

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2007/006

In the matter of Sections 19(1) and 15 of  
THE MONEY LAUNDERING (PREVENTION)  
ACT 1996 as amended

and

In the matter of MICHAEL TYRELL and  
JULIE PATERSON, persons charged in  
the United Kingdom with a money laundering  
offence as defined by THE MONEY LAUNDERING  
(PREVENTION) ACT 1996 as amended

BETWEEN:

PAMELA TYRELL

Appellant

and

THE DIRECTOR OF ONDCP

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Ola Mae Edwards

Justice of Appeal [Ag.]

The Hon. Mde. Janice George-Creque

Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC, with Mr. C. Hamilton for the appellant

Mr. Justin Simon, QC, Hon. Attorney General for the respondent

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2008: November 27;

2010: January 25.

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*Property Law – Money Laundering – freezing order made pursuant to money laundering proceedings – whether the appellant/third party's right to apply for removal of property from list of frozen assets was vested under the Money Laundering (Prevention) Act 1996 and 1999 – whether the Money Laundering (Prevention) (Amendment) Act 2001 was*

*substantive or procedural – whether the Money Laundering Act (Prevention) (Amendment) 2001 could vary the freezing order of the court so that the procedural regime established therein could be read into the freezing order – whether the 2001 amendments to the Money Laundering (Prevention) Act 1996 had retrospective effect – Interpretation Act Cap. 224*

The appellant and her son, Michael Tyrell, are tenants in common in equal shares of Parcel 26 Block 13 2490 in Antigua (“Parcel 26”). On 23<sup>rd</sup> October 2000, Michael Tyrell was arrested and charged for drug trafficking offences in the United Kingdom and a freeze order was obtained against all his properties on 9<sup>th</sup> November 2000. The freeze order provided that anyone notified and affected by the terms of the order could apply to vary or discharge it at any time by giving two clear days notice to solicitors for the applicant. The order also provided that it would remain in force until varied or discharged by further order of the court. By virtue of Section 23 of the **Money Laundering (Prevention) Act 1996** (“**MLA 1996**”) and its amendments, assets located in Antigua and Barbuda could be frozen pursuant to the order.

On 12<sup>th</sup> February 2002, Michael Tyrell was convicted in the United Kingdom of being knowingly concerned in the importation of a prohibited substance. An application for leave to appeal against this conviction was refused on 2<sup>nd</sup> December 2004. The appellant, on 29<sup>th</sup> April 2005, applied to the High Court of Antigua and Barbuda to have Parcel 26 removed from the list of frozen assets. On 8<sup>th</sup> September 2005, before the appellant’s application was heard, a confiscation order was made in the United Kingdom against the properties of Michael Tyrell including Parcel 26.

Without a consideration on the merits, the learned judge refused the appellant’s application on the grounds that: (1) Section 21 of the **Money Laundering (Prevention) (Amendment) Act 2001** (“**MLA 2001**”) operates retrospectively so that the amendments to Part IV of the **MLA 1996** should apply to a person’s conviction for a money laundering offence if the person was convicted after the commencement of the **MLA 2001** Act; (2) Michael Tyrell’s interest in Parcel 26 was automatically forfeited to the Crown 90 days after his conviction by virtue of Section 20 of the **MLA 1996** as amended by Section 15 of the **MLA 2001**, which is applicable; (3) the appellant was obliged to have made her application within 60 days of Michael Tyrell’s conviction by virtue of the procedure and timetable set out in the **MLA 1996** as amended by the **MLA 2001**; (4) a person claiming to be affected by the automatic forfeiture to the Crown had an opportunity to apply to the court after the expiration of the 60 day period for applying to “unfreeze” the property by virtue of Section 21(3) of the **MLA 1996** as amended by the **MLA 2001**; and (5) the appellant’s application, having been filed outside the stipulated period and no leave having been sought, was not properly before the court.

The appellant appealed against these findings and contended among other things the following: (1) that the law and procedure governing the appellant’s application is the **MLA 1996** as amended by the **Money Laundering (Prevention) Amendment Act 1999**; (2) this law required that upon the conviction of Michael Tyrell for the money laundering offence, it must be proven that Parcel 26 was derived from or connected or related to such offence before the court could make a forfeiture order; (3) the appellant’s rights to have

her claim to Parcel 26 determined by the court following the freeze order had already vested under this law; (4) the learned judge erred in her ruling that the **MLA 2001** had retrospective effect on the rights of the appellant; and (5) the learned judge misdirected herself in failing to find that the appellant did not require leave as the order of 9<sup>th</sup> November 2000 enabled an application to be made to the court at any time by the giving of two clear days notice.

**Held:** allowing the appeal and remitting the application to the court below with costs on the appeal to be assessed, if not agreed:

1. Michael Tyrell's conviction for the drug trafficking offence of being knowingly concerned in the importation of a prohibited substance is a money laundering offence within the meaning of the **MLA 1996**, as amended by the **MLA 1999**.
2. The **MLA 1996** as amended by the **MLA 1999** provided for the freezing of property, proceeds or instrumentalities located in Antigua and Barbuda derived from or connected or related to a money laundering offence occurring abroad for which a person had been charged abroad. The Act further made provision for the forfeiture of frozen property upon a conviction being made final. Having regard to the meaning of the word "forfeiture" as defined by the original **MLA 1996**, it could not have been the intention of the legislature that the frozen property Parcel 26 be automatically forfeited upon the conviction of Michael Tyrell being made final; and Section 20(2a)(d) of the **MLA 1996** as amended by the **MLA 1999** must be read as providing that on his conviction becoming final the frozen property shall be liable to be forfeited to the Government of Antigua and Barbuda.
3. Accordingly, upon Michael Tyrell's conviction being made final, the frozen property, Parcel 26, became liable to be forfeited by order of a court in Antigua and Barbuda without prejudice to the rights of a bona fide third party claiming legitimate legal interest in the property. Section 21(4) of the **MLA 1996** as amended by the **MLA 1999** provides the criteria to be applied by a court to the claim of a bona fide third party in respect of an existing freeze order or where a forfeiture order is being or has been made.
4. The **MLA 1996** as amended by the **MLA 1999** was repealed, replaced, and supplemented with provisions in the **MLA 2001** which have enlarged the category of property that may be the subject of a freeze order and forfeiture. The property to be forfeited no longer has to be property that is proceeds of crime derived or obtained directly or indirectly through the commission of drug trafficking and other related offences within or outside of Antigua and Barbuda. There is no longer a requirement for the court, before forfeiture, to make a determination on the question whether property, proceeds or instrumentalities were property, proceeds or

instrumentalities derived from or connected or related to the money laundering offence. The frozen property is simply deemed to be an instrument of the offence by the operation of the automatic forfeiture provisions. This amounts to a substantive shift from the position that existed when the freeze order was obtained in 2000 pursuant to the **MLA 1996** and the **MLA 1999** to the position that exists under **MLA 2001**.

5. Section 20 of the **MLA 2001** makes it clear that upon the conviction of a defendant for a money laundering offence, property frozen in reliance on the charge is forfeited to the Crown upon the expiration of 90 days from the date of conviction of the defendant. Applications may be made within this 90 day period to exclude property from forfeiture, failing which the property is automatically forfeited at the end of the 90 day period. Upon forfeiture of the property occurring, a third party application may be made within 60 days from the date of forfeiture for the interest of a third party in the forfeited property to be excluded from the operation of the forfeiture; and any untimely application has to be made with the grant of leave by the court.
6. The appellant in November 2000 was legally entitled to await the conviction of Michael Tyrell and an application for a forfeiture order, before raising the ownership dispute in respect of Parcel 26 under the **MLA 1996** as amended by the **MLA 1999**; since the law required that upon the conviction of Michael Tyrell an applicant for a forfeiture order had to prove that Parcel 26 was property derived from or connected or related to the offence for which Michael Tyrell was convicted. This gave her a settled expectation that the procedure under Sections 19 to 22 of the **MLA 1996** as amended by the **MLA 1999** would apply to her application; and this expectation is a vested right or entitlement protected by Section 31(1)(b) to (e) of **The Interpretation Act** Cap 224 which ought not to be defeated.
7. This vested right would be impaired if the changes in the law brought about by the provisions in Part IV of the **MLA 1996** (Sections 19 to 22) as amended by the **MLA 1999** and the **MLA 2001** were given retrospective effect.

