

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 243 of 2000

IN THE MATTER OF SECTION 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

Applicant

And

THE DIRECTOR OF THE ONDCP

Respondent

Appearances:

Mr. Dane Hamilton Snr for the Applicant

Mr. Curtis Bird and Ms. Paula Gilford for the Respondent

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2006: July 6th

2007: January 31st
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[1] Blenman J; This is an application by Paula Tyrell (M. Tyrell) to have land registered at the Land Registry as Parcel 26: Block 13 2490B Registration Section: East Central (Parcel 26) removed from the List of frozen assets stated in the Order of Court dated November 9th 2000.

[2] Ms. Tyrell contends that she is entitled to have Parcel 26 removed from the list of frozen assets since the property belongs to her (she says that she is the beneficial owner of the property)

- [3] On behalf of Ms. Tyrell, it is contended that the applicable law is the Money Laundering (Prevention) Act (MLA) 1996 with amendments only up to 1999.
- [4] The Director of the ONDCP (the Respondent) opposes Ms. Tyrell's application on several grounds including that Ms. Tyrell is not the beneficial owner of the property and that her application is not properly before the Court. Indeed, Ms. Tyrell's application is also strenuously objected by the Respondent on the main ground that Parcel 26 was forfeited to Crown and this was done automatically and that Ms. Tyrell had 60 days within which to move to the Court in order to have Parcel 26 removed from the forfeited property and that she has failed to do so.
- [5] In addition, the Respondent asserts that the applicable law is the MLA 1996 together with amendments up to 2001. More importantly, the Respondent, states that should Ms. Tyrell require to apply to the Court, outside of the stipulated time she ought to have sought the leave of the Court to do so. Ms. Tyrell has failed to apply for and obtain the leave of the Court in order to bring her application and this is fatal to her application.
- [6] The issues that arise for the Court's determination are as follows:
- (a) What is the applicable law that governs the Case at Bar;
 - (b) Whether Ms. Tyrell is entitled to have the Parcel 26 removed from the list of frozen assets.

Chronology of Facts

- [7] I find it useful to utilize the chronology as stated by the Respondent.
- (1) Ms Tyrell is Michael Tyrell's mother.
 - (2) On 23rd October 2000, MT was arrested in the Isle of Wight in the United Kingdom for cocaine smuggling and subsequently charged with being knowingly concerned in the importation of a prohibited substance, namely hydrochloride.
 - (3) On 2nd November 2000, an application was made in the High Court of Antigua and Barbuda by the Supervisory Authority for a Freeze Order against property of Michael Tyrell and Julie

Paterson Misc. Suit 243 of 2000 – In the name of Ferrance v Tyrell et al. The Order was granted on 9th November 2000.

- (4) On 27th November 2000, a Restraint Order against property of MT was obtained by Her Majesty's Customs & Excise.
- (5) On 28th November 2000, an application was made in the High Court of Antigua and Barbuda by Mr. Sydney Christian, QC. Attorney on behalf of Parham Properties, Supervisory against the Authority to remove items 1 – 4 from the Freeze Order dated 10th November 2000, which includes Parcel 26.
- (6) On 18th January 2000, Justice Ephraim Georges refused application by Applicant on behalf of Parham Properties Ltd. To vary the Freeze Order.
- (7) On 28th September 2000, Notice of Appeal by Parham Properties against the Decision of the Honourable Justice Georges.
- (8) On 12th February 2002, Michael Tyrell was convicted in the United Kingdom for the offence of being knowingly concerned in the importation of a prohibited substance, namely hydrochloride.
- (9) On 2nd December 2004, The Court of Appeal in London refused Michael Tyrell's leave to appeal against his convictions.
- (10) On 29th April 2005, the Application that is presently before this Honourable Court is made by Pamela Tyrell.
- (11) On 8th September 2005, The Confiscation Order was made against Michael Tyrell.

Law

Money Laundering (Prevention) Act (MLA)

[8] I propose now to address the relevant statutory provisions.

Section 19 of the (principal) MLA 1996 states:

- “(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 charged with money laundering offence.

- (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) determine 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”.

[9] By virtue of section 12 of the MLA 1999, Section 19 of (the principal Act), and MLA 1996 was amended as follows:

- (a) In subsection (1) by repealing “charged with money laundering offence” and substituting the following:
“criminally charged in any jurisdiction with a money laundering offence as defined in this Act.
- (b) in subsection (3) by repealing “of forty-eight hours following the hour” and substituting the following:
“of thirty days following the day”.

