Crown Prosecution Service* was concerned with the provisions under the Criminal Justice Act 1988. Neither the UK 2002 Act, nor the Criminal Justice Act 1988 nor the POCA in Bermuda contain an express

[3] Section 27(3) of the POCA

requirement for an apprehension of risk of dissipation of assets. For this reason, *Jennings v Crown Prosecution Service* and other English case law is persuasive authority.

The Interrelation between Confiscation Orders and Restraint Orders

49. Describing the operation of Part VI of the Criminal Justice Act 1988 as read with England's 1991 Order, Lord Hobhouse of Woodborough in *United States of America v Montgomery* [2001] UKHL 3 [44] and [47] said:

"*44. The sequence which the scheme of Part VI follows is (i) the offence/criminal conduct by the offender; (ii) the institution of criminal proceedings against the offender; (iii) the conviction of the offender; (iv) the making of a confiscation order; (v) proceedings in the High Court consequential on the making of the confiscation order. Into this sequence there may be inserted two other material events. A third party may have acquired a benefit from the offender: this may be interposed at any time after stage (i). A restraint or charging order may be made in anticipation of a confiscation order provided that the relevant criminal proceedings have been instituted (s.76): it may therefore be interposed after stage (ii).*"

47. So far I have been examining Part VI of the Act without referring to s.96(1) which is the subsection which authorises delegated legislation to enable external confiscation orders, as defined in s.96(2) to which I referred earlier, to be enforced in the High Court, in particular by registration under s. 97. S.96(1)(a) provides -

"*Her Majesty may by Order in Council -*

(a) direct in relation to a country or territory outside the United Kingdom designated by the Order ("a designated country") that, subject to such modifications as may be specified, this Part of this Act shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there;"

50. In *Jennings v Crown Prosecution Service* [2005] EWCA 746 the English Court of Appeal, having granted leave to appeal after it was initially refused by Maurice Kay LJ, heard an appeal against Leveson J's refusal to set aside a restraint order which had been granted *ex parte* by Forbes J. The underlying criminal charges related to conspiracy to defraud. The appeal was heard after the start of the trial which was estimated to close within a further three week period.

51. In the leading judgment of the Court, Lord Justice Laws distinguished confiscation orders from restraint orders under the old Criminal Justice Act 1988 regime as follows [28]:

"…*The cases are generally concerned with the court's function under s.71 to make a confiscation order. But this appeal is about the prior stage arising under s.77 relating to restraint orders, which is subject to the legislative steer given by s.82(2). I think it very important to have in mind that in deciding whether to make a restraint order under s. 77 (and if so, in what terms) the court's task is not to reach firm conclusions as to the precise extent of a respondent's benefit, or realisable property, for the purposes of s. 71; though of course if those matters are plain the facts will be put before the judge. Rather, under s. 77 the court's duty is to decide whether to make a protective order so that in the particular case the satisfaction or fulfilment of any confiscation order made or to be made will be efficacious.*"

52. Paras [43]-[44]:

"43. *It is obvious that restraint orders and confiscation orders fulfil different functions. The confiscation order constitutes a final judgment, subject to appeal, of what should be taken from a defendant as representing, in essence, the proceeds of his crime. By contrast the restraint order is pre-emptive and provisional. Lord Donaldson MR said this in Re Peters 24:*

"[Counsel] for the commissioners points out that a court faced with the making or variation of a restraint order or a charging order is not concerned with the making of a confiscation order or the process of execution in satisfaction of such an order. It is concerned solely with the preservation of assets at a time when it cannot know whether the accused will or will not be convicted. Such a jurisdiction is closely analogous to that exercised by the courts in relation to Mareva injunctions and might, not inaccurately, be referred to as a 'Drugs Act

Mareva' 25. Under the Mareva jurisdiction the interest of the potential judgment creditor has to be balanced against those of the actual creditors, whether secured or unsecured, and of the defendant himself who may succeed in the action and should be fettered in his dealing with his own property to the least possible extent necessary to ensure that the processes of justice are not frustrated.

Subsection (2) 26 is consistent with such a purpose, subject to what [counsel] describes as a 'legislative steer', namely, that, so far as is reasonable taking account of the fact that the accused may be acquitted and that, unlike the position under the Mareva jurisdiction, there is no counter undertaking in damages although there is a discretionary power to award compensation under section 19 of the Act, the value of the realisable property shall be maintained in order that it may be available to satisfy any confiscation order."

See also the judgments of Nourse LJ 27 and Mann LJ 28.

44. When a restraint order is applied for, the court is not only ignorant of the defendant's future fate at the hands of the jury. There may be other defendants; the court is, of course, equally ignorant of the jury's future view of them. Indeed it may be unclear who, if anyone, will stand his trial beside the defendant whom the court is considering. There may be large unanswered questions as to the respective roles of different defendants, as to who did what with the crime's proceeds, and the ultimate extent and destination of those proceeds. There

may be other uncertainties. In all these circumstances, it may often be appropriate in a case where there are several prospective defendants to make restraint orders against each of them, so as to protect, as against each, the whole sum which represents the proceeds of the crime so far as the court can at that stage ascertain it. While of course the Crown must lead evidence as to the amount of the proceeds, and the defendant's acts in getting- "obtaining"- the proceeds, and also the defendant's assets so far as they are known, the exercise is quite unlike the later exhaustive investigation undertaken by the trial judge in deciding what, if any, confiscation order to make. At the restraint order stage the court makes no final decision as to the defendant's "benefit" or "realisable property". It is concerned only, as I have said, to make a protective order so that in the particular case the satisfaction or fulfilment of any confiscation order made or to be made will be efficacious. Given the court's obligation under s. 82(2), there will be cases where it will advisedly make orders to preserve the same sum of money in the hands of multiple defendants.

53. Examining the scope of 'benefit' Laws LJ said [38]-[39]:

"*38. What remains to be said about the meaning of the word "obtain" in s.71(4)? Clearly it does not mean "retain" or "keep". But no less clearly, in my judgment, contemplates that the defendant in question should have been instrumental in getting the property out of the crime. His acts must have been a cause of that being done. Not necessarily the only cause: there may, plainly, be other actors playing their parts. All that is required is that the defendant's acts should have contributed, to a non-trivial (that is, not de minimis) extent, to the getting of the property. This is no more than an instance of the common law's conventional approach to questions of causation.*

39. I do not believe that there is a separate requirement that the defendant must be shown to have control over the property, although in reality if he has been instrumental in getting it he will, no doubt, in some sense (and at some stage) have had control over it…".