**Yew Bon Tew and Another v Kenderaan Bas Mara** [1983] 1 A.C. 553 (PC) considered and followed.

8. The **MLA 2001** did not apply to the appellant's application resulting from the freeze order made prior to the **MLA 2001** coming into force. The learned judge accordingly erred in finding that the appellant's application was not properly before the court.
9. Assuming that the appellant's application was caught by the retrospective application of the **MLA 2001** her application to recover or "unfreeze" the property (by whatever terminology used) would have been timely under

Sections 20 and 21 of the **MLA 2001**. The application was made within the period of 150 days from 2<sup>nd</sup> December 2004 which was the date that Michael Tyrell's conviction became final when the Court of Appeal in London refused his application for leave to appeal; and the 150 days includes the 90 days referred to in Section 20(1) and the 60 days referred to in Section 21(2) under the provisions of the **MLA 2001**. This would be so, where the word "conviction" in Section 20(1) of the **MLA 2001** (which speaks only to "conviction" and not to a "conviction becoming final") is given a broad and purposive construction.

10. A purposive construction results in the word "conviction" in Section 21(1) of the **MLA 2001** being interpreted to mean a conviction which is final in the sense that there is an appeal against the conviction which has been determined by exhaustion of the appeal process or the time for filing an appeal against the conviction has expired.

## JUDGMENT

- [1] **EDWARDS, J.A.:** In response to the international community's growing concern about the problem of money laundering activity, many countries around the world as a result of international co-operation, obligations, and treaties, have enacted and/or continued to strengthen their laws on the subject so as to effectively combat the problem.
  
- [2] Antigua and Barbuda first legislated its anti-money laundering law in 1996 by enacting **The Money Laundering (Prevention) Act, 1996 ("MLA 1996")**<sup>1</sup> as the **Principal Act**. The subsequent amendments to this **Principal Act** include: **The Money Laundering (Prevention) (Amendment) Act, 1998 ("MLA 1998")**<sup>2</sup>; **The Money Laundering (Prevention) (Amendment) Act, 1999 ("MLA 1999")**<sup>3</sup>; **The Money Laundering (Prevention) (Amendment) Act, 2001 ("MLA 2001")**<sup>4</sup>; **The Money Laundering (Prevention) (Amendment) Act, 2002 ("MLA 2002")**<sup>5</sup>. The amendments made to the **Principal Act** by the **MLA 1998** were repealed by

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<sup>1</sup> No. 9 of 1996 which came into operation on 28<sup>th</sup> May 1998: S/I 16 of 1998

<sup>2</sup> No. 18 of 1998 which was assented to on 28<sup>th</sup> October 1998

<sup>3</sup> No. 9 of 1999 which was assented to on 3<sup>rd</sup> September 1999

<sup>4</sup> No. 6 of 2001 which was assented to on 27<sup>th</sup> April 2001

<sup>5</sup> No. 17 of 2002 which was assented to on 16<sup>th</sup> December 2002

Section 17 of the **MLA 1999** and the **Principal Act** as it was before the 1998 amendment was revived.

[3] Section 12(2) of **The Interpretation Act**<sup>6</sup> states that:

“An amending enactment shall, so far as is consistent with the tenor thereof, be construed as part of the enactment that it amends, and, ... has, as from the date on which it comes into operation, effect accordingly for the purposes of the construction and operation of any other enactment that refers to, or is incorporated with, the enactment that it amends.”

[4] This appeal is against the learned judge’s interpretation of relevant provisions in the anti-money laundering legislation of Antigua and Barbuda; and her refusal of the appellant’s application for an order to remove property co-owned by Michael Tyrell and the appellant in Antigua, from the list of frozen properties contained in the freeze order made by Moe J. on 9<sup>th</sup> November 2000 against the assets of Michael Tyrell and Julie Paterson.

### **Background facts**

[5] The property in question is known as Parcel 26 Block 13 2490 in Registration Section East Central in Antigua (“Parcel 26”). This property is owned by the appellant and her son, Michael Tyrell, as tenants in common in equal shares. According to the 83 year old appellant’s supporting affidavit, she and her husband, Horace George Tyrell, had purchased Parcel 26 measuring approximately 0.6 acres in 1965. She deposed that several years later they gave Parcel 26 to their daughter, Nicola Kaufmann, as a wedding present on her marriage. Mr. and Mrs. Kaufmann built a dwelling house on Parcel 26 as their matrimonial home; and resided there up until they migrated to California. This matrimonial home was rented to tenants for several years but when maintenance problems developed, Mr. and Mrs. Kaufmann decided to sell Parcel 26.

[6] At the age of 70 years old, the appellant, who then operated a business known as the Toy Shop at Redcliffe Quay, St. John’s, Antigua, decided to buy Parcel 26

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<sup>6</sup> Cap. 224 of the Revised Laws of Antigua and Barbuda 1992

from Mrs. Kaufmann. The appellant obtained a loan of \$499,500.00 from Bank of Antigua, but because of her age, the bank required that the appellant place a younger relative's name on the documents including the Transfer and Charge. She deposed that she chose her son, Michael Tyrell, who was then the only person available to her since her daughter was the vendor. She deposed that she paid US\$154,743.00 (EC\$420,421.26) to Mrs. Kaufmann and used the balance of the loan for expenses. A copy of The Registered Land Certificate for Parcel 26 discloses that it was issued on 15<sup>th</sup> October 1992 with the registered proprietors being Pamela Tyrell and Michael Tyrell.

[7] On the request of Her Majesty's Customs and Excise in the United Kingdom, the freeze order was obtained against Michael Tyrell's properties after he was arrested and charged in the United Kingdom on 23<sup>rd</sup> October 2000 for drug trafficking offences along with other persons. The freeze order was obtained pursuant to Sections 19(1) and 15 of the **MLA 1996** as amended by the **MLA 1999**.

[8] Section 23 of the **MLA 1996** as amended by Section 16 of the **MLA 1999**, Section 18 of the **MLA 2001**, and Section 27 of the **MLA 2002** provides:

"23. (1) The court or the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty shall cooperate with the court of another State taking the appropriate measures to provide assistance in matters concerning money laundering offences, in accordance with this Act, and within the limits of their respective legal systems.

(2) The court or the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty may receive a request from the Court or other competent authority of another State to identify, trace, freeze, seize, or forfeit the property proceeds or instrumentalities connected to money laundering offences, and may take appropriate actions, including those contained in Parts IVA and IVB<sup>7</sup> of this Act.

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<sup>7</sup> Prior to the MLA 2002, Section 23(2) read "contained in sections 19 and 20 of this Act."

(3) A final judicial order of judgment that provides for the forfeiture of property, proceeds or instrumentalities connected to money laundering offences, issued by a court or other competent authority of another State, may be recognised as evidence that the property, proceeds or instrumentalities referred to by such order or judgment may be subject to forfeiture and disposed of in accordance with the law.

(4) ... (5)... (5A)... (5B)... (6)... (7)..."