[10] Section 20(1) of the MLA 1996 states:

- “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 of instrumentalities derived from or connected or related to such an offence be forfeited to the Government of Antigua and Barbuda.
- (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.
- (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.”

[11] By virtue of section 13 of the MLA 1999, section 20 of (the principal Act) the MLA 1996 was amended as follows:

“(a) in subsection (1) by

- (i) inserting after “offence” in the first place it occurs the following:
“under the laws of Antigua and Barbuda”,
- (ii) inserting after “forfeited” the following:
to the Government of Antigua and Barbuda”, and
- (iii) repealing “and disposed of in such manner as the minister may direct”,

(b) by inserting after subsection (1) the following subsection:

“(1a) When a person is charged with a money laundering offence under the laws of Antigua and Barbuda and he has been notified of the charge either by

- a. service at the business address of counsel (if any) acting on his behalf;
- b. service at his last known address, or place of business within the jurisdiction;
- c. in the case of a body corporate the registered or principal office of the body corporate;
- d. publication in the Gazette in Antigua and Barbuda; or
- e. publication in two consecutive issues of a local newspaper circulating in Antigua and Barbuda

and one hundred and eighty days after the notification, the preliminary inquiry or the trial has not taken place because of his failure to appear at the preliminary inquiry or trial in Antigua and Barbuda, the court shall order any property, proceeds or instrumentalities derived from, connected with or related to the offence, wherever they may be, forfeited to the Government of Antigua and Barbuda.

(c) by inserting after subsection (2) the following subsection

(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) if the person charged does not respond within one hundred and eighty days of the freeze order the court shall order the frozen property, proceeds and instrumentalities forfeited to the Government of Antigua and Barbuda;
- (b) if the person charged provides satisfactory evidence to the Court within one hundred and eighty days of the notice of the freeze order that the charges were filed for political purposes or otherwise in bad faith or are unfounded, the court shall immediately vacate its order;
- (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.

[12] Section 21 of the MLA 1996 states:

- "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.

[13] Subsequently the following sections were amended as follows: section 15 of MLA 2001 repealed and replaced section 20 of MLA 1996. The amended section 20(1) now reads:

(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 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) if the application is withdrawn or struck out, on that withdrawal or striking out.

[14] Section 21 of the MLA 1996 was amended by section 16 of the MLA 2001. Section 21 of the MLA 1996 as amended by section 16 states:

“(1) If property is forfeited to the Crown under section 20 and 20A, a person (other than the defendant) who claims to have had an interest in the property immediately before it was forfeited may, subject to subsection (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 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.”

[15] By virtue of section 21 of the MLA 2001 section 30 of (the principal Act), MLA 1996 is repealed and the following substituted:

“(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.

(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.”

Interpretation Act

[16] I now turn to the Interpretation Act Cap 224 (Interpretation Act) Laws of Antigua and Barbuda. Section 31(1) of the Interpretation Act Provides:

“(1) Where an enactment repeals or revokes an enactment, the repeal or revocation does not, except as in this section otherwise provided,

- (a) revive any enactment or thing not in force or existing at the time at which the repeal or revocation takes effect, or
- (b) affect the previous operation of the enactment so repealed or revoked, or anything duly done or suffered there under, or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed or revoked, or

- (d) affect any offence committed against the enactment so repealed or revoked, 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 or revoked.”

[17] Section 44(2) of the Interpretation Act states:

“Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.”

Applicant's Submissions

[18] Learned Counsel Mr. Hamilton Snr submitted that Ms. Tyrell's application is made pursuant to section 21 of the Money Laundering (Prevention) Act 1996 (MLA) as amended.

He said that the grounds upon which Ms. Tyrell relies are as follows:

“That she is the sole beneficial owner of Parcel 26; she alleges that she provided the entire considerations;

That notwithstanding that the registration of Parcel 26 is in her and Michael Tyrell's name, that MT holds title to parcel 26 on trust and for the benefit of the Applicant.”

[19] In support of the application, Ms. Tyrell has deposed to an affidavit in which she states as follows:

- (1) “That on or about the year 1965 my husband and I purchased Parcel 26 Block 13 2490B the subject matter of this application. It admeasures approximately 0.6 acre. About 28 years ago on the occasion of my daughter, Nicola Kaufmann's marriage, it was given to her as a wedding present. My daughter and her husband built a dwelling house on the said parcel of land and resided therein as their matrimonial home when they migrated to California.