54. On appeal from *Jennings v CPS*, although affirming the Court of Appeal's dismissal of Jenning's appeal, the House of Lords diverged from Laws LJ's articulation of "obtain". Lord Bingham's statement of the principle in *Jennings v CPS* [2008] UKHL 29 at [13]- [14] was as follows:

"*13. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.*

14. The committee does not, with respect, find the formulation of Laws LJ in his para 38, quoted above, to be helpful or entirely accurate. A person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it. But under section 71(4)

a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning "obtained by him". While the committee would not adopt the appellant's submission ipsissimis verbis (the defendant need not have had his hands on the property) it accepts the broad thrust of the appellant's criticism of the Court of Appeal's formulation. Whether the appellant obtained the benefit of the fraud jointly with his co-defendant remains to be decided, but there was clearly sufficient material to support the making of a restraint order."

The Law on 'Risk of Dissipation of Assets'

55. In so far as it relates to an application by the Director of Public Prosecutions for a restraint order, there is no express provision under section 27 for the Court to be satisfied that there is a risk of dissipation of assets.

56. RSC O.115A/6 applies where a restraint order has already been made but a further application to either vary a restraint order or obtain a further order in respect of other realizable property. It also applies to an application for the appointment of a receiver. In any such case, the Attorney General is expected to make the application by way of summons. However, where the application is either (i) urgent or (ii) such that the giving of notice would cause reasonable apprehension of dissipation of assets, the application may be made *ex parte*.

57. On a literal construction of this Rule, it seems that an application may be made *ex parte* without notice on the basis of urgency. Such urgency, it would seem, could arise without apprehension of dissipation of assets.

58. Glidewell LJ said in the decision of the English Court of Appeal in *AJ & DJ*:

"In my view, where there is a reasonable apprehension of dissipation of assets, an *ex parte* application will normally be the appropriate procedure."

59. Laws LJ in *Jennings v CPS* [55]:

"*This approach has been generally followed by the court in exercising the jurisdiction given by s. 77 of the Act of 1988, and analogous and predecessor provisions. Thus the court has imposed a duty on the shoulders of the Crown to make disclosure of material facts, if it seeks a restraint order without notice, just a claimant in a private civil suit must do if he seeks a freezing order without notice. Now, it is important to recognize the reality of these applications. As Mr. Mitchell frankly told us they are always, certainly routinely, made without notice. The reasons are obvious enough. The respondents to such applications are usually charged with or suspected of serious crimes involving large sums of money or money's worth.*

The risk of dissipation will generally speak for itself. That is no doubt reflected in Leggatt LJ's comment in AJ & DJ: "In the ordinary case, the prosecution would no doubt be unwise not to proceed ex parte"."

60. In the opening passage of his concurring judgment in *Jennings v CPS*, Longmore LJ restated the six questions raised by Clarke LJ about the duty of the prosecution and the role of the Court in determining applications for a restraint order. (Those questions were stated in Clarke LJ's Ruling whereby permission to appeal was granted.) The first of those questions was:

"*What is the duty of the applicant in making an application for a restraint order … to set out its reasons for fearing a risk of dissipation of the respondent's assets?*"

61. In answer to the first and final question Longmore LJ stated [61] and [66]:

"*Fear of dissipation of assets is the reason for seeking a restraint order. Such fear must, in fact, exist before an order should be applied for. But in a case where dishonesty is charged, there will usually be reason to fear that assets will be dissipated. I do not therefore consider it necessary for the prosecutor to state in terms that he fears assets will be dissipated merely because he or she thinks there is a good arguable case of dishonesty. Nevertheless prosecutors must be alive to the possibility that there may be no risk in fact. If no asset dissipation has occurred over a long period, particularly after a defendant has been charged, the prosecutor should explain why asset dissipation is now feared when it was not feared before.*

62. The second question was:

("*(6) In what circumstances should [the CPS] make an application to the court without notice, and how should the court react to a case in which the applicant should have made the application on notice?")*

63. Longmore LJ responded:

(6) Applications without notice.
As Leggatt LJ said in AJ and DJ (page 27D), if the prosecution considers it likely that assets will be dissipated, it would be wise not to give notice of the application. Normally, circumstances which give grounds for apprehension that assets will be dissipated are likely also to show a real risk that notice of an application for a restraint order will lead to dissipation of assets before the application can be heard."

Legal Principles on the Duty to Provide Full and Frank Disclosure

64. Mr. Hawthorne relied on binding authority from the Court of Appeal in *Minister of Finance v AP* [2016] CA (Bda) 29 Civ. In the leading judgment, Bell JA quoted from the opening passage in Chapter 9[4] of Mr. Steven Gee K.C.'s Commercial Injunctions (Sixth Edition):

'***The general principles***
Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider. It is part of the duty of an applicant for without notice relief to present the application fairly.'

65. Emphasizing the particular force of the rule for applications such as Mareva injunctions and Anton Pillar orders, Mr. Gee KC recited [9-002] Donaldson LJ's remarks in *Bank Mellat v Nikpour* [1985] F. S. R. 87 at 92:

"*The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the Draconian remedy of the Mareva Injunction. It is in effect, together with the Anton Pillar order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked*."

66. The duty on an *ex parte* applicant to make inquiries is also affirmed in the practitioners' text Commercial Injunctions [9-004]:

"*The duty to disclose applies to matters known to the applicant or his agents, or matters which they would have known, had they made all the inquiries which should reasonably have been made prior to the application. The case must be presented fairly, and this includes making these inquiries. The applicant has a duty to make sure as far as he can that the full story is before the court; this includes asking witnesses to produce all the relevant documents which they have, so as to ensure that the court is not misled. It has been held that even if the applicant has forgotten the matters in question, nevertheless this does not justify failure to disclose them. But it would be a relevant factor to be taken into account by the court in deciding what should be the consequences of the non-disclosure*."

67. The application of these principles in Bermuda law was confirmed by the Court of Appeal in *Minister of Finance v AP* where the issue of non-disclosure in an *ex parte* application arose

[4] Chapter 9-001

on a mutual legal assistance case. In short, at the request of the Government of India, the Minister of Finance obtained an *ex parte* order compelling the respondent's production of various materials. At the *inter partes* hearing before Hellman J in *Minister of Finance v AP* [2016] Bda LR 34, the Court learned that the information presented by the applicant at the ex parte hearing was materially deficient in more than one instance.