[9] On the date that the freeze order was obtained the applicable law contained in Section 19 of the **MLA 1996** as amended by Section 12 of the **MLA 1999** provided:

"19 (1) A judge of the High Court may, upon application by the competent authority, by order, freeze the property of, or in possession or under the control of that person wherever it may be, if the judge is satisfied that a person has been charged or about to be criminally charged in any jurisdiction with a money laundering offence as defined in this Act.

(2) The Court in making any order freezing the property of that person may give directions to the disposal of that property for the purpose of –

- (i) determining any dispute as to the ownership of the property or any part thereof;
- (ii) its proper administration during the period of freezing;
- (iii) the payment of debts due to creditors prior to the order; and
- (iv) the payment of moneys to that person for the reasonable subsistence of that person and his family.

(3) An order made under this section shall cease to have effect at the end of the period of thirty days following the day the order was made if the person against whom such order was made has not been charged with a money laundering offence within that time.

(4) ... (5)....<sup>8</sup>"

[10] Paragraphs 8 and 9 of the freeze order provided for its duration, variation and discharge in the following terms:

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<sup>8</sup> Section 19(4) provided for the person charged to be notified about the freeze order by the specific methods provided therein. Section 19(5) provided for the Supervisory Authority to direct financial institutions in writing to freeze property for a period of 4 days whilst making an application for a freeze order.

“DURATION OF THIS ORDER

8. This Order shall remain in force until it is varied and/or discharged by further order of this Court.

VARIATION OR DISCHARGE OF THIS ORDER

9. (1) The Defendants (or anyone notified and affected by the terms of the Order) may apply to this Court at any time on giving two clear days notice to the solicitor for the Applicant to vary or discharge this Order (or so much of it as affects that person).”

[11] On 12<sup>th</sup> February 2002 Michael Tyrell was convicted in the United Kingdom for the offence of being knowingly concerned in the importation of hydrochloride, a prohibited substance. On 2<sup>nd</sup> December 2004 the Court of Appeal in London refused Michael Tyrell’s application for leave to appeal against his conviction.

[12] The appellant made her application to the High Court in Antigua on 29<sup>th</sup> April 2005. However, before this application was heard the court in the United Kingdom on the 8<sup>th</sup> September 2005 made a confiscation order against the properties of Michael Tyrell (including Parcel 26 in Antigua) which, up to the date of the confiscation order, had not been unfrozen by a court order.

[13] The learned judge heard the application on 6<sup>th</sup> July 2006; and in her judgment delivered on 31<sup>st</sup> January 2007 made the following findings at paragraphs 58, 59 and 61 to 66 without determining the application on its merits:

(1) that the language of Section 21 of the **MLA 2001** indicated that its provisions should operate retrospectively and the legislature intended by Section 21(1) of the **MLA 2001** which amends Section 30 of the **MLA 1996** that the amendments to Part IV should apply to a person’s conviction for a money laundering offence if the person was convicted after the commencement of the Act;

(2) that the interest of Michael Tyrell in Parcel 26 was automatically forfeited to the Crown 90 days after his conviction for drug offences on 2<sup>nd</sup> February 2002, by virtue of Section 20 of the **MLA 1996** as amended by Section 15 of the **MLA 2001**, which is applicable;

(3) that the appellant was obliged to apply to the court within 60 days of Michael Tyrell’s conviction in order to have Parcel 26 removed from the list of frozen assets, since Section 21 of the **MLA 2001** which amends Section 30 of the **MLA 1996** clearly provides the procedure and timetable within which any person who claims to have an interest

in the property is to apply to the court in order that the property may be “unfrozen”;

- (4) that Section 21(3) of the **MLA 1996** as amended by Section 16 of the **MLA 2001** provided another opportunity for a person who claims to be affected by the automatic forfeiture to the Crown to apply to the court after the expiration of the 60 day period for leave to apply for the “unfreezing” of the property;
- (5) that since Ms. Tyrell’s application was filed very far outside of the stipulated period and she has not sought or obtained leave to apply to the court out of time her application to have Parcel 26 removed from the frozen assets was not properly before the court, and she is debarred from applying to the court without leave nearly 3 years after Michael Tyrell was convicted.

### The notice of appeal

[14] The appellant has challenged the above-mentioned findings of the learned trial judge and the grounds of appeal are set out below:

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- (1.1) That the Learned Judge erred and misdirected herself in law in failing to find that the Appellant did not require any leave to apply to have Parcel 26 removed from the list of frozen assets as the Order of the Court dated November 9, 2000 freezing the said Parcel by its clear terms enabled an application to be made to the Court at any time by the giving of two clear days notice to the Solicitor of the Respondent.
  - (1.2) Further, in any event, [the learned judge] failed to find that the Appellant was not instituting fresh proceedings but merely utilizing the prescribed application procedure set out in the aforesaid Order relevant to her as a person entitled to the property in question.
- (2) The Learned Judge erred in law in her finding that the **Money Laundering Act 2001** in amending the **Money Laundering Act 1996** had retrospective effect on the rights of the Appellant to property, in that, inter alia:
    - (a) It provided for automatic forfeiture of property within 90 days following conviction as from the date it came into force on the 24<sup>th</sup> April, 2001 notwithstanding that the provisions of the Act prior to amendment provided for no such forfeiture as of the date of the Freezing Order

(November 9, 2000) and further prescribed a procedure for a third party claim.

(b) It prescribed a procedure for making a claim to such property different to that set out in the Order of the Court which procedure had to be complied with.

(c) [I]t [m]ade mandatory an application by the Appellant for leave after automatic forfeiture of the property.

(3) The Learned Judge erred in failing to find that the Appellant was beneficially entitled to Parcel 26: Block 13 2490B; Registration Section East Central and that Michael Tyrell held the same in trust for her."

[15] The appellant is seeking a declaration that Parcel 26 is beneficially owned by the appellant; that Parcel 26 be removed from the list of frozen assets; further or other relief as to the court seems just; and, costs.

#### Issues

[16] Learned Queen's Counsel Mr. Hamilton submitted that the issues raised by the appeal were:

(1) whether the appellant's right was established under the **MLA 1996** and the **MLA 1999**.

(2) whether the **MLA 2001** was substantive or procedural.

(3) whether the **MLA 2001** could vary the freezing order of the court so that the procedural regime established therein had to be read into the freezing order.

[17] However, I have reconciled these issues with the grounds of appeal; and having done so, I regard the grounds of appeal as broadly raising for my determination only one question:

(1) Whether the statutory procedure prescribed by Sections 19A, 20(2), 21 and 22 of the **MLA 1996** as amended by the **MLA 1999** and the

**MLA 2001** applied to the appellant's application resulting from the freeze order made prior to the **MLA 2001** coming into force.

The answer to this question demands an interpretation and thorough analysis of the relevant statutory provisions existing before and after the **MLA 2001** came into force. This will enable a determination as to the nature and effect of the amendments and whether and/or how these amendments have impacted on the freeze order and the appellant's application.