- (2) That in September, 1992 I decided to purchase the said house and land and obtained a loan therefor from the Bank of Antigua located then at High Street. At the time I operated a business at Redcliffe Quay known as the Toy Shop which had been to date in operation of for over 50 years. On account of my age (70 years) the said Bank as part of their security requested that I place a close relative's name on the transaction document including the Transfer and Charge. I chose my son Michael Tyrell who was the only person then available to me the other being my daughter, the Vendor.
- (3) That I borrowed from the said Bank the amount of \$499,500.00 out of which an amount of US\$154,743.00 or \$420,421.26 was paid to Nicola Kauffman, the balance absorbed as expenses, legal and otherwise relating to the sale and loan.
- (4) That the loan from the Bank of Antigua was repaid partly from a legacy of £72,000 left to me by my uncle Louis Anthony Herve. I made regular transfers for this amount out of my account held by my solicitor in England. Apart therefrom the said loan was repaid from the earnings of my business "The Toy Shop". Apart from the same I received rents from two other properties at Vernons which went towards discharging the loan. My son Michael Tyrell made no payments to this loan. By 1999 the said loan was repaid. However, I never removed my son's name from the title given the fact of my age and he was one of only two children that I have, neither have I ever considered that I had advanced to him ½ interest in the property

[20] Learned Counsel Mr. Hamilton Snr submitted that Ms. Tyrell has an equitable right to the half interest in Parcel 26 that is held by Michael Tyrell. This legal right is enforceable against the legal estate and all persons who claim under him.

[21] There is no evidence that Michael Tyrell provided any part of the consideration for the acquisition of Parcel 26, he holds title to Parcel 26 in trust for Ms. Tyrell. In support of his argument, Counsel relied on *Gardener v Lewis (1998) 53 W.L.R 236* where Lord Justice Browne Wilkinson said:

"From these provisions it is clear that, as to the legal estate, the certificate of registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The Appellants legal title can only be challenged on the grounds of fraud or prior registered title, or, in certain circumstances

on the ground that the land has been included in the title because of a wrong description of parcels or boundaries.

But it is clear that these provisions relate solely to the legal title to the land. Although the owner of the fee simple in equity is authorized for first registration of the land, apart from that all trust, interest, whilst continuing to exist are kept off the register... The Land Certificate is conclusive as to the legal interests in the land. But that does not mean that the personal claims cannot be enforced against the registered proprietor.”

[22] Mr. Hamilton Snr also referred the Court to *Frazer v Walker* [1967] 1AC 569 at 585 where Lord Wilberforce stated:

“...their Lordships have accepted the general principles that registration under the Land Transfer Act 1952 confers upon a registered proprietor a title to the interest in respect of which he is registered which is ... immune from adverse claims, other than those specifically completed. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in possession, founded in law or equity, for such relief a court acting in personam may grant. That this is so has frequently and rightly been recognized in the Court of New Zealand and Australia.”

[23] Mr. Hamilton Snr submitted that under the MLA of 1996 there were no provisions for automatic forfeiture. There were no time limits save where the person was not charged within 48 hours. Before forfeiture could be proceeded with the provisions of the Act enjoined the Court to adjudicate on and give effect to third party rights by returning such property. The trigger for proceedings under the Act was being charged with a money laundering offence. It is clear that the date of being charged initiated proceedings. Forfeiture proceedings could only take place on conviction. This then was the state of the law as applicable and under which the freeze order was granted on November 9th 2000.

[24] Mr. Hamilton Snr posited that the changes to the MLA 1996 in so far as is relevant to this Application are those made by the MLA 1999 and are as follows:

- (i) Section 19 was amended and instead of the person being charged in a criminal offence there was substituted “criminally charged in any jurisdiction with a money laundering offence as defined in the Act” Section 12
- (ii) A period of “thirty days” was substituted for the “forty eight hours” time limit for being charged.