68. On the first breach, the applicant neglected to inform the Court that in compliance with a previous production order, the Defendant had previously produced the sought after material within the preceding 3-4 years and that this material was then received by the Government of India. Responsively, Hellman J noted that if the Court had been made aware of the previous request it would not have ordered the provision of duplicate material without an explanation as to why it was sought. Another occurrence of material non-disclosure related to the withholding of a written ruling by two Deputy Commissioners of Income Tax. This was held to be serious as the Request stated that enquiries carried out by the Indian Income-tax authorities revealed that the 'Subjects' had income and/or assets taxable in India which had not been disclosed or reported to the Indian Income-tax authorities. Of this Hellman J said [41]-[44]:

"*…It was highly material to the Court's decision to make the Production Order. Indeed, had I been aware of it on the ex parte application, I would not have made the Production Order without receipt of evidence explaining why the Indian Income-tax Department now sought to disregard its own findings as to the source of the monies deposited in the Third Account.*

"*42. That these findings were made in the context of a tax assessment relating to the Defendant rather than the Subjects is nothing to the point. The fact that the Request sought material not merely for the determination, assessment and collection of taxes but also for the purposes of investigation or prosecution of tax matters does not explain why the findings were disregarded, particularly as it is reasonable to suppose that a criminal or regulatory offence would be more difficult to establish than a higher tax assessment.*

43. Once the Plaintiff was alerted to the point by affidavit evidence filed by the Defendant, I would have expected the Plaintiff to file evidence providing an explanation not only as to why the findings were disregarded but also as to why the material non-disclosure had taken place. It could have obtained this evidence by making enquiries of the requesting State. Surprisingly, the Plaintiff chose not to file any such evidence.

44. There has, then, been a serious failure by the Plaintiff to discharge its duty of full and frank disclosure. This failure has been neither remedied nor explained. In the circumstances I am satisfied that the Production Order should be discharged."

69. Hellman J accordingly discharged the Production Order on account of material non-disclosure on the part of the Minister of Finance who appealed to the Court of Appeal. Addressing the Plaintiff's contention that the cause of the non-disclosure was occasioned by the Indian Government, Bell JA said this [19-20]:

"*19. It is no doubt appropriate at this stage to deal with one further aspect of material non-disclosure. As I understood the argument for the Minister this was that the Minister was entitled to rely on what he described as the certification of the requesting country, which, submitted Mr Elkinson, was something that the Minister could not go behind. It was argued for the Respondent that the Minister had been aware of the 2012 production request, and so aware that pursuant to this the relevant documents had been produced by the Respondent and had been sent to the Requesting Government. Mr Elkinson advised that there had been seventy-seven requests between 2013 and 2014, suggesting that the Minister could not be expected to focus on the earlier application and by means of a comparison conclude that the latter application was inaccurate, insofar as it failed to refer to the 2012 production and the matters which arose in consequence of that.*

20. To my mind, that submission seems to miss the point of the obligation of full and frank disclosure of all material matters, and the consequences which fall to be considered when there is non-disclosure of material matters. This is not a question of determining fault as between the Minister and the Requesting Government. It matters not to my mind who was responsible for the inaccurate or incomplete information being put before the judge on the ex parte application for the Production Order. The question is not where the responsibility or blame lies for the inaccurate and incomplete information; the treaty parties might as well be agent and principal, insofar as the Minister is seeking the Production Order not for his own benefit, but in the discharge of Bermuda's treaty obligations for the benefit of its treaty partner, in this case the Requesting Government. What matters is that misleading formation was presented to the judge on an ex parte application. I therefore agree with the judge when he stated at paragraph 22 of his ruling that 'It is no answer to an allegation of non-disclosure that the applicant did not disclose such matters to the court because the requesting party did not disclose them to the applicant.' Where, as in this case, the misinformation and omissions were highly material, it is hard to see what alternative the judge could have had but to set aside the ex parte order.

21. So in relation to the first and second grounds of appeal, I would hold that these have no merit."

70. In *AJ & DJ* Glidewell LJ said [22]:

"*… the same general considerations apply to the making of an application under these provisions as apply to an application in civil proceedings for a Mareva injunction. In particular, in an application for a restraint or charging order, the prosecution are under a duty to disclose in the affidavit in support all material facts known to them. If they fail to do this, [that] of itself, in an appropriate case, can be a ground on which an order obtained ex parte may, although I certainly do not say 'shall', be set aside*."

71. Having quoted the above passage in his judgment, Laws LJ in *Jennings v CPS* made the following remarks [56]-[57]:

"56. It seems to me that there are two factors which might point towards a different approach being taken to without notice applications for restraint orders in comparison to applications in ordinary litigation for freezing orders; but they pull in opposite directions. First, the application is necessarily brought (assuming of course that it is brought in good faith) in the public interest. The public interest in question is efficacy of s. 71 of the Act of 1998. Here is the first factor: the court should be more concerned to fulfil this public interest, if that is what on the facts the restraint order would do, than to discipline the applicant- the Crown-for delay or failure of disclosure. But secondly, precisely because the applicant is the Crown, the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the State, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure.

57. The court needs to have both these considerations in mind. But they do not, I think promote some district and separate test for the exercise of the s. 77 jurisdiction. They are relevant facts which in his good sense the judge will consider and weigh as they arise case by case."

72. In the concurring judgment of the Court of Appeal, Longmore LJ in *Jennings v CPS* answered Clarke LJ's second, third and fourth questions as follows [62] – [64]:

"(2) Failure to discharge the duty.
If there is a duty on the prosecutor to inform the court why, on the facts of a particular case, there is fear of dissipation and the prosecutor fails to discharge that duty, it would be a strong thing to discharge the order altogether. If an application is made by a defendant to discharge or vary the order on the grounds that it is unreasonable to fear that his assets will be dissipated, the court will decide that question on the evidence. If the court considers that the prosecutor failed to consider whether there was a risk of dissipation when he should have done or failed to put relevant documentary material before the court but that the public interest still requires an order, the judge can deprive the prosecution of their costs as Leveson J indeed did in this case. If the public interest requires than an order should be made, an order should still be made.

(3) Duty to make full and frank disclosure.
This duty applies to applicants for restraint orders as much as to applicants for freezing orders.

(4) Failure to discharge the duty.
See the answer to (2) above. The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified."