#### **Applicable statutory provisions at the date of the freeze order**

- [18] The relevant law as it stood on 9<sup>th</sup> November 2000 – the date the freeze order was granted – is radically different from the law that was in place upon the commencement of the **MLA 2001**. Under the original legislative scheme, a freeze order could be obtained for the property, proceeds or instrumentalities owned or in possession or under the control of Michael Tyrell; or which were located in or under the control of persons in Antigua and Barbuda where the judge in Antigua and Barbuda was satisfied that Michael Tyrell was charged in the United Kingdom with a money laundering offence, which is a prescribed offence under the **MLA 1996** whether committed in Antigua and Barbuda or elsewhere.
- [19] In making the freeze order, Section 19(2) empowered the court to give directions including directions so as to determine any dispute as to the ownership of all or part of the property. The **MLA 1996** as amended by the **MLA 1999** targeted property to be frozen which belonged to Michael Tyrell, or was in his possession or under his control in Antigua and Barbuda upon the assumption that it was derived from or connected with the offence for which Michael Tyrell was charged in the United Kingdom; provided that the offence qualified as a “**money laundering offence**” under the laws of Antigua and Barbuda. There was then no definition for the term “money laundering offence”. However in the **Principal Act** “**money laundering**” meant:

- “(a) engaging, directly or indirectly, in a transaction that involves property that is the proceeds of crime, knowing or believing the same to be the proceeds of crime; or
- (b) receiving, possessing, managing, investing, concealing, disguising, disposing of or bringing into Antigua & Barbuda any property that is the proceeds of crime, knowing or believing the same to be the proceeds of crime.”

[20] The term “**proceeds of crime**” under the original **MLA 1996** meant:

“...any property derived or obtained directly or indirectly, through the commission of a prescribed offence, whether committed in Antigua and Barbuda or else-where.”

The Second Schedule to the Act listed 12 types of offences as prescribed offences. “Drug Trafficking and other related offences” is one of the 12 prescribed offences in the Second Schedule.

[21] The word “**instrumentality**” was also defined in the **MLA 1996** to mean:

“something that is used in or intended for use in any manner in the commission of a money laundering offence.”

The word “**property**” is defined to include:

“money investments, holdings possessions, assets and all other property real or personal ... (whether in Antigua and Barbuda or elsewhere) and includes any interest in such property.”

[22] Part IV of the **MLA 1996** contained Sections 19 to 22. Prior to the amendments by the **MLA 2001** the relevant provisions in Section 19 were as stated at paragraph 9 above. Sections 20, 21, and 22 of the **MLA 1996** were respectively amended by Sections 13, 14 and 15 of the **MLA 1999**. The relevant portions of the provisions in the **MLA 1996** as so amended speak for themselves and are set out below:

“20. (1) When a person is convicted of a money laundering offence, under the laws of Antigua and Barbuda the court shall order that the property, proceeds instrumentalities derived from or connected or related to such an offence be forfeited to the Government of Antigua and Barbuda.

- (1a) ...<sup>9</sup>
- (2) When, as a result of any act or omission of the person convicted, any of the property, proceeds or instrumentalities described in subsection (1) above cannot be forfeited, the court shall order the forfeiture of any other property of the person convicted, for an equivalent value, or shall order the person convicted to pay a fine of such value.
- (2a) When a person is charged in any jurisdiction other than Antigua and Barbuda with a money laundering offence as defined in this Act, upon application of the Supervisory Authority or the competent authority, the court shall order any property, proceeds or instrumentalities derived from or connected with the offence which are located in, or under the control of persons presently in Antigua and Barbuda, to be frozen, and the person shall be notified of the order either by service at his last known address and in the case of a body corporate the registered or principal office of the body corporate, by publication in the *Gazette* in Antigua and Barbuda or by publication in two consecutive issues of a local newspaper circulating in Antigua and Barbuda within four days and
- (a) ...<sup>10</sup>
- (b) ...
- (c) if the person charged provides evidence to the Court within one hundred and eighty days of the notice of the freeze order that he is challenging the charges, then the freeze order shall remain in force pending the outcome of the proceedings in the foreign jurisdiction; and
- (d) if the person charged is convicted of the money laundering offence then on his conviction becoming final the frozen property, proceeds and instrumentalities shall be forfeited to the Government of Antigua and Barbuda.

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<sup>9</sup> Section 20(1a) provides for automatic forfeiture to the Government of Antigua and Barbuda of any property, proceeds instrumentalities derived from, connected with or related to the offence of money laundering under the laws of Antigua and Barbuda where the defendant has been charged and notified of the charge and fails to appear at the preliminary inquiry or trial in Antigua and Barbuda, thereby preventing the preliminary inquiry or the trial from taking place.

<sup>10</sup> Section 20(2a)(a) provides for forfeiture of the frozen property where the defendant does not respond within 180 days of the freeze order

- (3) In determining whether or not any property is derived from or connected or related to a money laundering offence the court shall apply the standard of proof required in civil proceedings.
- (4) In making a forfeiture order the Court may give directions for the purpose of determining any dispute as to the ownership of the property or any part thereof.

20A. (1) ... (2)... (3)...<sup>11</sup>

21. (1) The measures and sanctions referred to in sections 19 and 20 shall apply without prejudice to the rights of *bona fide* third parties.
- (2) Proper notifications shall be made so that all those claiming legitimate legal interest in property proceeds or instrumentalities may appear in support of their claims.
- (3) A third party's lack of good faith may be inferred, at the discretion of the court or the competent authority, from the objective circumstances of the case.
- (4) The court or the competent authority shall return the property, proceeds or instrumentalities to the claimant, when it has been demonstrated to its satisfaction that –
  - (a) the claimant has a legitimate legal interest in the property, proceeds or instrumentalities;
  - (b) no participation, collusion or involvement with respect to money laundering offence which is the subject of the proceedings can be imputed to the claimant;
  - (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, proceeds or instrumentalities;
  - (d) the claimant did not acquire any right in the property, proceeds or instrumentalities from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property, proceeds or instrumentalities, and;
  - (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property, proceeds or instrumentalities.

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<sup>11</sup> These provisions deal with the creation of a Forfeiture Fund and the use of the funds.

22. The provisions of sections 19 and 20 shall apply to all property possessed by, or under the control of a person after the coming into force of this Act."

### **Forfeiture under the MLA 1996 and 1999**

- [23] Learned Queen's Counsel, Mr. Hamilton, submitted that under Section 21(1) of the **MLA 1996** as amended by the **MLA 1999** the power to order forfeiture of any property on conviction of a person for a money laundering offence was vested in the court; and the test was whether it was derived from or connected or related to such offence. The standard of proof was on a balance of probability. Mr. Hamilton submitted further that on the state of the legislation as at 9<sup>th</sup> November 2000 (the date of the freeze order), the forfeiture provisions against a person charged with a money laundering offence within or without the jurisdiction applied without prejudice to the rights of bona fide third parties. Consequently, a person claiming a legitimate legal interest in property could appear before the court in support of his or her claim and the court had authority to return such disputed property. All of this, he argued, was predicated on the court making a forfeiture order, and in so doing giving directions for determining any dispute as to ownership of the property or part thereof, and there was no time limit provided by the legislation within which the third party was obligated to press his/her claim.
- [24] The learned Attorney General Mr. Simon, QC challenged the correctness of these submissions, by arguing that under Section 20, any vested right that the appellant may have had to make applications in relation to the frozen Parcel 26 would have terminated on the conviction of Michael Tyrell since upon his conviction, frozen property, "shall be forfeited to the Government of Antigua and Barbuda". He submitted that the appellant had slept on her right and done nothing until after Michael Tyrell's conviction was made final and Parcel 26 had been forfeited.
- [25] In the absence of any dispute that the court had not made any forfeiture order up to the date of the appellant's application, Mr. Hamilton made the following further submissions. There was no provision for automatic forfeiture. Upon Michael

Tyrell being charged, the legislation then required that there must be proof that the property was the proceeds of crime, and the judge had to make that determination. Since the legislation provided no time limit for the appellant to press her claim, and the freeze order directed the appellant to make the application at any time to vary the order, the court should construe the words, "shall be forfeited to the Government of Antigua and Barbuda" in section 20(2a)(d) to mean, "shall be liable to be forfeited to the Government of Antigua and Barbuda".