- (iii) The person charged had to be notified within 14 days of the freeze order being issued Section 12(c)
- (iv) Section 20 of the 1996 was previously repealed by Section 13 of the Money Laundering (Prevention) (Amendment) Act No. 18 of 1998, however, by section 17(1) of the Money Laundering (Prevention) (Amendment) Act 1999 those amendments were repealed and the principal 1996 Act was revived.
- (v) Forfeited now meant to the Government of Antigua and Barbuda.
- (vi) A subsection (2) was added to Section 20 of the 1996 Act which provided for notification to a person charged in Antigua and Barbuda and forfeiture 180 days after notification, if that person failed to appear at the preliminary inquiry or trial.
- (vii) A subsection (2)(a) was added deleting with notification to a person charged in a jurisdiction other than Antigua and Barbuda. This subsection provided a mechanism whereby that person charged could respond to the freeze order within 180 days, challenged the same and provided for forfeiture on conviction.

[25] Learned Counsel, Mr. Hamilton argued that PT's application falls to be construed in accordance with the MLA 1996 as amended by the MLA 1999. He maintained that the MLA 2001 which amended the MLA 1996 has neither application nor relevance to the matter. The 2001 amendment cannot properly be given retrospective application.

[26] Counsel agreed that section 20 and 21 were repealed and replaced by sections 15 and 16 of MLA 2001, but Counsel was adamant that they have no application to the matter. Mr. Hamilton maintained that since the provisions as amended by sections 15 and 16 of 2001 MLA, are penal in nature, the amending enactments cannot be construed as having retrospective effect. *R v Kirk* [1985] 1 ALL ER 453 at 462

[27] Mr. Hamilton said that at common law, the rule is that a statute ought not to be given retrospective effect, where to do so would affect an existing right or obligation unless the statute expressly or by necessary implication require such a construction. Where however, a statute affected a mere matter of procedure, there is no prescription against retrospectivity. Mr. Hamilton next referred the Court to *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC in which Lord Brightman stated:

“That apart from the provisions of the Interpretation Statutes, 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 law, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. 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.”

[28] Mr. Hamilton posited that the 2001 amendments were substantive and not merely procedural since it sought to interfere and/or erode rights already acquired and vested in the Applicant.

[29] Further, Mr. Hamilton stated that at common law, the rule is that a statute ought not to be given retrospective effect, where to do so would affect an existing right of obligation unless the statute expressly or by necessary implication require such a construction. Next he stated that where a statute affected a mere matter of procedure no presumption against retrospectivity existed and strictly speaking a procedural statute could operate only prospectively because it prescribes the manner in which something might or must be done, in the future, even if what was to be done was based on, or related to past events. In support of his arguments Mr. Hamilton relied on *Rodway v R* [1990] LLRC 237 at pages 241 letter (c) and page 243 letter (d)

“Fundamental rights, irrespective of whether they should be classified as procedural or substantive, will almost invariably be reflected in the common law and the protection against statutory inference with them, whether prospective or retrospective, lies in another presumption. That is the presumption that the legislature does not intend to affect basic common law doctrines unless it expresses its intention in the clearest of terms...”

[30] In *Uganda v Kirya* [1985] LRC 58 it was held that retrospective operation will not normally be given to a statute which affects existing rights or obligations. In the Privy Counsel Judgment in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 A.C 553 Lord Brightman stated:

“Apart from the provisions of the interpretation statutes, 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 law, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. 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.”

[31] Any construction of a provision in a statute which interferes with or erodes the further fundamental rights (such as the rights enshrined in Section 15(4) and Section 9 of the Antigua and Barbuda Constitution Order 1981) ought to be avoided, in particular, when it is claimed to operate retrospectively or impliedly: *R v. Pora* [2001] 5 LRC 530 at 456, subject to this rider in the context of Antigua and Barbuda: Parliament is not supreme, there is no doctrine of Parliamentary sovereignty, it is the Constitution which is supreme.

[32] Mr. Hamilton stated that under section 20 of the MLA 1996, the Court was given the power to forfeit property, proceeds and instrumentalities once the person was convicted. He stated however, that the Court was required under subsection (4) to give directions for the purpose of determining any dispute as to the ownership of property or any part thereof. No directions were given by the Court.

[33] Next Mr. Hamilton Snr stated that only property which was derived from or obtained directly or indirectly from the proceeds of crime was subject to forfeiture on the conviction of the person. Ms. Tyrell’s application is based on her contention that Parcel 26 was not acquired directly or indirectly from the proceeds of any crime but rather from a loan granted to her by the Bank of Antigua. Therefore, Parcel 26 could not properly be forfeited.

Respondent’s Submissions

[34] Learned Counsel, Ms. Paula Gilford stated that the Respondent does not admit that Michael Tyrell holds Parcel 26 on trust for Ms. Tyrell. Counsel submitted that even if that were so the Respondent still contends that Parcel 26 has been forfeited to the Crown.