73. In *Wastell and Another v Stanford International Bank Ltd and Another Serious Fraud Office (Intervening)* [2010] EWCA Civ 137; Civ 1554 and Civ 692 the English Court of Appeal[5] was concerned with two pending appeals to its Civil Division and one intended appeal for hearing in its Criminal Division. On the facts relevant to both the civil and criminal proceedings, it was alleged that a large scale fraud involving an insolvent Antiguan bank called Stanford International Bank Limited had occurred. The applications which followed in the Crown Court and in the High Court essentially became a race between three offices (i. the Director of the Serious Fraud Office (the "SFO"); ii. liquidators appointed in an Antiguan Court; and iii. a US Receiver) to administer the world-wide assets of the insolvent bank.

74. In the original jurisdiction of the criminal proceedings, HHJ Kramer of the Crown Court granted a restraint order an *ex parte* application by SFO under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the "2005 Order"). Subsequently, at the *inter partes* hearing, the Crown Court judge refused an application by Antiguan liquidators under Article 9 of the 2005 Order to discharge or vary the *ex parte* restraint order.

75. The Criminal Division of the Court of Appeal found the Crown Court judge had inadequate information about the appointment of a US receiver and was not informed that the insolvent bank was also the subject of cross-border winding up petitions already filed in civil proceedings. In sequence, the restraint order was made on 7 April 2009 and the winding up order was made on 15 April 2009. This was decidedly material as the risk of dissipation of assets would have likely been reduced by the pending appointment of liquidators charged with safeguarding the company's assets. Consequently, the Court of Appeal set aside the original order with an order for the payment of costs. The Chancellor of the Court of Appeal, Sir Andrew Morritt, said this [83] and [93]:

83. The judge then set out the relevant provisions of ERO and posed four questions, namely was there material (1) misrepresentation or (2) non-disclosure as a result of which the order

[5] The case of *Stanford International Bank* was appealed further to the UK Supreme Court ([2012] UKSC 3) where the Court of Appeal's procedural decision was confirmed.

was obtained? Even if there was (3) should the order be discharged? In any event (4) should the order be varied as requested? I pause to observe that the first two questions posed by the judge were the wrong ones. The question is not whether the order was obtained as a result of the misrepresentation or non-disclosure or whether the information not disclosed was material to be taken into account in deciding whether or not to grant to grant relief without notice and if so on what terms, see e.g. Dormeuil Freres SA v Nicolian Ltd [1988] 1 WLR 1362, 1368.

… … …

93. Taken together the matters which should have been disclosed but were not undermined the allegation made in both the Letter of Request and the witness statement of Mr. Tehal that there was an immediate risk of dissipation of the assets of SIB such as to warrant the grant of a restraint order unlimited in point of time on an ex parte application. The judge could not have been criticised had these matters been disclosed, as they should have been, and he had declined to make any order on an ex parte application. The obvious course would have been to see if the application for the restraint order could be heard by the same judge as would hear the application for the renewal of the freezing order on 27th April. At the most he might have granted a restraint order for a limited period so as to hold the position until a proper inter partes hearing could be arranged. For these reasons I conclude that not only did HH Judge Kramer QC ask himself the wrong questions but he gave the wrong answer to them. The effect or result of the non-disclosure was the grant of an order unlimited in point of time which, on proper disclosure, could not have been justified."

76. In the end, the restraint order originally sought was re-granted to take effect upon the expiry of a freezing order. The Chancellor explained [104]:

"*None of these solutions is ideal in that the US Receiver and the SFO/DoJ would not, seemingly, compensate creditors of SIB who are not victims of the frauds but the Antiguan Liquidators would not directly compensate victims of the frauds who were not also creditors of SIB. On the other hand there will be a good deal more for the victims if the administration of the assets and their distribution is entrusted to the SFO/DoJ for that should avoid most of the very substantial costs being incurred by both the Antiguan Liquidators and the US Receiver. Further the court is, in my view, entitled to place reliance on the passage in the Letter of Request I have quoted at the end of paragraph 76 above confirmed by the statements in the witness statement of Mr Addy J.de Kluiver made on 29th October 2009 to the effect that the assets of SIB in England will be distributed to the victims pro rata and pursuant to the relevant UK laws. In principle, therefore, I see no reason not to make the restraint order as of 29th July 2009 so as to confer administrative priority on the SFO/DoJ.*"

Summary of Relevant Findings on the Law: Requirements for a Restraint Order

77. So, what is to be proven to establish the integrity and soundness of the Restraint Order made under the 1998 Order? I find as a matter of law that this Court must be satisfied that:

(i) There are criminal proceedings underway or afoot in a designated country or territory;

(ii) The offences charged or to be charged are for a drug trafficking offence or a relevant offence (the "criminal conduct");

(iii) There is a request for seizure of assets held in Bermuda by a foreign Court of competent jurisdiction for assistance;

(iv) There is a judicial assessment of evidence before the foreign Court finding that the defendant has or appears to have obtained a benefit from the criminal conduct;

(v) There is a reasonable belief that an external confiscation order will be made in the foreign Court; and

(vi) There is a real risk of dissipation of assets, such assets representing the value of the proceeds of the criminal conduct.

Analysis of the Application to Discharge or Vary the Restraining Order:

Should the Second Defendant be named as a Defendant in these Proceedings?

78. I consider it wrong in principle that AAAIL is named as a Defendant in these proceedings. The granting of a restraint order, as a matter of law, is a protective measure designed to ring-fence the value of assets representing the benefit obtained by the defendant subject of a current or near future criminal prosecution. It must be intended that upon conviction, the assets preemptively restrained will serve as a guarantee to satisfy that which is demanded under the anticipated confiscation order. Thus it follows that the individual to be named as the defendant to the prospective confiscation order will be the same individual against whom the restraint order is made. That individual is Mr. de São Vicente.

Has the Corporate Veil been pierced?

79. The sustainability of the terms in the Restraint Order which freeze the assets of AAAIL and AARSL are, lock stock and barrel, contingent on a finding that the corporate veil has been pierced by reason of Mr. de São Vicente's alter ego control over those corporations.

80. Golden to post-millennial company law students, the English Court of Appeal in *R v Seager & Blatch* [2009] EWCA Crim 1303 outlined various scenarios which would surely onset the piercing of the veil, if not rudely tear through it, so to borrow Bingham LJ's parlance.