- [26] In my view, there is much force in Mr. Hamilton's submission that Section 20 first required a determination as to whether Parcel 26 is property connected with or related to the offence for which Michael Tyrell was charged or convicted. The legislature could not have intended that forfeiture of Parcel 26 would automatically occur where Michael Tyrell was convicted upon his conviction being made final, without a court determining whether Parcel 26 was proceeds or an instrumentality derived from or connected with or related to the money laundering offence.
- [27] The original **MLA 1996** specified clearly in Section 20(1) who should determine, and at what stage there should be a determination as to whether property, proceeds or instrumentalities were property, proceeds or instrumentalities derived from or connected or related to a money laundering offence. It is worth noting that Section 20 originally contained no provisions concerning the freezing of property. In its original form, Section 20 consisted only of 4 subsections (1) to (4). Sections 20(1) and (2) provided for the court in Antigua and Barbuda to make a forfeiture order after a conviction under the laws of Antigua and Barbuda for a money laundering offence, in respect of property, proceeds or instrumentalities derived from or connected to such an offence; or order the forfeiture of any other property belonging to the convicted person of an equivalent value; or order the convicted person to pay a fine of such value.
- [28] Section 20(1) and (2) obviously contemplated that the court would make the forfeiture order where there is an application for forfeiture with supporting evidence proving that the property in question was derived from or connected or related to

the money laundering offence for which the person was convicted. Section 23(3) (set out at paragraph 8 of this judgment) also assists an applicant for a forfeiture order; as it permits the court in Antigua and Barbuda to recognize a final judicial order or judgment issued by a court or other competent authority of another State, which provides for the forfeiture of property, proceeds or instrumentalities connected to money laundering offences, as evidence that such forfeited assets may be subject to forfeiture. Upon an application for forfeiture being made, Section 20(3) required the court in Antigua and Barbuda to apply the standard of proof required in civil proceedings in making that determination; and it may be implied from this provision that the burden of proof was on the applicant for the forfeiture order.

- [29] Section 20(4) apparently envisaged contests or challenges as to the ownership of part or all of the property which is the subject of an application for forfeiture; so it provided for the court to give directions for the purposes of determining such disputes.
- [30] The provision in subsection 20(2a) dealing with the freezing of property was inserted by the **MLA 1999**; and it obviously amplified and supplemented Section 19 since it provided for the court to freeze the property of a person charged abroad with a money laundering offence (as Section 19 had already done), and spoke further to the duration of the freeze order and what should happen to the frozen property after the defendant's conviction has been made final.
- [31] The effect of the insertion of Section 20(2a) in summary is that Section 20 provided for: (1) forfeiture of property, proceeds or instrumentalities derived from, or connected or related to a money laundering offence upon the conviction of a person for the money laundering offence under the laws of Antigua and Barbuda (regardless of whether or not a freeze order existed in respect of that property); (2) the freezing of property, proceeds or instrumentalities located in Antigua and Barbuda derived from or connected or related to a money laundering offence occurring abroad for which a person had been charged abroad; and (3) the

subsequent forfeiture of frozen property proceeds or instrumentalities where the person is convicted and his conviction is made final.

- [32] Although the language of Section 20(2a) and (d) suggested that upon Michael Tyrell's conviction becoming final Parcel 26 automatically became forfeited, as I have said before, this could not have been the intention of the legislature as the meaning of the word "forfeiture" was defined by the **MLA 1996** to mean, "the permanent deprivation of property by order of a court or other competent authority". This definition has been repealed by the **MLA 2001**<sup>12</sup>.
- [33] Section 20(2a)(d) when read along with Section 21 and applied to the facts, can therefore be interpreted to mean that on the basis of Michael Tyrell's conviction in the United Kingdom for the money laundering offence of drug trafficking, Parcel 26 became liable to be forfeited by order of a court in Antigua and Barbuda; without prejudice to the rights of the appellant as a *bona fide* third party claiming legitimate legal interest in Parcel 26. In the absence of any prior determination that Parcel 26 was derived from or connected or related to the money laundering offence for which Michael Tyrrell was convicted, Section 21(4) provided the criteria to be applied by a court to the claim of a bona fide third party claimant.
- [34] I am also of the view that Section 20(2a) and (d) and Section 21 did not shut out the appellant from making an application in respect of the existing freeze order in the absence of any expressed statutory timelines for making the application. The application could be made before or after the conviction, although it may be implied from the statutory provisions that if a court order for forfeiture was obtained with due notice to the appellant, a subsequent application concerning the freeze order would be inappropriate and inconsistent with the legislative scheme. It must be emphasized that no order for forfeiture of Parcel 26 was made in the United Kingdom or in Antigua and Barbuda prior to the appellant's application on 29<sup>th</sup> April 2005. In my view the language of Section 20 conveys a clear legislative intention that after the conviction of Michael Tyrell had been made final, the

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<sup>12</sup> See paragraph 39 of this judgment

Section 21(4) criteria would be applicable to an application concerning an existing freeze order or on consideration of a forfeiture application.

### **Submissions on the applicable procedural law for the application**

- [35] Learned Queen's Counsel, Mr. Hamilton contends that the law and procedure governing the appellant's application is the above stated law; because the appellant's rights to have her claim to the Parcel 26 determined by the court following the freeze order had already vested under this law; and the learned judge erred in her ruling that the **MLA 2001** had retrospective effect on the rights of the appellant.
- [36] Queen's Counsel, Mr. Simon countervailed in his oral arguments before us that since Michael Tyrell was convicted in February 2002, any application by the appellant would have to comport with the new procedure brought about by the **MLA 2001**; and this new procedure had not retrospectively changed the procedural steps to be taken, or given by the freeze order. Mr. Simon contended further that under Section 20 of the original **MLA 1996** as amended by the **MLA 1999**, the vested right of third parties terminated on the conviction of the defendant; but the appellant did not lose her right to make her application after Michael Tyrell's conviction; and the **MLA 2001** extended the time to allow the appellant to make her application.
- [37] The respondent submitted also in his written skeleton arguments that the appellant does not have a vested right in any particular course of procedure despite the terms of the freeze order, and although the application was made pursuant to the freeze order, the application has to come within the bounds permitted by the existing statute. Both counsel relied on the Privy Council authority from Malaysia **Yew Bon Tew and Another v Kenderaan Bas Mara**<sup>13</sup> which was also considered by the learned judge.

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<sup>13</sup> [1983] 1 A.C. 553

[38] The statutory rules governing the effect of the amendments by the **MLA 2001** are stated in Section 31 of **The Interpretation Act** as follows:

“31. (1) Where an enactment repeals... an enactment, the repeal ... does not

- (a) ...
- (b) affect the previous operation of the enactment so repealed ..., or anything duly done or suffered thereunder, or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed ..., or
- (d) affect any offence committed against the enactment so repealed..., or any penalty or forfeiture or punishment incurred in respect thereof, or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right ,privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed....”

[39] Apart from the provisions of **The Interpretation Act** “there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”<sup>14</sup>

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<sup>14</sup> Per Lord Brightman in **Yew Bon Tew v Kenderaan Bas Maria** [1983] 1 A.C. 553, 558 (P.C.)

## The existing law as at the date of Michael Tyrell's conviction

[40] The definitions of "money laundering"; "proceeds of crime" and "instrumentality" were repealed and replaced with new provisions by the MLA 2001; and a definition for the terms "money laundering offence"; "proceeds in relation to an offence"; and "unlawful activity" were introduced. The previous definition for the word "forfeiture" and the term "prescribed offence" were also repealed.

[41] The term "money laundering" now means:

- "(a) engaging directly or indirectly, in a transaction that involves money, or other property; or
- (b) receiving, possessing, managing, investing, concealing, disguising, disposing of or bringing into Antigua and Barbuda any money or other property, knowing, or having reasonable grounds to suspect that the money, or other property, is derived, obtained, or realised, directly or indirectly, from some form of unlawful activity."

[42] "Proceeds of crime" now means:

- "(a) proceeds of a criminal offence against the laws of Antigua and Barbuda; or
- (c) any property that is derived or realised, directly or indirectly by any person from acts or omissions that
  - (i) occurred outside Antigua and Barbuda; and
  - (ii) would, if they had occurred in Antigua and Barbuda, have constituted an offence against the laws of Antigua and Barbuda."

"Proceeds in relation to an offence" means, "any property that is derived or realised, directly or indirectly by any person from the commission of the offence."

[43] "Instrumentality" has been redefined to mean:

- "property that is used in or in connection with or is intended to be used in any manner in or in connection with the commission of –
- (i) a money laundering offence; or
  - (ii) an offence against subsection 18 (1) or subsection 18 (4) of this Act."

**“Unlawful activity”** means:

“an act or omission that constitutes an offence against a law in force in Antigua and Barbuda or against a law in force in a foreign country that would, if it was committed in Antigua and Barbuda, be an offence against a law of Antigua and Barbuda.”

[44] **“Money laundering offence”** means:

- “(i) an offence against
  - (a) section 3 of this Act; or
  - (b) section 18 of this Act; or
  - (c) section 61 of the Proceeds of Crime Act, 1993; or
  - (d) sections 4, 5, 6(3), 7 and 8 of the Misuse of Drugs Act Cap.283; or
- (ii) an offence against
  - (a) any foreign law specified by regulation under this Act; or
  - (b) any foreign law, whether or not it is specified by regulation under this Act which prescribes dealings in property which is the proceeds of crime, which, if it was committed in Antigua and Barbuda, would be an offence against this Act or any other law of Antigua and Barbuda.

In deciding whether an offence against any foreign law is a money laundering offence within the meaning of this definition, due regard should be given to differences in the form of usages of foreign laws and the meaning of any language used in such law should be construed broadly and not strictly.”

[45] Section 21 of the **MLA 2001** repealed Section 30 of the **Principal Act** which merely stated that that the **MLA 1996** “shall come into force on a day to be appointed by the Minister by order published in the Gazette.” By Statutory Instrument No.16 of 1998, the **MLA 1996** came into force on 28<sup>th</sup> May 1998. The repealed Section 30 was replaced with the following provision:

- “30. (1) Subject to subsection (2), the amendments to Part IV do not apply to a person's conviction of a money laundering offence if the person was convicted of the offence before the commencement of this Act;<sup>15</sup>
- (2) Subject to subsection (1), the amendments to Part IV apply to an offence committed or suspected to have been committed at any time (whether before or after the commencement of this Act);

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<sup>15</sup> Commencement date was on 16<sup>th</sup> December 2002

(3) The amendments to Part III apply from the commencement of this Act.”

[46] This provision is central to the issue as to whether parliament intended that the provisions relating to automatic forfeiture and the procedure and time schedule prescribed for making applications under the **MLA 2001** amendments applied retrospectively to the forfeiture of Parcel 26. The learned judge at paragraph 60 of her judgment did “not accept the arguments advanced by Learned Counsel Mr. Hamilton when he urged the Court to find that Section 30(1) and 30(2) of the **MLA 1996** as amended by Section 21 of **MLA 2001** do not apply retrospectively.” The learned judge continued:

“I am of the respectful view as stated earlier that when Parliament enacted section 21 [of the] **MLA 2001** which amends section 30 of **MLA 1996** it intended section 30 (1) and (2) **MLA 1996** as amended by **MLA 2001** clearly stated that Part IV of the **MLA** as amended was to have been applied retrospectively and this is so in relation to forfeiture of Michael Tyrell’s assets that was the subject of the Freeze Order.”

[47] The Part IV provisions contain Sections 19 to 22 as I have said before. Section 19 of the **MLA 1996** as amended by the **MLA 1999** was repealed, replaced, and supplemented with provisions which have enlarged the category of property that may be the subject of a freeze order and forfeiture. The property sought to be forfeited no longer has to be property that is proceeds of crime derived or obtained directly or indirectly through the commission of drug trafficking and other related offences within or outside of Antigua and Barbuda; and the person engaging in money laundering no longer has to know or believe that the transaction involves, or that he is dealing with, property that is the proceeds of crime. By Section 12 of the **MLA 2001** Section 19 of the **Principal Act** was repealed and replaced with new provisions.

[48] Section 13 of the **MLA 2001** introduced Section 19A into the **MLA 1996** which substituted conditions for making a freezing order. Section 14 of the **MLA 2001** also introduced Section 19B into the **Principal Act**. Section 19B mainly covers the

jurisdiction of the High Court to make ancillary orders and case manage a freeze order that has been made.

[49] It can be seen from these new provisions in Section 19 that where a defendant is charged or convicted for a “money laundering offence”, the High Court may make a freeze order for property for which there is reasonable suspicion that the defendant has an interest in – including specified property of the defendant, and all property of or in the name of the defendant acquired before or after the date of the freeze order – where the court is satisfied in the case of a defendant not yet convicted of the money laundering offence that: (a) the application is supported by the authorized officer’s affidavit stating that he suspects that the defendant committed the offence; and (b) the affidavit contains matters establishing reasonable grounds for holding that suspicion.

[50] In relation to specified property of a person other than the defendant (“Third Party”), the court may make a freeze order provided that the application is supported by an affidavit stating that the officer suspects that the property is an instrument of the offence; or the officer suspects that the defendant has an interest in the property; and the court is satisfied that the contents of the affidavit establish reasonable grounds for holding that suspicion.<sup>16</sup> A Third Party who makes an application for a variation of the freeze order to exclude the Third Party’s interest from the order has to satisfy the criteria under Sections 19B(4)(d) or (e) depending on whether the freeze order was made by virtue of Section 19A(3) or not; and also has a burden of proof prescribed by Section 19B(6) comparable to that of an applicant/defendant.

[51] Section 19B(5) and (6) places the onus of proof on the applicant defendant, upon his application for an order discharging the freeze order in relation to his interest in the property, to satisfy the court that the property was not used in connection with or related in any way directly or indirectly to any unlawful activity or money

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<sup>16</sup> See section 19A(3)

laundering scheme in Antigua and Barbuda or elsewhere; and was not directly or indirectly derived by any person from unlawful activity.

[52] Further, Sections 15, 16 and 17 of the **MLA 2001** repealed Sections 20, 21 and 22 respectively of the **Principal Act**. The following provisions were substituted as Sections 20, 21 and 22:

"20(1) If:

- (a) a person (in this section called the "defendant") is convicted of a money laundering offence;
  - (b) a freeze order is or was granted in respect of property (whether property of the defendant or of some other person) in reliance on:
    - (i) the defendant's conviction of that offence; or
    - (ii) the charging or proposed charging of the defendant with that offence or a related offence;
  - (c) the freeze order, to the extent to which it relates to the property, is not the subject of a discharging order under section 19B(5); subject to subsection (2) the frozen property is forfeited to the Crown upon the expiry of 90 days after (i) the making of the freeze order; or (ii) the conviction of the defendant, whichever is later.
- (2) If, within the period of 90 days referred to in subsection (1), an application has been made for an order under section 19B(5) in respect of frozen property, the property is forfeited to the Crown –
- (a) if the application is refused or dismissed, at the end of the period during which the person may appeal against the refusal or dismissal or, if such an appeal is lodged, when the appeal is abandoned or finally determined without the order having been made;
  - (b) ...
  - (c) if the application is withdrawn or struck out, on that withdrawal or striking out.

20A. (1)...(2)...(3)...<sup>17</sup>

21(1) If property is forfeited to the Crown under section 20, a person (other than the defendant) who claims to have had an interest in

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<sup>17</sup> See footnote 8 supra

the property immediately before it was forfeited may, subject to subsections (2) and (4), apply to the High Court for an order under section 22.

- (2) The application must, subject to subsection (3), be made before the end of the period of 60 days when the property is forfeited to the Crown.
  - (3) The High Court may grant a person leave to apply after the end of the period referred to in subsection (2) if it is satisfied that the delay in making the application is not due to neglect on the part of the applicant.
  - (4) An application for an order under section 22 in relation to an interest in property must not be made by a person who was given notice of:
    - (a) proceedings on the application for the relevant freeze order; or
    - (b) the making of the relevant freeze order – except with the leave of the court.
  - (5) The High Court may grant a person leave under subsection (4) to make an application if the court is satisfied that the person's failure to seek to have the property excluded from the relevant freeze order was not due to neglect on the part of the applicant.
  - (6) An applicant must give written notice of the application, and of the grounds on which it is made:
    - (a) to the Supervisory Authority; and
    - (b) to any person whom the applicant has reason to believe had an interest in the property immediately before it was forfeited.
  - (7) Any person notified under subsection (6) is entitled to appear and give evidence at the hearing of the application but the absence of that person does not prevent the court from making an order under section 22.
- 22(l) On an application made under section 21, the High Court may make an order excluding property in which the applicant claims an interest from the operation of section 20 if the court is satisfied that –
- (a) the applicant was not, in any way, involved in the commission of the offence; and
  - (b) the applicant's interest in the property is not subject to the effective control of the defendant; and

- (c) the applicant had no knowledge of the commission of the offence or of any illegal use to which instrumentalities the subject of the application may have been put (providing that this lack of knowledge was not the result of willful blindness); and
- (d) the applicant's interest in the property was not acquired by means of a gift from the defendant or any person or entity under the effective control of the defendant; and
- (e) where the applicant acquired the interest at the time or after the commission, or alleged commission, of the offence – the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was an instrumentality of the offence.”

[53] Of the utmost significance in my view, is the fact that there is no longer any need for a forfeiture order to be obtained from the court before it can be said that the frozen property of the convicted defendant or the frozen property of some other person has been forfeited to the Crown. Section 20 makes it quite clear that upon the conviction of a defendant for a money laundering offence property frozen in reliance on the defendant's charge for the money laundering offence or a related offence, whether the frozen property belongs to the defendant or some other third party, is forfeited to the Crown upon the expiration of 90 days of the conviction of the defendant. Indeed, under the **MLA 2001**, there is no longer a requirement for the court to make a determination on the question whether property, proceeds or instrumentalities were property, proceeds or instrumentalities derived from or connected or related to a money laundering offence to order forfeiture. The frozen property is simply deemed to be an instrument of the offence by the operation of the automatic forfeiture provisions. This amounts to a substantive shift from the position that existed when the freeze order was obtained in 2000 pursuant to the **MLA 1996** and the **MLA 1999** to the position that exists under **MLA 2001**.

[54] Applications may be made within this 90 day period only to exclude the property from forfeiture, failing which the property is automatically forfeited at the end of the 90 day period.

[55] Upon forfeiture of the property occurring, a third party application may be made within 60 days from the date of forfeiture for the interest of a third party in the forfeited property to be excluded from the operation of the forfeiture; and any untimely application has to be made with the grant of leave by the court. Sections 20(2)(a), 21(3) to (7) and 22 contain provisions which prescribe how the applications will impact on the operation of the forfeiture, and the criteria that the court will rely on in determining whether to grant leave to a third party to make the application out of time; or exclude the property from the operation of forfeiture. It may also be said that these new provisions under the **MLA 2001** have shifted the burden of proof from being on the applicant for a forfeiture order to the applicant third party seeking exclusion of property from a deemed forfeiture.

**Does the retrospective application of the amendments to Part IV in the MLA 2001 impair any existing rights and obligations accrued to the appellant under the previous law?**

[56] The Privy Council in **Yew Bon Tew**<sup>18</sup> at pages 558 to 559 recognized that, “an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings because it may, on one interpretation, revive or destroy the cause of action itself.” We are not dealing here with a cause of action, but with the nature and timeliness of the appellant’s application having regard to the changes in the law; and her right to make an application before the forfeiture of Parcel 26 takes effect. It is therefore wise to heed the strictures placed by the Privy Council as to how to approach the question raised. Their Lordships advised that the proper approach to the construction of the amending Act is not to decide what label to apply to it, procedural or substantive, but to see whether the

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<sup>18</sup> The issue raised in **Yew Bon Tew** was whether or not the defendant had the right to plead the time bar to the plaintiff’s cause of action for damages in negligence arising from an accident,<sup>18</sup> under a repealed enactment which provided a 12 month limitation period; or would the cause of action benefit from a later enactment which substituted a longer limitation period of 3 years. The accident occurred in April 1972 and the plaintiff filed the action in March, 1975. The High Court held that the claim was not time barred. The Federal Court allowed the appeal, and held that the defendant’s right to plead the time bar which had accrued on 5<sup>th</sup> April 1973, was a right protected by the Interpretation Act 1967 and was not affected retrospectively by the Act of 1974. On the plaintiff’s appeal to the Privy Council it was held that where a defendant had acquired an entitlement to plead a time bar, that entitlement constituted an accrued right which was protected by section 30(1)(b) of the Interpretation Act.

statute, if applied retrospectively to the appellant's case in the present appeal would impair her existing rights and obligations.<sup>19</sup>

[57] Mr. Hamilton QC made the following submissions:

- (1) The **MLA 2001** prescribes an entirely different regime both substantive and procedural in respect of money laundering offences, powers of the High Court, forfeiture and applications.
- (2) Third Parties are accorded rights exercisable within a specific time period or exceptionally outside of that period only with the leave of the court.
- (3) The penalty of forfeiture which existed when a person was charged and convicted in a jurisdiction outside of Antigua and Barbuda, under Section 20(2)(a) and (d) was exercisable on that person's conviction becoming final which evidently occurs when the appeal process comes to an end by the Court of Appeal upholding the conviction . The **MLA 2001** speaks only to conviction.
- (4) The terms of the freeze order permitted the appellant to make her application at any time on giving 2 clear days notice and the appellant's present application was in obedience to the freeze order and was not a fresh application.
- (5) The freeze order made under the **MLA 1996** and **MLA 1999** effectively bound the parties thereto in terms of their respective rights and duties and the order had to be obeyed until set aside or varied by the court.
- (6) As at 9<sup>th</sup> November 2000, the **MLA 1996** and the **MLA 1999** contained the totality of the criminal forfeiture applicable to Michael Tyrell and to third parties associated with him on his arrest and charge on 23<sup>rd</sup> October 2000. The vista and legal landscape contemplated by the court when it

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<sup>19</sup> At page 563.

made the order has significantly and fundamentally changed in terms of the rights of third parties and the basis upon which property is forfeited.

(7) There are fundamental differences between English confiscation laws and the laws of Antigua and Barbuda. The change in the law regarding forfeiture of property offends Section 15(4) of the **Antigua and Barbuda Constitution**<sup>20</sup> because whereas on 23<sup>rd</sup> October 2000, Parcel 26 was upon Michel Tyrell's conviction being made final, liable to forfeiture, the **MLA 2001** prescribed automatic forfeiture without proof that it was derived from, connected with or related to the money laundering offence for which he was convicted as was prescribed under the **MLA 1996** and **MLA 1999**.