[35] Ms. Gilford stated that in a matter that deals with drug trafficking the issue cannot solely be whether the property is subject to a trust. Were this to be so, it would be far too easy for any drug trafficker (and/or his relatives) confronted with the possibility of a confiscation order to assert that the property that is the subject matter of a confiscation order is held by him on trust for someone else; it was to prevent this sort of assertion that the legislature sought to address.

[36] Ms. Gilford submitted that section 2 of the MLA 1996 was amended by the MLA 2001 to introduce the following sections namely section 2(c) 1(a) – (e) and section 2(d), the latter which are very germane to the Case at Bar. Ms. Gilford stated due to the nature of the drug trade and the process by which a person dealing with drugs may seek to hide his/her proceeds of the crime from possible forfeiture, the Act, which is draconian in nature “is designed to strip drug barons of the proceeds of their unlawful activity”. (Mitchell, Taylor & Talbot on Confiscation and the Proceeds of Crime, Cap VII-19 at paragraph VII.027 (referring to the United Kingdom Drug Trafficking Act, which is somewhat similar to the Act in its intention).

[37] The legislature has therefore established a more objective means of settling the property issue by requiring the Court to assess the Defendant’s actual (not merely legal) relationship to and with the property. The law therefore emphasizes the issue of “effective control” of property by the Defendant. Thus the court is urged to look at sections 2D (1) of the MLA 2001.

[38] Section 2D (1) of the MLA 2001 Act states:

“For the purpose of an application under this Act, property in which the defendant has an interest includes:-

- (1) any property that is, on the day when the first application is made under this Act in respect of that offence or money laundering activity subject to the effective control of the defendant.”

[39] Ms. Gilford asked the Court to find that Michael Tyrell was in effective control of Parcel 26, which property was forfeited to the Crown. Next, Ms Gilford argued that it was

Parliament's intention's intention to have the amendments to Part IV of the MLA 2001 Act operate retrospectively. Therefore for the purposes of this Application (engaging the Court's attention) the MLA 1996 with the subsequent amendments including the 2001 amendments to the Act must be taken into consideration.

[40] Ms. Gilford referred the Court to section 30(1) and (2) of the MLA 2001 Act which state:

“(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;

(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.”

[41] Ms. Gilford stated that though the issue before the Court is not one dealing with fundamental rights, the insight to the rule of interpretation provided by the case of Rodway is very useful. The case of Rodway makes it clear that though certain statutes are not to be viewed retrospectively, the statute can expressly require that a retrospective construction be adopted. She however argued that the conjoint effect of sections 30(1) and (2) clearly shows that it was indeed the intention of Parliament to make Part IV retrospective in some regards. It is clear that it was the intention of Parliament that the law relating to automatic forfeiture operates retrospectively with regards to the commission of the offence, but not with regards to the conviction. Thus as stated in the case of Rodway, Parliament has expressly stated its intention regarding how the Court is to deal with automatic forfeiture.

[42] The facts show that Michael Tyrell was arrested on the 23 October 2000 in the United Kingdom and subsequently charged. Therefore it is clear that section 30(2) of the Act will apply to Tyrell, since the section states that “*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)*”. Ms. Gilford stated that the issue then for consideration is whether section 30(1) applies to Tyrell. The facts show that Michael Tyrell was convicted on the 12 February 2002 and the amendments to Part IV came into force on the 24th April 2001, almost one year before Tyrell was convicted.

[43] In addition, Ms. Gilford, submitted that section 21 of the MLA 2001 sets out the criteria that must be fulfilled in order to obtain an order pursuant to section 22 as amended by sections 17 and 26 of the Money Laundering (Prevention) (Amendment) 2001. The criteria are that:

- (i) the applicant must show at the time of the application that the property was forfeited to the Crown either by virtue of section 20 or 20A of the Act;
- (ii) the applicant must show that he/she is a person who had an interest in the property immediately before it was forfeited to the Crown;
- (iii) the application must be made within 60 days of the forfeiture of the property to the Crown;
- (iv) if the above criterion as it relates to the time period is not fulfilled the applicant must show that he/she has leave of the court to make the application out of time;
- (v) the applicant must show that he/she did not receive notice of the proceedings on he relevant freeze order or notice of the freeze order;
- (vi) if the preceding criterion is not fulfilled, then the applicant must show that he/she was given leave of the court to make the application, and
- (vii) notice was served on the Supervisory Authority and any other interested party.

[44] Ms. Gilford stated that Michael Tyrell's conviction, his property was automatically forfeited to the Crown 90 days thereafter (automatically).

[45] Ms. Gilford maintained that Ms. Tyrell's application ought to have been made within 60 days of Parcel 26 being automatically forfeited to the Crown. Ms. Tyrell has clearly failed to do so. Accordingly, if Ms. Tyrell wanted to apply to the Court out of time she needed to first obtain the leave of the Court in order to be able to do so, this she has clearly failed to do so.

[46] Ms. Gilford was strong in her view that in accordance with section 20 of the MLA as amended by section 15 of the MLA 2001 on the conviction of Michael Tyrell, his property was automatically forfeited to the Crown on the expiration of 90 days either after:

- “(i) the making of the freezing order; or
- (ii) the conviction of the Defendant, which ever is later.”

[47] Ms. Gilford referred the Court to section 44(2) of the Interpretation Act Cap 224 which provides that:

“Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period”

Counsel referred to *Radcliffe v Bartholomew* [1891] 1QB 161 in which the Court was interpreting the term “within one calendar month after the cause of such complaint shall arise” the Court held that “the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made.” Analogously, this will apply where something is to be done after a conviction.

Therefore the 90 days period began to run the day immediately following the conviction of the person charged or the making of the freeze order which ever is later.”

[48] Ms. Gilford maintained that pursuant to section 20 of MLA as amended by MLA2001 automatic forfeiture took effect on the date on which the 90 days expired and that this was so irrespective of whether the Crown had taken any action to assert its rights.

[49] It is a fact Michael Tyrell was convicted on 2nd February 2002; Parcel 20 was the subject of the Freeze Order dated 9th November 2000, therefore, Parcel 26 devolved to the Crown on the expiration of 90 days after Michael Tyrell’s conviction namely on 1st May 2002, by operation of law.

[50] Ms. Gilford also stated that Ms. Tyrell who ought to have applied to the Court within 60 days after the property was forfeited to the Crown has filed her application on 29th August 2005, nearly 3 (three) years after the property was forfeited to the Crown and, without obtaining the leave of the Court. Ms. Gilford says that these omissions are fatal to Ms. Tyrell’s claim.

[51] Next, Ms. Gilford argued that Ms. Tyrell had notice of the proceedings and the Freeze Order and therefore Ms. Tyrell cannot properly rely on section 21 MLA as amended by MLA 2001. The Court's attention was adverted to Suit No 243 of 2000 in which an application was made on behalf of Parham Properties Limited to have the Freeze Order dated 9th November 2000 varied. As stated earlier the said Freeze Order also covered Parcel 26. Counsel asked the Court to take judicial notice of the fact that in that application, Ms. Tyrell deposed to an affidavit in support of Parham's Properties Limited's application. Therefore, Ms. Gilford stated that there could be no disputing that at all material time Ms. Tyrell was aware of the Freeze Order.

[52] Finally, Ms. Gilford advocated since PT has brought her application without the 60 days period as stated in section 21(2) and 21(4) and there PT's application is not properly before the Court.

Court's Analyses and Findings

[53] It seems to me that the Court must determine the first issue raised in the Case at Bar. In my view, the Court's determination of which are the applicable statutory provisions brings into sharp focus the interpretation of statutory provisions which have been amended several times and the interesting questions of interpretation which such amendments can give me.

[54] I will now address the relevant statutory provisions. Let me say at the onset that, I am of the considered opinion that there is nothing to prevent Parliament from making specific provisions of an Act retrospective if the intention to do so is apparent. This is a well settled principle and in *Smith v Callender* [1901] AC 297, 305 131 Lord Ashbourne stated that "*it is obviously competent for the legislature, in its wisdom, to make an act of Parliament retrospective.*"

[55] Dr Lushington stated in the *Ironsides* [1862] 31 LJ PM of A 129, 131 as follows:

"No one denies the competency of the legislature to pass retrospective statutes if they think fit, and many times they have done so. Before giving such a construction to an Act of Parliament one would require that it should either appear very

clearly in the terms of the Act or arise by necessary and distinct interpretation”

[56] For the sake of completeness, SGG Edgar in his Treatise *CRAIES ON STATUTE LAW* Seventh edition at page 398 states that:

“It is a well recognized rule that statutes should be interpreted if, possible, so as to respect vested rights but such a construction should never be adopted if the words are open to another construction.”