81. The Court of Appeal said at [76]:

"*... It is "hornbook" law that a duly formed and registered company is a separate legal entity from those who are its shareholders and it has rights and liabilities that are separate from its shareholders: Salomon v A Salomon & Co Ltd [1897] AC 22; .... A court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain circumstances. It cannot do so simply because it considers it might be just to do so. Each of these circumstances involves impropriety and dishonesty. The court will then be entitled to look for the legal substance, not just the form. In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced. First, if an offender attempts to shelter behind a corporate façade, or veil, to hide his crime and his benefits from it: .... Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, then "the veil of incorporation has been not so much pierced as rudely torn away": per Lord Bingham in Jennings v Crown Prosecution Service [2008] AC 1046, para 16. Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham", i.e. an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts: R v Dimsey [2000] QB 744, 772, per Laws LJ, applying Snook v London and West Riding Investment Ltd [1967] 2 QB 786, 802, per Diplock LJ."*

82. *Prest v Petrodel Resources and others* [2013] UKSC 34 was later described by the English Court of Appeal as the leading case on the issue, albeit that the following passages from Lord Sumption JSC is to be considered strictly obiter. At [28] and [35]:

"*28. The difficulty is to identify what is a relevant wrongdoing. References to a "façade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "façade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists*

independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

...

...

35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

83. Also stated in *obiter*, in *Jennings v CPS* Laws LJ remarked [47]:

"*It is important to be clear as to the context in which a debate about piercing the corporate veil may actually arise. If an application to the court, whether for a restraint order or a confiscation order, seeks to restrain or confiscate a named item of property as being in the ownership or control of the respondent, though on the face of it the property belongs to a company, there is at once a question about the corporate veil…*"

84. Mr. Hawthorne cited *Trustor AB v Smallbone & ors* [2001] 1 WLR 1177. Sir Andrew Morritt VC said:

"In my judgment the court is entitled 'to pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or a façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)."

85. More recently, Stuart-Smith LJ in *Stanley Leslie Miller v R* [2022] EWCA Crim 1589 said at [33]-[34]:

"*33*
One basic tenet of the common law is that "a person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it": see R v Jennings [2008] UKHL 29, [2008] 1 AC 1046 at [14] per Lord Bingham, again giving the opinion of the House. It comes into sharp focus whenever a defendant's criminal conduct causes property to be obtained by a third party, whether human or corporate.

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It frequently happens that a defendant whose conduct has caused property to be obtained by a corporate third party may concede that the company's property should be treated as his own, as in R v Harvey 2017 AC 105. Where he does not, it is common ground that, because a company is a separate legal entity, an obtaining by a company pursuant to a natural defendant's crime is not ordinarily an obtaining by the defendant for the POCA purpose of calculating benefit. However, a number of potential routes may open the way to a conclusion that the obtaining of property by the company is to be treated as obtaining property by the defendant, of which the route provided by agency is just one example. For the present appeal, the relevant route is said to be by "piercing the corporate veil." As with other routes, where that route is adopted, normal common law rules should apply: see May at [48(5)] …"

86. The starting point in answering this question is whether the Angolan Trial Court judge made any findings on his assessment of the evidence which support a finding that the corporate veil has been pierced. The Judicial Request is premised on the conclusion of the Angolan Court that a Restraint Order ought to be made and that the conditions which need to be met for the making of a Restraint Order have been satisfied as a matter of Angolan law. In drawing those conclusions, the Angolan Trial Judge accepted the sufficiency of the evidence presented by the prosecutor in that Court. In the Order of that Court, the Angolan Trial Judge expressly concluded; "*In view of the above request made by the State Prosecutor, it is believed without reasonable doubt that there is strong evidence to endorse such preventative seizure*."

87. In the Judicial Request, the following findings were made by the Angolan Court :

(i) There was a strong indication that the offences of embezzlement, money laundering and profiting from economic interest in business and influence peddling had occurred;

(ii) That bank records and other documents showed that money owned by the Angolan State were illegally transferred from the accounts of the Angolan companies to AAAIL and the ownership and AAA Risk Solutions Ltd [the Second Applicant];

(iii) Mr. de São Vicente has made efforts to conceal the assets he acquired by distributing them through *his relatives, with several bank accounts being opened overseas* in countries including Bermuda i.e. AAAIL and the ownership and AAA Risk Solutions Ltd [the Second Applicant];

(iv) Mr. de São Vicente benefitted from this criminal activity which caused loss to the Angolan State in excess of US$4Billion; and

(v) There is a risk of decrease in the payment of guarantees for the benefits obtained through criminal activity.

88. The Director of AAAIL, Mr. Nicholas Millar, filed affidavit evidence in these proceedings in support of the application to vary or discharge the Restraint Order. However, as pointed out by Mrs. Dill-Francois, Mr. Millar's evidence did not challenge any of the evidence accepted by the Angolan Court. Seemingly for good reason. Had AAAIL or AAARSL filed any such factual evidence, it would have resulted in an implicit invitation for this Court to go behind the findings of the Angolan Court.

89. It is trite law that the Bermuda Court will not seek to revive factual or legal issues which have been adjudicated in a foreign Court in circumstances where the Bermuda Court is merely been called upon to recognize or enforce a judgment in furtherance of comity and reciprocity. In this case, there is no application for recognition or enforcement. The assistance which is sought requires the Bermuda Court to make an order within the walls of its domestic law.

90. The domestic law in this case is the 1998 Order as read with the POCA. This bundle of primary and secondary legislation is rooted in this jurisdiction's commitment to fulfil its international obligations, pursuant to international conventions implemented in accordance with the recommendations of independent inter-governmental bodies such as the Financial Action Task Force ("FATF"). The 1998 Order, at its nucleus, is Bermuda's subscription to the global commitment to protect against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. That is the DNA of Bermuda's statutory regime.

91. So, although the ordinary rules of statutory interpretation apply without modification, it is contextually relevant to consider the following passages under Part G of the FATF Recommendations on "International Cooperation" at [38] and [40]:

38. Mutual legal assistance: freezing and confiscation ***

Countries should have measures, including legislative measures, to take expeditious action in response to requests by foreign countries seeking assistance to identify, trace, evaluate investigate, freeze, seize and confiscate criminal property and property of corresponding value. These measures should also enable countries to recognise and enforce foreign freezing, seizing, or confiscation orders. Further, countries should be able to manage property subject to confiscation at all stages of the asset recovery process and share or return confiscated property. Countries should have in place the widest possible range of treaties, arrangements, or other mechanisms to enhance cooperation in asset recovery

40. Other forms of international cooperation *

Countries should ensure that their competent authorities can rapidly, constructively and effectively provide the widest range of international cooperation in relation to money laundering, associated predicate offences and terrorist financing. Countries should do so both

spontaneously and upon request, and there should be a lawful basis for providing cooperation.… … …

Competent authorities should use clear channels or mechanisms for the effective transmission and execution of requests for information or other types of assistance. Competent authorities should have clear and efficient processes for the prioritisation and timely execution of requests, and for safeguarding the information received.

