

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANGUILLA CIRCUIT  
(CIVIL)  
A.D. 2009

Claim No. AXA HCV 2008/0094

BETWEEN:

MISS ERICA EDWARDS, CROWN COUNSEL OF ANGUILLA

Prosecutor/Respondent

And

EDUARDO CARTY

1<sup>st</sup> Defendant/Applicant

YASMIN LUDO (OR LUGO) CABRERA

2<sup>nd</sup> Defendant/Applicant

JANE CARTY

Third Party/Applicant

Appearances:

Ms. Eustella Fontaine for the Defendants/Applicants and the Third Party/Applicant  
Mrs. Tecla Henry-Benjamin and Miss Erica Edwards for the Prosecutor/Respondent

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2009: February 10<sup>th</sup>, 12, 26<sup>th</sup>  
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JUDGMENT

**MICHEL J.(Ag.):** On 9<sup>th</sup> December 2008 an ex parte application without notice was made to the High Court by the Prosecutor/Respondent for a Restraint Order against three named Defendants – Eduardo Carty (described as 1<sup>st</sup> Defendant), Jasmin Ludo Cabrera (described as 2<sup>nd</sup> Defendant) and Jane Carty (described then as 3<sup>rd</sup> Defendant) – pursuant to Section 17 of the Proceeds of Criminal Conduct Act, Revised Statutes of Anguilla, Chapter P100 (the Act). The application was

made orally but it was supported by a witness statement by Anthony Edward Marsden, a Financial Investigator of the Financial Intelligence Unit of the Royal Anguilla Police Force.

The Honourable Justice Janice George-Creque, having heard Counsel for the Applicant supported by written information (the witness statement) by Mr. Marsden dated and filed on the said 9<sup>th</sup> December 2008, expressed that she was satisfied that the requirements for making a Restraint Order under Section 17 of the Act had been fulfilled and so she made a Restraint Order against the Defendants, with liberty to any of the Defendants to apply to the Court to vary or discharge the order or to apply to the Court for the making of provision as the Court may think fit in respect of living and legal expenses.

On 23<sup>rd</sup> December 2008 another ex parte application without notice was made to the High Court by the Prosecutor/Respondent, again supported by a witness statement by Mr. Marsden, this time seeking a variation of the Restraint Order made on 9<sup>th</sup> December 2008 to include certain identified bank accounts.

Justice George-Creque, again having been satisfied on the basis of the application made by the Prosecutor/Respondent supported by written information (the witness statement) by Mr. Marsden dated 23<sup>rd</sup> December 2008, granted the Variation of Restraint Order under Section 17(6)(a) of the Act.

By Notice of Application dated and filed on 30<sup>th</sup> January 2009 and supported by affidavits of Yasmin Cabrera and Jane Carty dated and filed on the same date, the Defendants/Applicants (Eduardo Carty and Yasmin Cabrera) and the party now described as the Third Party/Applicant (Jane Carty) seek to discharge the Restraint Order made on 9<sup>th</sup> December 2008 and the Variation of Restraint Order made on 23<sup>rd</sup> December 2008.

The application was heard in this Court on 10<sup>th</sup> February 2009 with vigorous argument by Counsel on both sides. On the application of Counsel for the Prosecutor/Respondent the matter was adjourned to 12<sup>th</sup> February 2009 (with costs for the day to the Defendants/Applicants to be agreed or otherwise assessed) to enable Counsel for the Prosecutor/Respondent to provide the Court with

legal authorities on her submission that the order against the 1<sup>st</sup> Defendant/Applicant should not be discharged notwithstanding the arguments and authorities advanced and presented by Learned Counsel for the Defendants/Applicants and the Third Party/Applicant, who from hereon shall be referred to for purposes of brevity as Counsel for the Applicants.