[57] Further, it is perfectly settled that if the legislature forms a new procedure, that instead of proceeding in this form or that, you should proceed in another and different form, clearly the bygone transactions are to be viewed and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. I also agree with Mr. Hamilton that it is a well recognized rule of construction that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment.

[58] Having reviewed section 21 of the MLA 2001 which amends section 30 of the principal Act (MLA 1996), in my view of the language of section 21 of the MLA 2001 indicates that the provisions should operate retrospectively, to do otherwise would clearly be to do violence to the clear language of the provisions. There is no denying that the conjoint reading of section 21(1) and section 21(2) of the MLA 2001 provide some very nice questions of statutory interpretation. Be that as it may, it clearly seems to me that the legislature clearly intended, by section 21(1) MLA 2001 which amends section 30 MLA 1996, that the amendments to Part IV should apply to a person's conviction of a money laundering offence if the person was convicted after the commencement of the Act.

[59] There is no dispute that the relevant provisions amending Act (MLA 2001) came into force on the 24th April 2001 whereas Michael Tyrell was convicted on 2nd February, 2002. Accordingly, by virtue of section 21 MLA 1996 as amended by section 16 of MLA 2001 Ms.

Tyrell was obliged to apply to the Court within 60 days of Michael Tyrell's conviction in order to have the Parcel 26, which was automatically forfeited to the Crown removed from the list of frozen assets.

[60] With respect, I do therefore, not accept the arguments advanced by Learned Counsel Mr. Hamilton Snr 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. I am of the respectful view as stated earlier that when Parliament enacted section 21 MLA 2001 which amends section 30 of MLA 1996 it intended section 30 as amended by MLA 2001 to be given retrospective application. I am therefore in total agreement with Learned Counsel Ms. Gilford that Parliament in 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 the Michael Tyrell's assets that was the subject of a Freeze Order.

[61] Further, I do not agree with Learned Counsel Mr. Hamilton that the applicable law is the MLA as amended up to 1999. I am also of the view that section 20 of the MLA 1996 as amended by section 15 of the MLA 2001 is applicable. The interest of Michael Tyrell in Parcel 26 was automatically forfeited to the Crown 90 days after his conviction on drug offences on February 2nd 2002. This is clearly stated in section 20 of the MLA 1996 as amended by section 15 of MLA 2001 clearly state that "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
- which ever is later."

[62] The above section when read together with section 21 of the MLA 2001 which amends section 30 of MLA 1996 clearly provide the procedure and importantly, the timetable within which any person who claims to have had an interest in the property to apply to the court in order that the property can be "unfrozen". I agree with Ms. Gilford that Ms. Tyrell ought

to have applied to the Court within 60 days of Michael Tyrell's conviction to have Parcel 26 removed from the list of frozen Assets. This Ms. Tyrell has failed to do.

[63] By virtue of section 21(3) of MLA1996 as amended by section 16 of MLA 2001, the legislature provided yet 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 period mentioned above, for leave to apply for the "unfreezing" of the property. This was yet another opportunity provided to Ms. Tyrell to apply to the Court to "unfreeze" Parcel 26 in which she claims an interest. However, Ms. Tyrell was first required to seek the leave of the Court in order to apply; she has clearly failed to do so.

[64] There is no doubt that in the Case at Bar the period of 60 days after Parcel 26 was automatically forfeited to the Crown has expired. The only question that remains to be answered therefore is whether, in the circumstances that obtain Ms. Tyrell's application is properly before the Court.

[65] I am afraid that the answer to that question is clearly in the negative since Ms. Tyrell has not sought nor obtained leave to apply to the Court out of time. I hasten to add that Ms. Tyrell's application to have Parcel 26 removed from the list of frozen assets was filed very far outside of the stipulated period and is therefore not properly before the Court since she has obtained no leave.

[66] Accordingly, I am of the view that Ms. Tyrell is debarred from applying to the Court, without leave and in the manner which she has (since Ms. Tyrell) on the 29th April 2005, nearly 3 years after Michael Tyrell was convicted.

Conclusion

[67] In conclusion and for the above reasons, I hereby refuse Ms. Pamela Tyrell's application to have Parcel 26 removed from the List of frozen assets.

[72] In the exercise of my discretion, I make no order as to costs.

[73] I thank all Learned Counsel for their assistance.

Louise Esther Blenman
High Court Judge