92. A request for assistance by way of a Restraint Order is similar in character to a request for recognition or registration of a foreign judgment. This Court ought not to revisit the issues which formed the basis of the Angolan Court's preliminary findings as it relates to the evidence pointing to the use of AAAIL and AAARSL in the embezzlement of public funds belonging to the Angolan Government. To do otherwise would be to reopen the merits of an external order. This legal principle was followed by the Royal Court of Jersey in *Doraville Properties Corporation v HM Attorney General* [2016] JRC 128 at [104]:

"*We can see no reason to go behind the Default Judgement* [sic] *to question whether the District Judge Bates was justified on the evidence before him to reach that finding, in the same way that a court in considering the registration or enforcement of the foreign judgment does not go behind that judgment – see Showlag v Mansour [1995] 1 AC 431 at 440B and In re IMK Family Trust [2008] JLR 250 at paragraph 62. The point was made in the case of USA v Abacha [2015] 1 WLR 1917 at page 1932G where Gloster LJ said this:-*

> *"(v) There is no suggestion in the 2005 Order that a respondent may reopen the merits of the external order or the jurisdiction of the foreign court to make it. The court must, however, be satisfied that the criminal conduct is conduct which would either constitute an offence in any part of the United Kingdom or would have constituted an offence in any part of the United Kingdom if it had been committed here. See section 447(8) of POCA.""*

93. Correctly, Mr. Hawthorne maintained that this did not shift the burden of proving the merits of the application for the Restraint Order onto his client.

94. On the facts underlying the findings in the Judicial Request, Sonangol, the State concessionaire for Angola's risk management program for petroleum operation, set up AAA Serviços Financeiros as a holding company with four subsidiaries, all with 100% of State capital. This was done during Mr. de São Vicente's directorship over Sonangol RMD. The prosecution's case in Angola is that one of the four subsidiaries was charging and receiving inflated premiums. Payment of those exorbitant prices was transferred to Sonangol under the direction of Mr. de São Vicente.

95. Sonangol was the ultimate and sole beneficial owner of AAARL (the Bermuda incorporated reinsurance company with US$250,000.00 in paid up capital) until Mr. de São Vicente

fraudulently used AAA Serviços Financeiros as a vehicle to transfer the entire shareholding of AAARL to himself.

96. Part of the prosecution's evidence before the Angolan Court was that Mr. de São Vicente colluded with other senior officials, Mr. Nick Millar included, in the commission of his criminal wrongdoing. On the facts presented in the Request, Mr. de São Vicente was instrumental in the formation of both AAAIL and AAARSL and the prosecutor's case is that Mr. de São Vicente embezzled money through these companies. More so, the evidence also expressly alleged a "gift" of the shares of AAA Insurance & Reinsurance Brokers Limited[6] to AAAIL.

97. Mr. Hawthorne argued that there was no factual information before Hargun CJ to lend understanding to how he would have concluded that the assets of AAAIL qualify as the realizable property of the First Defendant. Having accepted that Mr. de São Vicente is the ultimate beneficial owner of all of the shares in AAAIL, Mr. Hawthorne nevertheless insisted that no further information was placed before Hargun CJ to explain how the First Defendant would have pierced the corporate veil to acquire legal or equitable rights to the whole of the company's property or assets. To that end, Mr. Hawthorne flagged the distinction between a shareholder's right to dividends and a company's sole possession of the property vested in it, citing *Short v Treasury Commissioners* [1948] 1 KB 116 and *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89. He further cited Davis LJ in *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19 [96]:

> "*…even where a company mixed up in relevant wrong doing is solely owned and solely controlled by the (criminal) defendant that does not of itself always necessitate a conclusion in a confiscation case that it is an alter ego company, whose turnover and assets are to be equated with property of the defendant himself…*"

98. While Mr. Hawthorne was without flaw in his submissions on the legal principles concerning the piercing of the veil, I could not and would not find that the facts assessed by the Angolan Court fell short of the threshold required for a *prima facie* finding that the Court veil was pierced. In my judgment, the evidence to be relied on by the Angolan prosecutor's office, if proven, establishes that Mr. de São Vicente was in fact the alter ego for AAIL and AAARSL. On the prosecution's case, they were companies which were set up for the purpose of embezzling Angolan public money outside of Angola (whether or not those companies had a mere aura of legitimacy or actually operated as legitimate businesses prior to the alleged period of embezzlement etc.). As the Royal Court put it in Doraville Properties Corporation v HM Attorney General at [93]:

[6] The reference to "AAA Insurance & Reinsurance Limited" at paragraph 16 of the Request appears to be in error and is taken to mean "AAA Insurance & Reinsurance Brokers Limited".

"*93. We accept that the international materials do support at least the propositions put forward by Advocate Jowitt as set out above. Specifically in relation to Article 31 paragraph 5 of the Anti-Corruption Convention and Article 5 b of the Warsaw Convention, these provisions are concerned with clean assets which have been intermingled with the proceeds of crime and they limit confiscation up to, as Advocate Nicholls put it, the value of the dirty assets that were intermingled. However, that does not apply to clean assets that have been used or involved in crime—instrumentalities. There is no such limitation in either Convention to the confiscation of those assets. They are tainted by such use or involvement and are susceptible to confiscation for that reason, notwithstanding their legitimate origins*."

99. Kindred to the scheme under the 1998 Order, although not identical, the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007 (the "Jersey 2007 Law") applies in Jersey. The Royal Court of Jersey may make a property restraint order on the application of the Attorney General in respect of any recoverable property specified in the application where the requirements of Article 6(5) of the Jersey 2007 Law are met. Not dissimilar to the 1998 Order, the Jersey Court must be satisfied that (i) the external civil asset recovery proceedings that relate to property in Jersey have been instituted in a country or territory outside Jersey; (ii) the proceedings have not been concluded; and (iii) there are reasonable grounds for believing that an external civil asset recovery order may be made in the proceedings.

Whether there is cause for apprehension of a real risk of dissipation

100. On the *prima facie* findings of the Angolan Court, this case involves criminal proceeds in excess of US$4Billion. The offences are grave dishonesty offences. More so, the defendant, Mr. de São Vicente, has been found to have engaged in efforts to conceal the proceeds in question which are said to have been funneled through AAAIL and AAARSL.