## THE FACTS

The relevant facts in this matter, as gleaned from the two witness statements and the two affidavits filed herein, are as follows:

1. Mr. Anthony Edward Marsden – a Financial Investigator of the Royal Anguilla Police Force - stated in his witness statement of 9<sup>th</sup> December 2008 that:
  - (a) Proceedings for offences of money laundering and running an illegal lottery were about to be started in Anguilla by the Attorney General's Chambers;
  - (b) Eduardo Carty and Yasmin Ludo Cabrera, together with others, are to be arrested as part of a pre planned operation the following day;
  - (c) It is anticipated that charges will be laid against them in these matters and ultimately confiscation sought;
  - (d) If an order is not in place prohibiting them from disposing of their assets it is felt that attempts will be made to dissipate illegal monies obtained from their activities;
  - (e) Profits or even winnings from an illegal lottery are the proceeds of criminal conduct and are subject to money laundering legislation;
  - (f) In November 2008 Yasmin Ludo Cabrera, in a statement to the police in connection with a robbery in which she was the victim, outlined how both herself and Eduardo Carty are involved in running an illegal lottery as a business;
  - (g) Production Orders under the Act had been served on financial institutions in this matter and evidence had come to light that, when accounting for substantial

deposits into accounts, Eduardo Carty had admitted running a lottery which is not legal;

- (h) There are grounds for believing that the Defendants had benefited from their criminal conduct;
  - (i) The Defendants are the holders, either separately or jointly with one another, of several bank accounts, which were specifically enumerated, and Eduardo Carty is also the owner of two vehicles;
  - (j) Eduardo Carty and Yasmin Ludo Cabrera have jointly benefited in excess of \$250,000 from criminal conduct.
2. Mr. Marsden stated in his witness statement of 23<sup>rd</sup> December 2008 that:
- (a) Proceedings for offences of money laundering and running an illegal lottery had been started in Anguilla;
  - (b) Eduardo Carty and Yasmin Ludo Cabrera , together with others, were arrested as part of a pre planned operation on 10<sup>th</sup> December 2008;
  - (c) Charges were laid against Eduardo Carty and Yasmin Ludo Cabrera in these matters and ultimately confiscation orders will be sought;
  - (d) If the Order of 9<sup>th</sup> December 2008 is not varied it is felt that efforts will be made by Eduardo Carty to dissipate illegal monies obtained from his activities;
  - (e) On 10<sup>th</sup> December 2008 Eduardo Carty and Yasmin Ludo Cabrera were arrested and later charged with money laundering and using a property for an illegal lottery;
  - (f) Since the arrest of Eduardo Carty and Yasmin Ludo Cabrera and their subsequent release on bail another joint bank account between Eduardo Carty and Jane Carty had been located at the Caribbean Commercial Bank and Yasmin Ludo Cabrera was found to be a signatory to at least one account at that bank.
3. Yasmin Cabrera – the 2<sup>nd</sup> Defendant/Applicant in this matter – in her Affidavit of 30<sup>th</sup> January 2009 stated that she had been advised or informed by her Solicitor and verily believed:

- (a) That the Restraint Order and Variation of Restraint Order made against the Defendants are void and without merit as it was not within the Court's jurisdiction to grant these orders against the Defendants pursuant to the Act;
- (b) When the aforesaid orders were applied for there was material non disclosure by the Prosecution of pertinent facts and had these facts been disclosed to the Court there is a very strong possibility that the Court would not have granted the orders;
- (c) On the evidence before the Court in the application for the Restraint Order it was stated that the Defendants would be charged with the offences of money laundering and running an illegal lottery;
- (d) There is no charge in the Laws of Anguilla of "running an illegal lottery;"
- (e) That on 12<sup>th</sup> December 2008 the 2<sup>nd</sup> Defendant/Applicant was charged with a summary offence of gambling, pursuant to Section 337(1) of the Criminal Code and the 1<sup>st</sup> Defendant/Applicant was charged with that same offence and with concealing or disguising any property that is, or in whole or in part directly or indirectly represents, proceeds of criminal conduct for the purpose of avoiding prosecution for an offence, pursuant to Section 29 (1) (a) of the Act, which offence is triable summarily or on indictment;
- (f) When the Prosecution returned to the Court on 23<sup>rd</sup> December 2008 for the Variation of Restraint Order the Prosecution failed and/or neglected to disclose to the Court that the 2<sup>nd</sup> Defendant was only charged with a summary offence and that neither herself or the 1<sup>st</sup> Defendant were capable of falling under the ambit of the Act because of the offences with which they were charged on 12<sup>th</sup> December 2008;
- (g) Had these facts been disclosed to the Court there is a very strong possibility that the Court would not have granted the Restraint Order and the Variation of Restraint Order, but there is no mention of the change in these circumstances in the supporting evidence to the Court, which evidence would be of material importance to the Court;
- (h) The Prosecution's application for a Restraint Order and a Variation of Restraint Order was improperly before the Court as there was no written application before the Court and the evidence before the Court was by way of witness statement

instead of by way of evidence on oath by affidavit as is the proper course in support of an application to the Court, especially in the case of a Without Notice Application;