(8) Criminal forfeiture is penal in nature and the general rule is that penal provisions of an enactment are to be construed as having no retrospective effect: **R v Kirk** [1985] 1 All E.R. 453 at 462 (b).

[58] Mr. Simon QC submitted that forfeiture was always present in the **MLA 1996** and the **MLA 2001** prescribed the time frame and procedure for making the application after forfeiture. In his written submissions the respondent contended that to interpret the terms of the freeze order as giving the appellant an unfettered procedural discretion to apply literally at any time while the freeze order has not been discontinued, would render the statutory limitation period of no effect, or make the appellant an exception to statutory procedure; and by extension the appellant would be able to apply based on the freeze order well after automatic forfeiture takes effect.<sup>21</sup>

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<sup>20</sup> Section 15(4) states: "No person shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, **and no penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed**".

<sup>21</sup> Section 28 of the MLA 1996 provides: "All prosecutions, actions, suits or other proceedings brought for any offence, or for the recovery of any fines, penalties or forfeitures, under this Act or the regulations made thereunder, shall be brought within six years next after the date of the offence committed or the cause of action accrued "

[59] It was also argued in the written submissions that by virtue of Section 30(1) of the **MLA 1996** as amended by the **MLA 2001**, since Michael Tyrell was convicted on 12<sup>th</sup> February 2002 and the **MLA 2001** came into force on 27<sup>th</sup> April 2001, the amendments to Part IV including automatic forfeiture operates against any property that is the subject of the freeze order since he was convicted after the commencement of the **MLA 2001** amendments. The **MLA 2001** amended the procedure for third parties to apply to remove property from a freeze order where automatic forfeiture has taken place, it was argued, and the freeze order should be read so as to be consistent with the statute, bearing in mind that the retrospective nature of the statute altered procedure, including the procedure for unfreezing property that has been forfeited, not merely frozen. To the extent therefore that the freeze order may be inconsistent with the new procedure, it should be interpreted to conform with the existing law since no transitional provisions in relation to the freeze order were enacted.

[60] In my respectful view the submissions of Mr. Hamilton QC are insurmountable.

[61] Starting from the fact that Parcel 26 is co-owned by the appellant and Michael Tyrell, the legislature chose to merge the third party rights of an owner of frozen property to contest a freeze order, with the criminal proceedings against Michael Tyrell and the criminal forfeiture of his property. To that extent the present proceedings are penal in nature. These penal proceedings began when Michael Tyrell was charged with the drug trafficking and other related offences, and the freeze order was made in respect of Parcel 26 in November 2000.

[62] In November 2000 the appellant was legally entitled to await the conviction of Michael Tyrell and an application being made for a forfeiture order, before raising her issue as to ownership in respect of Parcel 26 under the **MLA 1996** as amended by the **MLA 1999**; since the law required that upon the conviction of Michael Tyrell an applicant for a forfeiture order had to prove that Parcel 26 was property derived from or connected or related to the offence for which Michael Tyrell was convicted. This legal entitlement had accrued to the appellant under

the law existing in November 2000. It was a legal entitlement that remained intact regardless of the statutory limitation of 6 years provided in Section 28 of the **MLA 1996** as time would begin to run against the appellant upon the making of the forfeiture order by the court. However, that entitlement was taken away under the **MLA 2001** automatic forfeiture provisions. Indeed, the **MLA 2001** amendments in Part IV did not merely prescribe the procedure for the appellant to make her application, but the relevant amendments altered the character of forfeiture in the sense that no determination regarding the property's connection to the money laundering offence was required to be made by the court as the basis for a forfeiture order.

[63] The **MLA 2001**, having repealed Sections 19 and 20, included no transitional provisions as to what should happen for applications in cases where no forfeiture order existed in respect of property frozen under the repealed law. It speaks only to property to be frozen after the commencement of the **MLA 2001** in my view on the basis of the new definitions previously referred to at paragraphs 39 to 43 above; and though it applies to offences committed before and after the commencement of the **MLA 2001**, it excludes from its application convictions which occurred before the commencement of the **MLA 2001** for money laundering offences.

[64] The appellant obviously had and was indeed entitled to have a settled expectation with respect to her interests in Parcel 26 under the law as it existed in November 2000. Her expectations that a determination was required to be made by the court as to whether the property was connected to the money laundering offence; and that this was a prerequisite to the making of a forfeiture order under Sections 19 to 22 of the **MLA 1996** as amended by the **MLA 1999**; and that Parcel 26 would not be subjected to an automatic forfeiture without the benefit of such a determination, these expectations ought not to be defeated. Her vested right or entitlement is protected by Section 31(1)(b) to (e) of **The Interpretation Act**. This vested right would be impaired if the changes in the law brought about by the provisions in Part

IV of the **MLA 1996** as amended by the **MLA 1999** and **2001** were given retrospective effect as it relates to the circumstances of this case.

[65] I therefore hold that the statutory procedure prescribed by Sections 19A, 20 (2), 21 and 22 of the **MLA 1996** as amended by the **MLA 1999** and the **MLA 2001** did not apply to the appellant's application resulting from the freeze order made prior to the **MLA 2001** coming into force. The learned judge obviously erred in her findings and conclusions that the appellant's application was not properly before the court.

[66] Assuming that the appellant's application was caught by the retrospective application of the **MLA 2001**, her application to recover or "unfreeze" the property (by whatever terminology used) would have been timely under Sections 20 and 21 of the **MLA 2001**. The application was made within the period of 150 days from 2<sup>nd</sup> December 2004 which was the date that Michael Tyrell's conviction became final when the Court of Appeal in London refused his application for leave to appeal; and the 150 days includes the 90 days referred to in Section 20(1) and the 60 days referred to in Section 21(2) of the **MLA 2001**. This would be so, where the word "conviction" in Section 20(1) of the **MLA 2001** is given a broad and purposive construction under the **2001 MLA** provisions (which speak only to "conviction" and not to a "conviction becoming final"). A purposive construction results in the word "conviction" being interpreted to mean a conviction which is final in the sense that there is an appeal against the conviction which has been determined by exhaustion of the appeal process or the time for filing an appeal against the conviction has expired.

[67] I also do not consider that the omission of the words "becoming final" in the **MLA 2001**, could in the context of this statute (which is penal in nature, with automatic forfeiture consequences) be construed to mean anything other than a conviction which is final in light of Section 27 of the **MLA 1996** with its subsequent amendments. Section 27 provides for all offences under the Act to be tried summarily unless directed otherwise by the Director of Public Prosecutions.

Section 169 of the **Magistrate's Code of Procedure** states that where there is an appeal from a summary conviction the appeal has the effect of suspending the execution of the decision, judgment or order appealed from until the final determination of the appeal.

[68] A restricted construction could lead to an absurd and unjust result where a person's conviction was successfully overturned on appeal but at the same time the automatic forfeiture provisions have already bitten, and cannot be unscrambled. I do not consider that parliament intended such a result. If Parliament intended this it should be stated in clear and unequivocal language.

[69] I would allow the appeal in the circumstances and remit the appellant's application to the court below to be determined in accordance with the relevant provisions under the **MLA 1996** as amended by the **MLA 1999**.

[70] The learned judge made no order as to costs in the court below. In the absence of any submissions from Queen's Counsel regarding costs I would direct that the question of costs is to be agreed on and if not agreed, is to be determined upon the submissions of counsel within 20 days from the date of delivery of the judgment.

**Ola Mae Edwards**  
Justice of Appeal

I concur.

**Hugh A. Rawlins**  
Chief Justice

I concur.

**Janice George-Creque**  
Justice of Appeal