101. AAARSL, on the evidence of Mr. Millar, is said to be on the fringes of a voluntary liquidation. However, the business line for which it was incorporated went into 'run-off' in 2016 and its broker's licence was revoked by the Bermuda Monetary Authority nearly four years ago in December 2020. So, it seems far more likely in my view, that its assets ($200,000.00 in a Butterfield Bank account) have been held hostage at the pleasure of its ultimate beneficial owner by 80%, Mr. de São Vicente, rather than being placed in line for priority distribution to creditors in an ever-pending liquidation.

102. This Court was also made aware, on the evidence of DC Shannon Trott, that AAA Reinsurance Limited (which was infused with US$250,000.00 of Angolan State money in paid-up capital) was sold by Mr. de São Vicente to a company named Acumen Holdings III for the sum of US$173,087,218.00. On the evidence before the Angola Court, AAA

Reinsurance Limited was formerly owned by Sonangol until Mr. de São Vicente caused the entire of its shares to be transferred to him. The proceeds of that sale, having been refused by the Bank of Singapore branch in Dubai, were transferred to a Butterfield Bank account held by AAAIL. DC Trott's evidence is that there is now a remaining balance of US$160,000,000.00 in this account for AAAIL. DC Trott deposed that two further investment accounts owned by AAAIL at a Butterfield Bank show a balance of US$15,000,000.00 and £687,000. These accounts were the subject of the November 2021 Addendum Request on the Angolan Court's assessment that they are proceeds of the same criminal conduct. This evidence not only supports the case for a piercing of the corporate veil but also establishes a real risk of dissipation of assets.

103. As for AAAIL, the fact that there has not been any recent incident of suspicious or concerning withdrawals is neither here nor there on the facts of this case. Mr. de São Vicente, against whom the evidence of both the criminal conduct and concealment after-the-fact is strong, has *prima facie* alter-ego control over AAAIL. He has the ultimate beneficial interest in these Bermuda companies. That is relevant in cases of this nature given today's reign of modern technology which enables the depletion or dissipation of local and overseas assets to be carried out by the mere click of buttons.

104. In my judgment, the risk of dissipation is obvious and speaks for itself.

Counsel's Duty to Produce a Skeleton Argument

105. Mr. Hawthorne, on behalf of the Second Defendant, complained that the Attorney General, via the Acting Solicitor General did not fulfil her duty to the Court, when making an *ex parte* application, to produce a skeleton argument, citing, *inter alia*, *Memory Corporation plc v Sidhu* (No. 2) [2000] EWCA Civ 9, per Mummery LJ [65]:

"*It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case.*

It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

106. As a matter of usual practice, *ex parte* applications are made with the benefit written submissions. However, in particularly urgent *ex parte* without-notice applications, time may not realistically or practically afford such levels of preparation by Counsel. Whether that is the case can only be properly assessed by the sitting judge who is best-placed to evaluate and balance between the need for written submissions and the pursuit of a time-sensitive order.

107. In this case, there is an obvious a public interest factor. The proceeds in question, on the early assessment of the Trial Court Judge, represent stolen property belonging the Angolan Government. Further, the Crown's evidence for trial in Angola is expected to be that a portion of these proceeds was snatched from the State's investment in Bermuda's international reinsurance market. So, the Attorney General, in bringing the application, would surely have been under pressure to close off the risk of dissipation which I have found was an existing factor.

108. Hargun CJ clearly considered himself able to digest the substance of the application without the need for a written submissions which would be filed primarily for the convenience of the judge. As for the need for a respondent to be served with all of the information, it is notable than an audio record of the hearing would always be accessible to the parties.

109. For this reason, I do not consider it appropriate or even fair to criticize Counsel or the Bench for the absence of written arguments in this case. That said, the importance and duty of full and frank disclosure is never capable of compromise.

Counsel's Duty to Give Full and Frank Disclosure

110. There can be no quarrel about the fact that a party making an *ex parte* application before the Court carries the full burden and responsibility for providing the Court with full and frank disclosure. In simple terms, that means that the *ex parte* applicant must make the Court unambiguously aware of any relevant matter, whether of fact or of law and whether favourable or adverse to any party. The question as to what is relevant and material is plainly objective. It matters not if the non-disclosure is innocent or unmotivated by mischief. What matters is that the Court has not only the big picture but the complete picture. Relevancy and materiality relate to all matters which ought to form part of the Court's assessment and decision making. Fairness to the absent defendant and the proper exercise of the Court's process demands it.

111. In the present case, the Acting Solicitor General has been criticized for not having flagged for the Court's attention the fact that the Request only contemplated Mr. Carlos de São

Vicente as a Defendant in these proceedings. I have resolved this narrow procedural aspect of AAAIL's complaint in its favour.

112. Mr. Hawthorne also argued that the Request never sought to freeze all of AAAIL's assets. Mr. Hawthorne submitted that this ought to have been brought to the attention of the Court as material information relevant to the exercise of Hargun CJ's discretion. I disagree. Looking at the evidence as a whole, it is clear that the Angola Court seeks for all of AAAIL's accounts to be frozen. The funds in its receipt, even if mixed with seemingly legitimate funds (which is not accepted), is tainted and subject to a wholesale seizure. For that reason I am bound to reject this complaint from AAAIL.

113. In my judgment the non-disclosure complaints are without merit.

The Court's Duty to Provide Reasons and a return date for an Inter Partes Hearing

114. Claiming a shortfall on the part of the Court, Mr. Hawthorne pointed out that Hargun CJ ought to have provided written reasons for his granting of the Restraint Order, which he did not. This, on Mr. Hawthorne's submissions, offended the legal principles outlined by Simon J of the English Divisional Court in *Glenn & Co (Essex) Ltd et al v HM Commissioners for Revenue and Customs and East Berkshire Magistrates' Court* [2011] EWHC 2998.

115. In *Glenn & Co v HMRC*, a claim for judicial review was brought to challenge the legality of the issue and execution of search warrants issued by District Judge Vickers of the East Berkshire Magistrates' Court under section 8 of the Police and Criminal Evidence Act 1984. Once served, the judicial review claimants sought interim injunctive relief to prevent the HMRC from copying and examining the material seized. The injunction was granted on an ex parte order but later set aside following an *inter partes* hearing.

116. The claimants also, through their Counsel, wrote to the District Judge requesting for a copy of any written reasons given or for a transcript of any other written note made when issuing the warrants. In reply, Judge Vickers summarized the making of the application and stated that he gave his reasons orally which were recorded by his legal adviser.