- (i) The evidence put before the Court for the granting of the Restraint Order and Variation of Restraint Order, as well as being improper, is also wholly inadequate and inaccurate and there was limited documentation in support of the alleged accusations against the Defendants in the witness statement of Anthony Edward Marsden;
  - (j) As a result of the above stated facts the Court was not clothed with the necessary information needed to exercise its discretion pursuant to Section 16(3) of the Act for the grant of a Restraint Order and Variation of Restraint Order against the Defendants.
4. Ms. Cabrera also stated in her aforesaid Affidavit that the Restraint Order and Variation of Restraint Order are causing incalculable and irreparable harm to the Defendants.
5. Jane Carty – a party to these proceedings originally styled as the 3rd Defendant but now designated as the Third Party – stated in her Affidavit of 30<sup>th</sup> January 2009 that:
- (a) She worked as a housekeeper at Cap Juluca Hotel in Anguilla from 1990 to 2006 and at Sonesta Hotel in the evenings for a period of nine years and saved the bulk of the money that she earned in bank accounts in Anguilla;
  - (b) She gave her son, Eduardo Carty, access to her accounts in order for him to use her monies as collateral for his car business and for him to secure loans with the bank;
  - (c) She was advised or informed and verily believed much of what Ms. Cabrera had been similarly advised or informed, as stated in paragraph 3 above;
  - (d) She was also informed and verily believed that on the evidence before the Court in the application for the Restraint Order it was stated that she would be charged or that she was associated with certain criminal activities, but to date she has not been charged with any offence;

- (e) In the Restraint Order dated 9<sup>th</sup> December 2008 she was named as the 3<sup>rd</sup> Defendant and in the Variation of Restraint Order she was named as a 3<sup>rd</sup> Party, but there was no mention of the change in these circumstances in the supporting evidence to the Court, which evidence would be of material importance to the Court;
- (f) The Restraint Order and the Variation of Restraint Order are causing her incalculable and irreparable harm.

## THE LAW

The Prosecutor/Respondent applied for and obtained the Restraint Order made on the 9<sup>th</sup> day of December 2008 and the Variation of Restraint Order made on the 23<sup>rd</sup> day of December 2008 pursuant to Sections 16 and 17 of the Act.

Section 17(1) of the Act provides as follows: "*The High Court may by order prohibit any person from dealing with any realizable property, subject to such conditions and exceptions as may be specified in the order.*"

Section 16 of the Act provides for the circumstances under which the Court can make such an order and, in particular, subsection (3) states that the Court can exercise this power where: "*(a) the High Court is satisfied that a person is to be charged (whether by the laying of an information or otherwise) with an offence....*"

Section 17(6)(a) of the Act provides that a restraint order, once made, may be varied in relation to any property.

Having regard therefore to the information provided to the Court to the effect that Eduardo Carty and Yasmin Ludo Cabrera were to be arrested the following day and charged with offences of money laundering and running an illegal lottery and that confiscation will be sought as a result, and having regard to the fact that the Act makes provision for various money laundering offences and the Criminal Code, Revised Statutes of Anguilla, Chapter C140 (the Code) makes provision for

offences relating to the holding of an unauthorized lottery, the Court then had the power, under Section 17(1) and 16(3)(a) of the Act, to make the Restraint Order of 9<sup>th</sup> December 2008 and to vary it under Section 17(6)(a) of the Act .

The indication by Counsel for the Applicants that there is no charge under the Laws of Anguilla which speaks to “running an illegal lottery” and that therefore an intention expressed to charge the Defendants for such an offence might potentially vitiate a Restraint Order made on the basis of this expressed intention is better categorized as a curious suggestion rather than as a serious submission by Learned Counsel and will be so treated by this Court.

Learned Counsel's submissions though on the sustainability of the Restraint Order and Variation of Restraint Order in light of various provisions of the Act and the Code are serious and substantial submissions. To these submissions the Court now turns.

Learned Counsel submits that the Restraint Order and consequently the Variation of Restraint Order against Jane Carty cannot stand because she has not been charged with any offence whatsoever. Learned Counsel therefore submits that, in accordance with Section 16(5) of the Act, the orders made against her must be discharged.

Learned Counsel for the Prosecutor/Respondent was not really able to come up with a cogent and credible response to this submission and she ended up conceding that there was no charge now nor was any charge contemplated against Ms. Carty and that Ms. Carty was only named in the proceedings because of the presence of her name on a joint account or accounts with her son, Eduardo Carty.

Surely this cannot be a basis for instituting proceedings against Ms. Carty and getting a Restraint Order against her tainting if not painting her with a brush of criminality. In accordance with Section 16(5) of the Act, and having regard to the fact that no proceedings in respect of any offence have been instituted or are even contemplated against Ms. Carty, the Restraint Order and Variation of Restraint Order against Jane Carty are hereby discharged.

Counsel for the Applicants also submits that the Restraint Order and the Variation of Restraint Order against Yasmin Ludo Cabrera cannot stand because although a charge was proffered against her, the charge does not come within the meaning of offence in the Act. This submission is supported by a reference to Section 1 of the Act wherein offence is defined as meaning “an offence, other than a drug trafficking offence, that is or may be proceeded with by indictment;” it is also supported by Section 8 of the Code which provides, in effect, that for an offence to be proceeded with by indictment it must carry a maximum term of imprisonment of more than 2 years; and by Section 337(1) of the Code, under which Ms. Cabrera was charged, which provides for a maximum term of imprisonment of 1 year. So, in effect, Counsel submits, like in the case of Jane Carty, Ms. Cabrera has not been charged with any “offence.”

In response to this submission, Learned Counsel for the Prosecutor/Respondent offered that not charging Ms. Cabrera for an offence as defined in the Act was an error on the part of the investigating team and Ms. Cabrera will be charged with “the money laundering offence.” Counsel also suggested that the two months that had elapsed between the making of the Restraint Order (9<sup>th</sup> December 2008) and the date of the hearing of the application (10<sup>th</sup> February 2009) may not be a reasonable time as contemplated by Section 16(5) of the Act.

This Court remains unconvinced by the declarations from the bar table made by Learned Counsel for the Prosecutor/Respondent to the effect that it was an error on the part of the investigating team not to have charged Ms. Cabrera with an offence as defined in the Act and that she will be charged with a money laundering offence. And the Court is unconvinced both as to the propriety of the declarations made by Counsel with no evidential basis and as to the materiality of the declarations made in altering the Court's view of the sustainability of the Restraint Order and Variation of Restraint Order against Ms. Cabrera.

The Prosecutor/Respondent brought the proceedings for the Restraint Order on an ex parte motion without notice urging the Court to grant the order because, as of the following day, arrests were being made and charges were being laid against the Defendants in respect of certain identified breaches of the law. The Court was so moved and granted the orders requested and further extended them by a Variation of Restraint Order, by the time of application for which it was

presented to the Court that the arrests had been made and the charges had been laid. It is inappropriate, to put it mildly, for the Court to be told over two months after it was so urged, and when the Defendants are now seeking to discharge the orders, that the charges that should have been laid against one of the parties to justify the making of the Restraint Order were not laid in error and that they will be laid.

In any event, it is the Court's view that the language of reasonable time in Section 16(5) of the Act, which language Learned Counsel for the Prosecutor/Respondent sought to rely on, is referable to "an application of a kind mentioned in paragraph (1)(b)" of Section 16 of the Act, which has no relevance to the current proceedings. And, if the Court is wrong in this view, it would nonetheless be the Court's view that, in the circumstances of this case, two months from the time of the application for and the making of the Variation Order is outside of the time that the Court would consider reasonable to be now seeking to charge Ms. Cabrera.

The Court therefore holds that, in accordance with Section 16(5) of the Act, and having regard to the fact that no proceedings in respect of any offence as defined in the Act have been instituted against Ms. Cabrera, the Restraint Order and Variation of Restraint Order against Jasmin Ludo Cabrera are hereby discharged.

Counsel for the Applicants submits further that the Restraint Order and Variation of Restraint Order against Eduardo Carty cannot stand because, although charges were proffered against him, one of which – the money laundering charge - is triable either summarily or on indictment, the charge which may be proceeded with by indictment is not – as Counsel puts it – "a stand alone charge" and depends for its sustenance on there being another charge proffered together with it, and this other charge, Counsel contends, must be for an offence as defined in the Act. In other words, the other charge which must be proffered together with the money laundering charge must be for an offence triable on indictment, because the money laundering charge is based on a person concealing or disguising property that is or represents the proceeds of criminal conduct. And "criminal conduct" is itself defined in the Act as "an act or omission that constitutes an offence," with the definition of offence in the Act requiring a charge that can be proceeded with on indictment. Since the only other charge proffered against Mr. Carty apart from the parasitic money

laundering one is a charge triable summarily only, then Counsel submits that the requirements of the Act are not thereby satisfied and the Restraint Order and Variation of Restraint Order against Mr. Carty must also be discharged.

Learned Counsel for the Prosecutor/Respondent rebutted that the money laundering charge is a stand alone charge and she indicated that there are many authorities. She said that off the top of her head she could remember Regina v Anwar, which she said was the latest one that came out on money laundering from the United Kingdom back in July of last year. She said also that the relevant provision of the UK statute is similarly drafted to the equivalent provision of the Anguillan statute.

When pressed for the authorities to which she referred, Counsel requested a short adjournment of the matter so that, in her words, "I can do some research and bring the cases where it states that it is a stand alone offence." The Court acceded to Counsel's request and the matter was adjourned to Thursday 12<sup>th</sup> February 2009 at 1.30 p.m. to allow Counsel a full two days to produce the authorities on this issue. When the matter resumed on the said Thursday 12<sup>th</sup> February, however, Learned Counsel for the Prosecutor/Respondent addressed the Court only to say that: "The Crown is unable to assist the Court further in this matter and the matter is left in the Court's hands."

The Court is therefore left on its own to deconstruct the edifice constructed by Counsel for the Applicants.

The Court's view is that, unlike the situation of his mother, charges have been laid against Eduardo Carty following the making of the Restraint Order and Variation of Restraint Order against him. One of the charges laid against Mr. Carty is for an offence as defined in the Act. The offence with which Mr. Carty has been charged is consistent with the information provided to the Court to satisfy it that a Restraint Order should be made (and later varied) against Mr. Carty. The fact that the offence (as defined in the Act) with which Mr. Carty has been charged is of a parasitic nature requiring it to derive sustenance from another offence before he can be convicted of the first offence, and the fact that there is at this time no other offence (as defined in the Act) with which Mr. Carty is charged, will present a difficulty for the court hearing the charge or charges against Mr.

Carty but does not present a difficulty for this Court hearing an application by Mr. Carty to discharge the Restraint Order and Variation of Restraint Order against him, because this Court cannot hold on the facts before it that proceedings in respect of the offence against Mr. Carty on the basis of which the Court was moved to grant the Restraint Order and Variation of Restraint Order have not been instituted.

This being the case, this Court holds that, notwithstanding the legal conundrum which the Prosecutor/Respondent will have to face in prosecuting Mr. Carty for the money laundering offence, the Restraint Order and Variation of Restraint Order against Mr. Eduardo Carty will stand, at least will withstand this particular challenge to it.

But that is not the end of the matter. There is also the submission by Counsel for the Applicants that material non disclosure by the Prosecutor/Respondent in the application for the Restraint Order and Variation of Restraint Order granted against the Defendants vitiated the aforesaid orders.

Learned Counsel identified the instances of non disclosure by the Prosecutor/Respondent by stating that the following facts and matters were all within the knowledge of the Prosecutor/Respondent and were material but were not disclosed:

1. That Jane Carty was not charged;
2. Whether the Restraint Order was served on Jane Carty;
3. That Jane Carty was first a Defendant and then a Third Party in the proceedings;
4. That Yasmin Cabrera was not charged with an indictable offence;
5. That Yasmin Cabrera was not charged with money laundering, as might have been suggested by paragraph 15 of the witness statement of Anthony Marsden dated 23<sup>rd</sup> December 2008;
6. That Eduardo Carty was not charged with an indictable offence;
7. That the charges against Yasmin Cabrera and Eduardo Carty were not exhibited to the Court on 23<sup>rd</sup> December 2008;
8. That there is no charge under the Laws of Anguilla of "running an illegal lottery;" and

9. That the documentation allegedly recovered pursuant to production orders referred to in certain identified paragraphs of the witness statements of Anthony Marsden was not submitted to the Court.

Learned Counsel cited the following cases in support of her submission:

1. *Bank Mellat v Nikpour* [1985] Com. L. R. 158;
2. *Columbia Picture Industries Inc. v Robinson* [1987] Ch. 38;
3. *Brink's Mat Ltd. v Elcombe* [1988] 1 W.L.R. 1350;
4. *R. v Kensington Income Tax Commissioners. Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486; and
5. *International Bank & Trust Corporation Ltd. v Joao Luis Perestrello*, the citation for which was never provided and so I never located or read it.

In response to this submission, Learned Counsel for the Prosecutor/Respondent contended that the Crown had complied with the overriding duty to give full and frank disclosure to the Court and she cited the case of *Jennings v Crown Prosecution Service* [2006] 1 W.L.R. 182 which she said explained the duty of the Crown in making an ex parte application to make disclosure of material facts to the Court. She further contended that if the Court is of the view that the Crown failed to discharge a duty in seeking the Restraint Order and Variation of Restraint Order then the Court is asked to consider that the Crown acted in the public interest in seeking the Restraint Order and Variation of Restraint Order and the orders should not therefore be discharged. She also indicated her reliance on *Jennings v Crown Prosecution Service* (earlier cited) in support of this position.

In considering the submissions and authorities on this issue, the Court noted that most of the instances of non disclosure identified by Counsel for the Applicants as vitiating the Restraint Order and Variation of Restraint Order were facts which could only have come to the knowledge of the Prosecutor/Respondent after the Restraint Order had been made. In fact, these "facts" would not have been in existence until after the Restraint Order had been made. The two exceptions to this being the fact that there is no charge under the Laws of Anguilla of "running an illegal lottery" and

the fact that documentation allegedly recovered pursuant to production orders referred to in the witness statements of Anthony Edward Marsden were not submitted to the Court.

But neither of these two facts appears to the Court to be very weighty and to meet the criteria laid down in the cases cited for vitiating an order of the Court. The first fact really borders on an issue of mode of expression rather than motive of deception, because whereas it is a fact that a person cannot be charged under the Laws of Anguilla with an offence specifically called "running an illegal lottery," a person can be and the Defendants were charged with an offence relating to the running of a lottery, which lottery was not legally authorized and was therefore illegal. This therefore cannot constitute material non disclosure. The second fact also does not rise to the level of material non disclosure, because the paragraphs in the witness statements of Mr. Marsden referred to by Learned Counsel in her submission appear to disclose to the Court the findings from the production orders obtained by the Prosecutor/Respondent and there is no evidence to suggest that the findings as disclosed were in any way inadequate or inaccurate. The fact that documentation was not actually submitted to the Court containing the information disclosed to the Court does not, in this Court's view, constitute material non disclosure.

This then leaves us with the information which would have come to the knowledge of the Prosecutor/Respondent after the making of the Restraint Order but before the making of the Variation of Restraint Order. And the questions which arise are, firstly, whether the knowledge of that information would have fastened the Prosecutor/Respondent with a duty, in making the application for the Variation of Restraint Order, to inform the Court of these facts and, secondly, whether, if she failed to do so, this would affect the Restraint Order previously granted or only the Variation of Restraint Order.

The cases to which the Court have been referred do not assist with an answer to the question as to whether, in making an application for a variation of an injunctive-type order granted by the Court, the party making the application ought then to disclose to the Court material since coming to its attention which might have had a bearing on the grant by the Court of the order in the first place and which might bear on its grant of the variation of the order being sought. But the Court takes the view, even in the absence of specific authority, that if this information relates to the application

for variation, it ought to be disclosed at the stage of that application and that further, even if it does not relate to the application for variation, but might have impacted on the determination of the Court in the grant of the Restraint Order in the first place, then it ought to be disclosed to the Court when once the party is before the Court in connection with the case.

Having regard to the view taken by the Court on this issue, the Court would be minded to discharge the Restraint Order and Variation of Restraint Order against both Jane Carty and Yasmin Ludo Cabrera because there were, in relation to them, material non disclosures of the fact that Jane Carty was not charged at all and that Yasmin Ludo Cabrera was not charged with a money laundering offence or any indictable offence whatsoever. However, in relation to Eduardo Carty, who is the real focus of the Court's concern at this juncture, having regard to determinations already made with respect to Ms. Carty and Ms. Cabrera, the Court does not find that there were any material non disclosures in relation to him. The issues of there being no charge under the Laws of Anguilla of "running an illegal lottery" and the non submission of documentation derived from production orders have already been addressed. The remaining "facts" concerning Eduardo Carty are therefore the fact that he was not charged with an indictable offence, and this Court has determined that he has been charged with an indictable offence, and the fact that the charges laid against him were not exhibited to the Court on 23<sup>rd</sup> December 2008, which the Court considers cannot be stretched even, to constitute a material non disclosure.

Now it is possible to take the view that once having determined that there were material non disclosures by the Prosecutor/Respondent in these proceedings that this would dirty the hands of the Prosecutor/Respondent to an extent that any equitable relief granted to her should be discharged. The Court does not however take this view because there is no evidence in this case that such material non disclosure as there was resulted from a deliberate attempt by the Prosecutor/Respondent to embark on a course of either suppression of material information or deliberate deception of the Court so as to justify the Court in stripping the Prosecutor/Respondent of any relief granted by the Court, such as the English courts were minded to do in the cases of *Bank Mellat v Nikpour*, *Columbia Picture Industries Inc. v Robinson* and *R v Kensington Income Tax Commissioners*. Regard too should be had to the fact that such relief as remains after the determinations already made in relation to Ms. Carty and Ms. Cabrera could not be said to have

been obtained by virtue of the non disclosure, because if the Court had before it on 23rd December 2008 all of the information now before the Court, the Court would likely have discharged the Restraint Order against Jane Carty and Yasmin Ludo Cabrera, while maintaining the Restraint Order against Eduardo Carty. This case partakes more of the nature of the English Court of Appeal cases of Brink's Mat Ltd. v Elcombe and Jennings v Crown Prosecution Service than it does of Bank Mellat, Columbia Picture Industries Inc. and R v Kensington ITC.

Before concluding, it should be settled that the Court does not regard the absence of a written application to the Court and an affidavit in support thereof for the grant of the Restraint Order or the Variation of Restraint Order to be a defect, because it was always open to the Court to dispense with the requirement of a written application and an affidavit in support, which the Court obviously did when it heard and granted the applications by the Prosecutor/Respondent.

## DECISION

This Court accordingly holds that –

1. The Restraint Order dated 9<sup>th</sup> December 2008 and the Variation of Restraint Order dated 23<sup>rd</sup> December 2008 are hereby discharged against the 2<sup>nd</sup> Defendant/Applicant, Yasmin Ludo Cabrera, and the Third Party/Applicant, Jane Carty.
2. The Restraint Order dated 9<sup>th</sup> December 2008 and the Variation of Restraint Order dated 23<sup>rd</sup> December 2008 are hereby continued against the 1<sup>st</sup> Defendant/Applicant, Eduardo Carty.
3. The Prosecutor/Respondent shall pay the costs of the 2<sup>nd</sup> Defendant/Applicant and the Third Party/Applicant in these proceedings, such costs to be agreed or otherwise assessed at two-thirds of Ms. Fontaine's costs for the making and hearing of the Notice of Application.

MARIO MICHEL  
High Court Judge (Ag.)