117. On the judicial review application before Simon J, the claimants' counsel attached importance to the duty of the Court to articulate reasons for its decision-making so to show that the Court satisfied itself of the statutory criteria, citing *Wood v North Avon Magistrates Court* [2009] EWHC 3614 (Admin) and R v Crown Court at Lewes, ex p. Hill (1991) 93 Cr App R 60.

118. Setting out the legal principles applicable to the Court's duty to provide sufficient reasoning for its decisions, Simon J stated:

"*29 It is convenient shortly to summarise the relevant principles which apply.*

i) As has been repeatedly stressed, the safeguard against the unlawful invasion of premises is the strict application of the statutory criteria.

ii) There is nothing in PACE which requires the court to give reasons why it is satisfied that there are reasonable grounds for believing the matters set out in section 8(1)(a)-(e); and in some cases, it may be unnecessary to do so. One example would be where the written Information was compelling as to the grounds for a belief, and clearly addressed the specific matters which are required to be addressed in section 8(1)(a)-(d), see for example Lord Woolf CJ in Cronin (above) at [15]

… On examination of the information it would be possible to say, if the matter had to be reviewed by a court, whether there was material on which a justice could be satisfied. Therefore, without any more, it would be possible for a court to scrutinise the question whether this was a case where, prima facie, the warrant had or had not been lawfully issued.

iii) In most cases, and particularly where the information is given or supplemented orally, Magistrates should ensure that:

a) Reasons for their decision are given, see for example R v. Lewes Crown Court and Chief Constable of Sussex Police, ex. p. Nigel Weller and Co [1999] EWHC 424 (Admin) Kennedy LJ at [6],

The reality is that (1) the person or persons against whom an order is made are entitled to know why it is made; (2) the requirement to give reasons should help ensure that a judge does, as he must, address each of the statutory requirements before making the order, and (3) if it is necessary to review an order in this court reasons will be of great assistance. We will know why the judge decided as he did;

b) Those reasons are recorded at the time, see Wood v. North Avon Magistrates Court [2009] EWHC 3614, Moses LJ at [25]

If reasons are recorded at the time, then not only a Complainant will be in a position to understand why his premises had been raided, but also there will exist the powerful discipline for the decision-maker of knowing and having to record why the warrant was issued."

119. As to the role of the Court examining the impugned decision with its lack of articulated reasons, Simons J focused on whether there was a sufficient basis for the decision rather than the insufficient reasoning. Dismissing this ground of appeal on his finding that the section 8 test was satisfied, Simons J said [34]:

"*Ultimately, the question is whether the statutory test has been applied, and on what basis. If despite the lack of a fully reasoned decision, the court is able to discern a sufficient basis for the Magistrate's decision to issue the warrant, the challenge will fail, see for example R v. Lewes Crown Court case, Kennedy LJ at [6A]*."

120. Mr. Hawthorne in his written submissions stated [25]-[26]:

"*AAAIL has not been provided with a note of the hearing, a ruling, or anything else by which it could identify Hargun CJ's reasoning or the application of the statutory (and other) requirements. The author of these submissions understands that there was an ex parte without notice hearing before Hargun CJ but there was no skeleton argument produced and Hargun CJ had very few, [if] any, questions. As matters stand, it is not even clear that POCA and the 1998 Order were even before or referred to by Hargun CJ.*

The result is that AAAIL has to apply to discharge the Restraint Order without knowing the basis upon which it was made. It is submitted that it is wholly unfair and a breach of section 6(8) of the Bermuda Constitution for AAAIL to be deprived of their assets contrary to section 13 of the Bermuda Constitution and to have to apply to discharge or vary the Restraint Order to use those assets without knowing the basis upon which it was made."

121. The extent to which the Court will provide detailed reasons will depend on all circumstances of the case. In cases such as *Glenn & Co v HMRC* involving a warrant permitting entry on private premises and seizure of material, it may be particularly important to provide reasons since there no statutory *inter partes* hearing internal to the section 8 warrant procedure. The setting aside of a warrant will usually be challengeable only by judicial review proceedings. By way of contrast, where an early return date is given for an *inter partes* hearing to challenge an *ex parte* order in ordinary private civil relief cases, it may likely be more reasonable for the sitting judge to simply state short oral reasons for the granting of the *ex parte* order. This is because there is a real prospect of that same judge having to give considered reasons after an *inter partes* hearing.

122. Notwithstanding, I accept that the Restraint Order was invasive and intrusive. It prohibited the Defendants from dealing with any and all of their assets held in the Bank of N.T. Butterfield and HSBC Bermuda. If for no other reason, the Defendants were entitled to know

the application was not rubberstamped but instead granted in accordance with the statutory criteria.

123. In the present case, it is agreed between the parties that Hargun CJ provided very little by way of reasoning and certainly committed no basis for his granting of the Restraint Order to a written document. Had Hargun CJ fixed a quick return date for directions on an *inter partes* hearing, it seems certain that the Court would have been better shielded from the criticism made on this ground.

124. While there is an overall duty of fairness on the Court to provide reasons for its decision making, a principle which has strong constitutional footing on the grounds of open-court justice, I have found that Hargun CJ's decision to impose the Restraint Order is unimpeachable for all of the reasons outlined further above.

125. I do, however, accept that a return date for an *inter partes* hearing ought to have been fixed, ideally within a 3-7 day period from the making of the Restraint Order. Usually, where an *ex parte* order is to be opposed on an *inter partes* hearing, the Court will issue directions on the first return date and consider the respondent's position on the need for an urgent hearing date for a discharge or variation of the original order. In this case, that did not happen. Be that as it may, I am more so concerned with whether there was indeed a sufficient basis for the making of the Restraint Order.

Conclusion

126. I have refused to set aside the Restraint Order on the grounds argued by AAAIL and AAARSL.

127. However, in DC Ridley's evidence, he states that the criminal prosecution process has now concluded. This Court was not addressed on the effect of the finality of the Angolan criminal proceedings, which appears to be a statutory basis for the discharge of the Restraint Order.

128. I will hear Counsel further on this and on any application which may be filed for the registration of an external confiscation order.

129. I also further reserve my decision on a variation of the Restraint Order (to allow coverage of its reasonable costs for legal fees in respect of these proceedings in Bermuda and to defend the legal proceedings in Switzerland). I will hear Counsel further on this at the hearing on the effect of the finality of the Angolan criminal prosecution proceedings.

130. Counsel may also be heard on the issue of costs.

131. The Registrar is directed to fix a return date for these issues to be heard on an urgent and expedited basis and in any event no later than within the next 28 days.

Friday 28 June 2024

THE HON. MRS SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT