EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2017/0003

BETWEEN:

THE SUPERVISORY AUTHORITY

Appellant

and

[1] CRESSWELL OVERSEAS S.A.
[2] MEINL BANK (ANTIGUA) LTD.

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Reginald Armour SC, appearing with him Mr. Anthony Armstrong and Mr. Raphael Ajodhia for the Appellant
Mr. Frank E. Walwyn, appearing with him Ms. Jacqueline Walwyn for the First Respondent
Mr. Kelvin John, appearing with him Ms. Lisa John-Weste and Mr. Loy Weste for the Second Respondent

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2018: February 13;
2019: April 10.

Civil Appeal – Mutual Legal Assistance Request – Mutual Legal Assistance in Criminal Matters Act – Money Laundering Act – Black Swan Principle – Inherent jurisdiction – Jurisdiction pursuant to international treaties – Ratification of Treaties Act – Jurisdiction to register foreign criminal restraint orders – Whether judge had jurisdiction to register a Brazilian criminal restraint order

The Supervisory Authority ("the Authority") is a statutory body established under the Money Laundering Prevention Act, 1996 ("the MLPA"). In accordance with a request from the Brazilian Government, the Authority applied to have the order of a Brazilian judge ("the Moro Order") registered and given full legal effect in Antigua and Barbuda. The Moro Order

was essentially a worldwide freezing order which sought to freeze the assets of several persons and entities, pursuant to a money laundering investigation in Brazil.

On 22nd July 2016, Justice Keith Thom ordered that the Moro Order be registered in Antigua and Barbuda in accordance with section 27 of the Mutual Assistance in Criminal Matters Act, 1993 ("MACMA") and given full force and effect with respect to a number of accounts identified in the Authority's application, including the accounts of Cresswell Overseas S.A. ("Cresswell") which were held at Meinl Bank (Antigua) Ltd ("Meinl Bank"). Cresswell applied to have the registration order set aside. On 30th January 2017, the application was heard by Thom J, whereupon he made an order setting aside the registration order made by him on 22nd July 2016. In his written judgment on the set aside application, Thom J stated that he did not have jurisdiction to register the Moro Order; that the Authority failed to make full and frank disclosure in its application for registration; that the Mutual Assistance in Criminal Matters (Brazil Order) Regulations 2016 ("the 2016 Regulations"), which were made in support of the registration order, were *ad hominem*, retrospective and invalid; and ultimately, that the registration order was to be set aside and the monies held at Meinl Bank belonging to Cresswell were to be forthwith transferred pursuant to Cresswell's instructions.

Being dissatisfied with the judge's decision to set aside the registration order, the Authority appealed. The issue for the Court's determination was whether the judge had jurisdiction to register the Moro Order. The court's jurisdiction was asserted by the Authority, and challenged by Cresswell, under four heads: (1) jurisdiction under MACMA; (2) jurisdiction under the MLPA; (3) jurisdiction under the United Nations Convention Against Transnational Organised Crime, the Inter-American Convention for Mutual Legal Assistance in Criminal Matters, and the Inter-American Convention Against Corruption ("the treaties"); and (4) jurisdiction under the principle in [the case of] Black Swan Investment I.S.A v Harvest View Limited et al ("the Black Swan Principle").

Held: dismissing the appeal and awarding costs to Cresswell, that:

1. The registration of foreign criminal restraint orders, like the Moro Order, is governed by section 27 of MACMA. It is clear that section 27, without more, does not apply to the registration of orders from non-Commonwealth countries. Brazil is not a Commonwealth country and as such, the very clear wording of section 27 automatically precludes its application to Brazilian orders. Accordingly, the judge was correct in concluding that he did not have the jurisdiction to register the Moro Order pursuant to section 27, on the basis that the section does not apply to Brazilian orders.

   Section 27 of the Mutual Assistance in Criminal Matters Act 1993, Act No. 2 of 1993 considered.

2. The existence of regulations which satisfy section 30 of MACMA, or some other legislation having the effect of section 30 regulations, is a necessary pre-condition to a registration order being made under section 27 in respect of orders from a non-Commonwealth country. Without any regulations or some other legislation,

section 27 does not vest the court with jurisdiction to register such orders. The 2016 Regulations were made almost five months after the judge's registration of the Moro Order. As a result, the 2016 Regulations could not have given the court jurisdiction to register the Moro Order, and in the absence of any legislation having the same effect, the 22nd July registration order was made without jurisdiction and was without any legal effect.

Section 30 of the Mutual Assistance in Criminal Matters Act, Act No.2 of 1993 considered; The Attorney General v Samuel Knowles Jnr and another [2017] UKPC 5 distinguished.

3. Section 6 of MACMA recognises and preserves the use or development of existing or future forms of co-operation in criminal matters, in the context of two categories of relationships: (i) Antigua and Barbuda (on the one hand) and any Commonwealth country (on the other hand); and (ii) Antigua and Barbuda or any enforcement agencies or prosecuting authorities in Antigua and Barbuda (on the one hand) and, the International Criminal Police Organization ("INTERPOL") or any such agencies or authorities outside of Antigua and Barbuda (on the other hand).The request from the government of Brazil does not fall within either of the categories of relationships addressed in section 6. As such, section 6 does not enlarge the court's jurisdiction to register the Moro Order, or to consider alternative methods of registration.

   Section 6 of the Mutual Assistance in Criminal Matters Act 1993, Act No. 2 of 1993 considered; Quazi v Quazi [1979] 3 WLR 833 applied; DPP v Jordan [1977] AC 699 applied.

4. Sections 19 and 19A of the MLPA are concerned with the court's power to grant an injunction in respect of the property of a person who has been charged or convicted of a money laundering offence. It is clear that neither section 19 nor 19A was intended to, or does in fact, clothe the court with jurisdiction to make a registration order. As such, the Authority is not correct in its assertion that section 19A empowered the judge to grant a registration order.

   Sections 19 and 19A of the Money Laundering (Prevention) Act 1996, Act No.9 of 1996 considered.

5. It is true that section 23 of the MLPA is concerned with the provision of legal assistance in criminal cases, particularly money laundering cases. However, in so far as section 23 refers to the "limits of their respective legal systems", the section intends to defer to the laws of Antigua and Barbuda and the laws of the relevant foreign state, when it is that legal assistance falls to be provided. In the context of this appeal, section 23 of the MLPA therefore redirects one's focus to the rules set out in Part 72 of the CPR and sections 27 and 30 of MACMA, which regulate the registration of orders like the Moro Order. Given the earlier finding that the requirements of sections 27 and 30 of MACMA were not satisfied, it is not possible for the Authority to obtain a registration order on the basis of section 23 of the

MLPA. Accordingly, the judge did not err in failing to grant the registration order on the basis of that section.

Section 23 of the Money Laundering Prevention Act 1996, Act No. 9 of 1996 considered.

6. In order for the court to rely on any of the treaties cited for jurisdiction to register the Moro Order, the treaties would have to be ratified in accordance with section 3(3) of the Ratification of Treaties Act and have become part of the laws of Antigua and Barbuda. There is no evidence that the treaties relied upon were ratified in accordance with section 3(3). As such, the treaties would not form part of the laws of Antigua and Barbuda, and could not confer jurisdiction on the court to register the Moro Order. In any event, the treaties themselves, in almost identical language, defer to the domestic laws of signatory states on the processing of mutual legal assistance requests. The ineluctable conclusion therefore is that these treaties did not provide any basis upon which the Moro Order could have been registered.

   Section 3 of the Ratification of Treaties Act CAP 364, Revised Laws of Antigua and Barbuda 1992 applied; Resolution Ratifying United Nations Convention Against Transnational Organized Crime S.I. No.54 of 2002 considered; Resolution of the House of Representatives Ratifying the Inter-American Convention on Mutual Assistance on Criminal Matters S.I. No.15 of 2003 considered; Resolution Ratifying the Inter-American Convention Against Corruption (S.I. No. 16 of 2003) considered.

7. The Black Swan Principle appears to invoke the court's inherent jurisdiction to give ancillary relief in support of civil proceedings in another jurisdiction in which a money judgment is given or is expected to be given, and not in support of criminal or quasi-criminal proceedings like the money laundering proceedings which gave rise to the Moro Order. Additionally, a general common law principle, like the Black Swan Principle, which seeks to invoke the court's inherent jurisdiction, is not intended to circumvent or derogate from statutory regimes that operate toward the same end. As a result, the Black Swan Principle would be precluded from application by virtue of the detailed process for the registration of foreign orders which is set out in sections 27 and 30 of MACMA, and which governs the registration of orders like the Moro Order. For these reasons, the Black Swan Principle could not be utilised to register the Moro Order.

   Health Service Executive of Ireland v Z and others [2016] 3 WLR 791 applied; Westminster City Council v C and others [2009] 2 WLR 185 applied; Black Swan Investment I.S.A v Harvest View Limited et al BVIHCV2009/0399 (delivered 23rd March 2010, unreported) considered.

[1] MICHEL JA: This is an appeal against an order made by Thom J in the High Court in Antigua and Barbuda on 30th January 2017 setting aside a previous order made by him on 22nd July 2016.

Background

[2] The Supervisory Authority ("the Authority") is a statutory body established under section 10 of the Money Laundering (Prevention) Act 1996[1] ("the MLPA") to supervise financial institutions in Antigua and Barbuda in accordance with the Act. In June of 2016, the Authority received a request from the Government of Brazil to have the order of a Brazilian judge, Judge Sergio Fernando Moro, dated 22nd June 2016 ("the Moro Order") registered and given full legal effect in Antigua and Barbuda. The Moro Order was essentially a worldwide freezing order which sought to freeze the assets of several persons and entities, which were alleged to have been used in connection with a widespread corruption scandal in Brazil, referred to as the "Operation Car Wash".

[3] Operation Car Wash involved a group of companies called the Odebrecht Group ("Odebrecht"). Odebrecht is a global infrastructure, construction and engineering conglomerate based in Brazil. Odebrecht was alleged to have paid bribes and kickbacks to Brazilian government officials to secure major construction contracts in Brazil. The officers at Odebrecht were alleged to have used foreign accounts held in the names of offshore companies to facilitate the payment of its bribes and kickbacks. The government of Brazil became aware of the corruption by way of an informant, who identified a number of offshore companies whose accounts were used for the payment of bribes by Odebrecht. Brazilian federal prosecutors caused an investigation to be launched into the allegations and the matter was brought before the Federal Court in Brazil under Brazilian money laundering prevention legislation. Among other things, Judge Moro of the Brazilian Federal Court found that there was probable cause to believe that a number of bank

[1] Act No. 9 of 1996.

accounts maintained by the offshore companies identified by the informant were used by Odebrecht to facilitate "surreptitious payments, including [the] transfer [of] kickbacks in order to corrupt and bribe officials". As such, Judge Moro made an order requesting that the bank accounts identified be frozen, pending the determination of investigations into the purpose for which funds were being transferred out of the accounts.

[4] Among the companies whose assets were intended to be frozen by the Moro Order was Cresswell Overseas S.A. ("Cresswell"). Cresswell is a company incorporated under the laws of Panama which maintained a bank account at Meinl Bank (Antigua) Ltd. ("Meinl Bank") during the currency of the proceedings below.

[5] In accordance with the Brazilian Government's request, the Authority filed an *ex parte* application, by way of claim form with affidavit in support, to have the Moro Order registered and given full legal effect in Antigua and Barbuda. The application was made on the ground that several bank accounts held at Meinl Bank, including the account maintained by Cresswell, were used for, or in connection with alleged bribery, fraud, corruption or money laundering offences in Brazil. On 22nd July 2016, Thom J ordered that the Moro Order be registered in Antigua and Barbuda in accordance with section 27 of the Mutual Assistance in Criminal Matters Act 1993[2] ("MACMA") and given full force and effect with respect to all the accounts identified in the Authority's application. Thom J's order of 22nd July 2016 ("the registration order") was made in the following terms:

> "(1) That the Order made on 22nd June 2016 by Judge Sergio Fernando Moro in the 13th Federal Court of Curibita in the Jurisdiction of Parana in Brazil and cited as DATA No.5029814-13.2016.4.04.7000/PR, BE REGISTERED in the High Court of Justice and given full force and effect with respect to all accounts and funds frozen thereby.
>
> (2) The frozen accounts that are subject to his Order are the accounts at Meinl Bank (Antigua) Limited set out in the Schedule hereto.

[2] Act No. 2 of 1993.

(3) The Defendant is prohibited from dealing with the frozen accounts, and the assets and funds are not to be disposed of, or otherwise dealt with by any person until further order of this Court.

(4) Service: A copy of this Order shall be served on the Defendant. The Order shall also be published in the Government Gazette.

(5) The Defendant and persons affected by this order are at liberty to apply upon giving notice to the Claimant."

[6] Being one of the depositors at Meinl Bank whose accounts were affected by the registration order, on 14th November 2016 Cresswell applied to have the registration order set aside (or varied so as to permit it to settle legal costs it incurred in contesting the money laundering allegations in Brazil). The set aside application was made principally on the grounds that the court did not have jurisdiction to register the Moro Order pursuant to section 27 of MACMA, and that the Authority failed to make full and frank disclosure in its application to register the Moro Order.

[7] The set aside application was heard by Thom J on 30th January 2017, whereupon he made an order (the set aside order) setting aside the registration order made by him on 22nd July 2016. The set aside order made on 30th January 2017 was entered on 31st March 2017, but the order entered referred to submissions made by the parties after 30th January 2017 with respect to the form of the set aside order and an application for a stay of the set aside order.

[8] On 21st April 2017, Thom J delivered a written judgment on the set aside application, wherein he stated that he did not have jurisdiction to register the Moro Order; that the Authority failed to make full and frank disclosure in its application for registration; that the Mutual Assistance in Criminal Matters (Brazil Order) Regulations 2016[3] ("the 2016 Regulations"), which were made in support of the registration order, were *ad hominem*, retrospective and invalid; and ultimately, that the registration order was to be set aside and the monies held at Meinl Bank

[3] S.I. No. 55 of 2016.

belonging to Cresswell were to be forthwith transferred pursuant to Cresswell's instructions.

[9] The written judgment dated 21st April 2017 is a judgment on the set aside application, an order on which application was made on 30th January 2017 and entered on 31st March 2017. Notably though, there is no reference made in the written judgment to the order made on 30th January and entered on 31st March 2017. Notwithstanding, the written judgment can only be the written reasons for the order made by Thom J on 30th January 2017, which order was appealed on 14th February 2017.

The Appeal

[10] Being dissatisfied with the judge's decision to set aside the registration order, on 14th February 2017 the Authority appealed the set aside order on 18 grounds of appeal. Skeleton arguments in support of the appeal (titled "Legal Submissions of the Appellant") were filed by the Authority on 27th July 2017. In the skeleton arguments, the 18 grounds of appeal were refashioned into 8 grounds of appeal, as follows:

(1) The learned judge erred in law when he found that the court had no jurisdiction to register the Brazilian freeze order because there was no bilateral treaty for Antigua and Barbuda to provide mutual legal assistance to Brazil.

(2) The learned judge erred in law when he failed to give adequate consideration to the fact that section 23 of the MLPA empowers the Authority to execute MLAT Requests based on bilateral or multilateral treaties.

(3) The learned judge erred in law when he found that regulations under MACMA were the only means of effecting the registration of a foreign order pursuant to section 27 of the Act.

(4) The learned judge wrongly found that the 2016 Regulations were aimed at the Cresswell and breached the separation of powers.

(5) The learned judge failed to give proper consideration to the Attorney General's Certificate under section 31 of MACMA.

(6) The learned judge erred in law when he held that there was a lack of full and frank disclosure by the Authority.

(7) Cresswell did not come to the court with clean hands.

(8) The learned judge failed to give due consideration to the fact that there were reasonable grounds to suspect that the money in Cresswell's accounts were the proceeds of crime.

[11] On 24th August 2017, Cresswell filed skeleton arguments in opposition to the appeal. In its skeleton arguments, Cresswell challenges the Authority's alteration of its grounds of appeal (by refashioning them in their skeleton arguments) without the permission of the Court and submitted that 4 of the 8 refashioned grounds of appeal should be dismissed on the basis that they were "not properly pleaded in the notice of appeal". Cresswell proceeded, however, to respond to the 8 refashioned grounds of appeal contained in the Authority's skeleton arguments and not to the 18 grounds of appeal contained in the notice of appeal.

[12] Of note also is the fact that the Authority then proceeded at the actual hearing of the appeal to canvass issues in its oral arguments which were not mentioned in its notice of appeal or foreshadowed in its skeleton arguments.

[13] Rule 62.4(8) of the Civil Procedure Rules 2000 ("CPR") prohibits an appellant from relying on any ground of appeal not mentioned in the notice of appeal without the permission of the Court. This prohibition would certainly extend, and apply

even more strongly, to arguments not foreshadowed even in the skeleton arguments in support of the appeal.

[14] Rule 62.4(8) is predicated on fairness to the respondent to the appeal in that, a respondent must, in advance of the hearing of the appeal, know the case which he is being called to answer. On a strict application of rule 62.4(8), therefore, the issues and arguments not mentioned in the notice of appeal or foreshadowed in the skeleton arguments in support of the appeal should not be considered, since the permission of the Court was neither sought nor granted. Some of the arguments raised for the first time at the hearing of the appeal, in relation to the registration of foreign orders pertaining to criminal matters, do however raise some significant issues which do not appear to have been previously addressed by this Court and can be addressed in this judgment without unfairness to Cresswell or Meinl Bank. These 'new' arguments will accordingly be addressed in dealing with the issues raised in the notice of appeal and/or the skeleton arguments.

[15] Notwithstanding the Authority's 18 grounds of appeal contained in the notice of appeal, and its refashioned 8 grounds of appeal contained in the skeleton arguments, and notwithstanding the Authority's 44-page skeleton arguments in support of the appeal and Cresswell's nearly 30-page response to it, the overarching issue in this appeal (as can be gleaned from grounds (1) to (5) of the Authority's refashioned grounds of appeal) is whether the judge had jurisdiction to order the registration of the Moro Order. If he did not have this jurisdiction, then his order setting aside the registration order must be upheld and the appeal dismissed. If he did have jurisdiction, then there is a need to determine the issues that arise from the remaining 3 refashioned grounds of appeal, which are - (1) whether the registration order was made without full and frank disclosure; (2) did Cresswell come to the court with clean hands; and (3) was the judge wrong to set aside his registration of the Moro Order in light of evidence before him that Cresswell's accounts possibly contained the proceeds of crime.

[16] I will now proceed to address the issue of the court's jurisdiction under the four heads arising from the arguments advanced by both the Authority and Cresswell, as follows:

(1) jurisdiction under MACMA;

(2) jurisdiction under the MLPA;

(3) jurisdiction under international treaties; and

(4) jurisdiction under the principle in Black Swan Investment I.S.A v Harvest View Limited et al[4] ("the Black Swan Principle").

Jurisdiction under the Mutual Assistance in Criminal Matters Act, 1993

[17] In relation to MACMA specifically, the Authority contends that: (1) there is no requirement for a bilateral treaty between Antigua and Barbuda and Brazil under the Act; (2) section 30 of the Act is not the only means by which the provisions of MACMA can be made applicable to a non-Commonwealth country; (3) section 6 of MACMA enlarges the court's jurisdiction and permits the judge to consider alternative methods of registering an order from a non-Commonwealth country; (4) MACMA does not prohibit the Attorney General from authorising a capable law enforcement authority from providing the assistance under the Act, as if the registering country were a Commonwealth country; and (5) relying on The Attorney General v Samuel Knowles Jnr and another,[5] that even if the requirements of MACMA were the only means of effecting registration of the Moro Order, the failure to follow the express statutory procedure in MACMA would not be fatal in these circumstances.

[18] Cresswell contends that MACMA is the only enactment that confers jurisdiction on the court to register a foreign restraint or freezing order, but that – in accordance with section 27(1) of the Act – this applies only to orders from Commonwealth countries. Cresswell argues that, in accordance with section 30, the court may register a foreign restraint order from a non-Commonwealth country if there is a

[4] BVIHCV2009/0399 (delivered 23rd March 2010, unreported).
[5] [2017] UKPC 5.

bilateral mutual assistance treaty between Antigua and Barbuda and the non-Commonwealth country. This treaty must, however, be set out in regulations made under MACMA and must expressly make provision for the Act to apply to that non-Commonwealth country. Cresswell submits that the requirements of section 30 were not met in this case, because there was no bilateral mutual legal assistance treaty between Antigua and Brazil and, even if the Inter-American Convention on Mutual Assistance in Criminal Matters was a bilateral mutual legal assistance treaty, as contended by the Authority, no regulations were passed pursuant to section 30 of MACMA to extend the application of the Act to Brazil. Accordingly, Cresswell finds no fault in the judge's conclusion that the court did not have jurisdiction to register the Moro Order, and submits that there is no basis upon which the judge's decision may be faulted.

[19] Additionally, Cresswell contends that the case of The Attorney General v Samuel Knowles Jnr and another is distinguishable from the present case, because: (1) Knowles is based strictly on an interpretation of the Bahamian Proceeds of Crime Act and related delegated legislation, which are not equivalent to sections 27 and 30 of MACMA; (2) Knowles deals with the issue of the evidence required in the presentation of a mutual legal assistance request and not the conferral of jurisdiction on the court for the registration of such an order; and (3) Knowles contains no authority on which the court could rely to circumvent the procedure set out in MACMA in favour of its alleged powers under the MLPA.

[20] The provision of legal assistance by the Government of Antigua and Barbuda to other countries, in the context of criminal investigations and proceedings, is largely governed by MACMA. Legal assistance under MACMA includes, but is not limited to, the provision of support in relation to obtaining evidence, locating or identifying persons of interest, tracing property and the recognition and enforcement (or registration) of orders which pertain to criminal proceedings. The rules which are relevant to the registration of foreign orders in criminal matters are set out in Part

III of MACMA, which is entitled "Requests By Commonwealth Countries to Antigua and Barbuda for Assistance". In particular, section 27 states:

"(1) This section applies where –

(a) an order is made in a Commonwealth country –

(i) confiscating property derived or obtained, directly or indirectly, from the commission of a specified serious offence;

(ii) imposing on the person against whom the order is made pecuniary penalty calculated by reference to the value of property so derived or obtained; or

(iii) restraining dealings with property which is, or is suspected on reasonable grounds of being, property so derived or obtained;

(b) property available for the satisfaction of the order or the pecuniary penalty under the order, or to which the order would apply, as the case may be, is suspected, on reasonable grounds, to be in Antigua and Barbuda,

(c) a request is transmitted requesting that the order concerned be enforced in accordance with the law of Antigua and Barbuda and that, to that end, Antigua and Barbuda give appropriate assistance; and

(d) the request is accepted.

(2) Where this section applies, the Attorney General shall cause an application to be made to the High Court in accordance with the rules of the Supreme Court for the registration of the order concerned.

(3) On application made pursuant to subsection (2) the High Court shall register the order if it is satisfied –

(a) that at the time of registration the order is in force; and

(b) in the case of an order such as is referred to in subsection (1) (a) (ii) –

(i) that the person against whom the order was made appeared in the proceedings or, if he did not do so, that he received notice of the proceedings in sufficient

time to enable him to defend them, or that he had died or absconded before such notice could be given to him; and

(ii) that the order is not subject to appeal." (underlining supplied)

[21] MACMA is admittedly geared towards the provision of legal assistance between Antigua and Barbuda and other Commonwealth countries, in the context of ongoing criminal investigations and proceedings. Section 5(1) of MACMA is evidence of this, and states: "Subject to subsection (2), this Act, other than Part IV, shall apply in relation to all Commonwealth Countries." The cross-applicability of MACMA to the provision of legal assistance by Antigua and Barbuda to non-Commonwealth countries is provided for under Part IV of MACMA, which is entitled "Application of Act to Countries other than Commonwealth Countries". In particular, section 30 of MACMA states:

"(1) The regulations may make provision to give effect to a treaty, set out in the regulations, for bilateral mutual assistance in criminal matters between Antigua and Barbuda and a country specified in the regulations.

(2) For that purpose, the regulations may, in particular –

(a) direct that this Act shall apply in relation to the country so specified as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed; or

(b) extend, as provided in section 36 (2), the application of any other Act, in relation to the country so specified,

and this Act or, as the case may be, the other Act shall apply accordingly."

[22] At least two observations may be made from the wording of section 27. First, it is evident that in order for the section to be properly engaged, all the conditions set out therein must be satisfied. In other words, the conditions in section 27 must be satisfied conjunctively in order for the court to register an order under that section. Accordingly, if one condition under section 27 is not satisfied, the section cannot

be properly engaged or relied upon for the registration of an order. Second, the category of orders which may be registered under section 27 is limited in so far as the orders must be "made in a Commonwealth country" and must either confiscate property, impose a pecuniary penalty or restrain dealings with property.

[23] It is clear that section 27 of MACMA, without more, does not apply to the registration of Brazilian orders. Brazil is not a Commonwealth country as defined in section 3 of MACMA[6] and, as such, the very clear wording of section 27 automatically precludes it from applying to Brazilian orders. Accordingly, the learned judge was correct in concluding that he did not have jurisdiction to register the Moro Order pursuant to section 27 on the basis that the section does not apply to Brazilian orders. In order for section 27 to have applied to the registration of the Moro Order, some legislative action would have to be taken to either make section 27 applicable to the registration of orders from non-Commonwealth countries or to otherwise give the court jurisdiction to register orders from such countries. This could be achieved by way of regulations under section 30 (which provides for the cross-applicability of MACMA to non-Commonwealth countries) or by the passage of an Act which contains a provision of similar effect to section 4 of the Mutual Assistance in Criminal Matters (United States of America) Ratification Act 2000, which states:

> "The procedures prescribed in the Mutual Assistance in Criminal Matters Act shall apply to the execution of any request made by the Competent Authority of the United States of America to the Competent Authority in Antigua and Barbuda."

[24] With respect to section 30, it appears from the wording of subsections (1) and (2) that regulations will have the effect of making MACMA applicable to a non-Commonwealth country, once the following conditions are satisfied:

(i) The regulations make provision to give effect to a treaty;

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[6] Section 3 defines Commonwealth country as "(a) a Sovereign and independent country within the Commonwealth; and (b) every independent country within the Commonwealth".

(ii) The treaty to which effect is intended to be given is set out in the regulations;

(iii) The treaty to which effect is intended to be given has the purpose of facilitating bilateral mutual assistance in criminal matters between Antigua and Barbuda and a non-Commonwealth country specified in the regulations; and

(iv) The regulations direct that the Act shall apply in relation to a specified non-Commonwealth country, as if it were a Commonwealth country.

[25] It also appears that the existence of regulations which satisfy the conditions under section 30, or some other legislation having the effect of section 30 regulations, is a necessary pre-condition to a registration order being made under section 27 in respect of orders from a non-Commonwealth country. This is so as, without any regulations or some other legislation, section 27 does not vest the court with jurisdiction to register such orders, and can only apply to the registration of an order from a Commonwealth country. It follows therefore that a registration order made in the absence of valid section 30 regulations, or some other legislation having the effect of such regulations, would be void from the outset on account of the court's lack of jurisdiction.

[26] The 2016 Regulations were made on 13th December 2016. This was almost 5 months after the registration order was made. As such, the registration order was made without jurisdiction and was without any legal effect. In any event, even if the 2016 Regulations purported to apply retrospectively to the registration order, it would be difficult to conclude that the 2016 Regulations were intended to satisfy the conditions under section 30. This is so for two reasons. First, the 2016 Regulations do not expressly or impliedly indicate that they were made to "give effect to a treaty, set out in the regulations, for bilateral mutual assistance in criminal matters" in accordance with section 30(1) or to make the MACMA apply to

orders from Brazil in accordance with section 30(2)(a). In fact, Section 2 of the 2016 Regulations states:

> "These regulations are made to enable the enforcement of the Order of a Court in Brazil made by Judge Sergio Fernando Moro, which is the subject of a mutual legal assistance request from Brazil to Antigua and Barbuda, and which was registered under section 27 of the Act in the High Court in Claim No. ANU HCV 2016/372 by Order dated the 22nd day of July, 2016."

These words are evidence that the 2016 Regulations were intended to aid with the enforcement of the Moro Order and not to permit the registration of Brazilian orders in accordance with section 30. Second, the Authority, in its skeleton arguments, avers that the 2016 Regulations were made to assist with the enforcement of the Moro Order. At paragraph 47 of its arguments, the Authority states:

> "After the registration order was granted, there came a point at which the Attorney General issued [the 2016 Regulations]. A proper analysis of those regulations shows that it is an act to address the general problem arising out of the Brazilian order, namely, what should be the procedure in dealing with any application that challenges the freezing of the accounts in question. Prior to the regulations being promulgated, dealing with such matters rested on the ingenuity of any judge called upon to deal with such matters."

[27] In light of my analysis at paragraph 26 above, and in light of the Authority's averments in its written submissions, it is clear that the 2016 Regulations were not made with a view to engaging section 30. In fact, on a close examination of the Authority's averments, the contents of the 2016 Regulations and the provisions of MACMA, it would appear that the 2016 Regulations were made in pursuance of section 27(7) and not section 30. Section 27(7) states:

> "The regulations may make provision for and with respect to the enforcement in Antigua and Barbuda of any order registered in accordance with this section and may, for that purpose, direct that any Act shall apply in relation to any such order, subject to such limitations, exceptions or restrictions (if any) as may be prescribed and the Act shall apply accordingly."

[28] Sections 27(7) and 30 are different. Section 27(7) is a means by which the enforcement of an order validly registered within the terms of section 27 is

assisted by parliament. Section 30 on the other hand is the mechanism which is to be engaged for an order from a non-Commonwealth country to be validly registered. As a result, and in the absence of any regulations making section 27 of MACMA applicable to the registration of orders from Brazil, or any legislation of similar effect, the inescapable conclusion is that the 2016 Regulations could not have given the court jurisdiction to make the 22nd July registration order. Accordingly, the judge did not have jurisdiction to make the registration order pursuant to section 27 of MACMA.

[29] As regards the submissions on The Attorney General v Samuel Knowles Jnr and another, the passage relied on by the Authority, by which it seeks to cure the failure of the Government of Antigua and Barbuda to designate Brazil as a country to which MACMA applies, is as follows:

> "Third, even if article 7 were to be read as imposing a unique requirement for the procedural route to registration, it would not follow that a failure to comply with its precise terms would render registration invalid. As the House of Lords explained in R v Soneji [2005] UKHL 49; [2006] 1 AC 340, the consequences of a failure to comply with a statutory procedure do not depend on prior classification of the statutory provision as either mandatory or directory, but on an analysis of what Parliament had intended those consequences to be. In that case, procedural rules governing the postponement of confiscation proceedings after sentence, although couched in prescriptive terms, were held not to carry the consequence that an order made after breach of their terms was invalid. In that case there was the additional factor, not present here, of a duty cast by the statute on the court to make a confiscation order, but otherwise the reasoning is applicable. On the facts of this case, there can be no unfairness to a defendant or to anyone else if the order is registered without there having been two copies of it or a certificate in the prescribed form, but the information is contained in an affidavit, and no such unfairness is suggested. Whilst there is no statutory duty to register an external order, the enforcement of such is part of the modern comparatively high level of reciprocal international co-operation in the removal from criminals of the proceeds of their crime."

[30] In my view, the arguments of Cresswell on the applicability of the court's dicta in Knowles are largely to be preferred. Knowles is concerned with a finding by the Court of Appeal of the Commonwealth of the Bahamas that the registration of a

foreign order was impermissible on the ground that the procedure for the registration of a foreign order under the Bahamian Proceeds of Crime Act was not complied with. The foreign order in question emanated from the United States of America, a country which had been designated under delegated legislation as a country from which the Bahamian courts were permitted to register orders under the Proceeds of Crime Act. The Privy Council was enjoined to determine whether the breach of procedure for the registration of an order from a designated country could properly prevent the court from registering the order. That is the context in which Knowles was considered and decided. It is obvious that the issue in the present case, being the presence or absence of jurisdiction, was not before the Privy Council in Knowles and that the pronouncements made by the court were not made with a view to curing a lack of jurisdiction. Rather, it appears that the Privy Council's pronouncements were made with a view to determining whether, in a circumstance where the court was seized of jurisdiction, it could exercise that jurisdiction in light of apparent procedural noncompliance. As such, Knowles does not assist the Authority in its quest to avoid the procedural requirements of MACMA with a view to restoring the registration of the Moro Order.

[31] In addition to the conclusions arrived at above, and my interpretation of sections 27 and 30, it is necessary for me to express my disagreement with the judge's interpretation of section 30 of MACMA. The learned judge at paragraph 29 of his judgment interpreted section 30 to require that a bilateral treaty exists between Antigua and Barbuda and the non-Commonwealth country in respect of which regulations would be made. However, section 30 of MACMA does not require a bilateral treaty. Rather, the words of section 30 very clearly require a treaty which facilitates "bilateral mutual assistance". Such a treaty may in fact be a multilateral treaty, so long as it facilitates bilateral legal assistance between Antigua and Barbuda and other states. As a result, and notwithstanding my agreement with the judge that he did not have jurisdiction to register the Moro Order under sections 27 and 30 of MACMA, the judge was wrong in his interpretation of section

30, and for having found that he had no jurisdiction to register the order on the basis of that interpretation.

[32] With regard to the Authority's submissions on section 6 of MACMA, it does not appear that the words of section 6 have the effect which the Authority claims it does. Section 6(1) of MACMA states:

> "Nothing in this Act derogates from existing forms or prevents the development of other forms of co-operation (whether formal or informal) in respect of criminal matters between Antigua and Barbuda and any Commonwealth country, or between Antigua and Barbuda, or any enforcement agencies or prosecuting authorities in Antigua and Barbuda, and the International Criminal Police or any such agencies or authorities outside Antigua and Barbuda."

A careful examination of section 6 will reveal that it intends to recognise and preserve the use or development of existing or future forms of co-operation in criminal matters, in the context of two categories of relationships:

(i) Antigua and Barbuda (on one hand) and any Commonwealth country (on the other hand); and

(ii) Antigua and Barbuda or any enforcement agencies or prosecuting authorities in Antigua and Barbuda (on the one hand) and, the International Criminal Police Organization ("INTERPOL") or any such agencies or authorities outside of Antigua and Barbuda (on the other hand).

[33] The first category of relationship mentioned clearly does not support the Authority's argument, because there is no mention of non-Commonwealth countries. The second category of relationship mentioned, however, warrants some examination. The question arises as to whether the expression "or any such agencies or authorities outside of Antigua and Barbuda" includes non-Commonwealth countries. This question of construction is resolved with reference to the *ejusdem generis* rule of statutory interpretation. The *ejusdem generis* rule

of interpretation was defined by Professor E.A. Driedger in Construction of Statues as:

> "Where general words are found following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, the construction should be restricted to things of that class or category unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification."[7]

[34] The *ejusdem generis* rule was further explained by Lord Diplock in Quazi v Quazi[8] in the following way:

> "The presumption then is that the draftsman's mind was directed only to the [genus of things indicated by the specific words] and that he did not, by his addition of the word "other" to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words, those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity."

[35] The applicability of this rule of statutory interpretation has been doubted in cases where one attempts to deduce a genus or class of items from a single item mentioned in a legislative provision (as is the case with section 6 of MACMA). However, as Lord Wilberforce noted in DPP v Jordan:

> "Even if this is not strictly a case for applying a rule of ejusdem generis… the structure of the section makes it clear that the other objects, or, which is the same argument, the nature of the general concern, fall within the same area, [the other matters to which the statute is intended to apply] cannot fall in the totally different area…".[9]

[36] In accordance with the principles set out in Quazi and Jordan, it is my view that the second category of relationship mentioned in section 6, contemplates arrangements for legal assistance between Antigua and Barbuda (on the one hand) and INTERPOL, or other multi-jurisdictional agencies that are similar in nature and purpose to INTERPOL (on the other hand). The request from the government of Brazil therefore would not fall within either of the categories of

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[7] E.A Driedger: Construction of Statutes (2nd edn., 1983) 116.

[8] [1979] 3 WLR 833.

[9] [1977] AC 699.

relationships addressed in section 6. As such, the section does not support the Authority's contention that section 6 enlarged the court's jurisdiction to register the Moro Order, or consider alternative methods of registration.

[37] For the reasons expressed above, and for the avoidance of doubt, the grounds of appeal in relation to the judge's finding on jurisdiction to register the Moro Order under MACMA, must fail.

Jurisdiction under the Money Laundering Protection Act, 1996

[38] In relation to the MLPA, the Authority argues that: (1) sections 19A and 23 of the MLPA empowers the Authority to provide mutual legal assistance on a bilateral or multilateral basis and makes no distinction of the type of country in the rendering of assistance; (2) there is nothing in section 23 which invites the importation of the requirements of MACMA; (3) because section 23 of the MLPA provides for the provision of mutual legal assistance in criminal matters, regulations would be superfluous and unnecessary to make MACMA applicable to non-Commonwealth countries; (4) the MLPA is a stand-alone Act which supersedes and cures the shortcomings of MACMA, in so far as the MLPA allows for the provision of mutual assistance to non-Commonwealth countries without the added step of having to pass regulations; (5) the Supervisory Authority under the MLPA has legislative power to execute mutual legal assistance requests with efficiency in a short responsive time frame, while allowing it to deal with requests from countries which Antigua and Barbuda would have never dealt with or contemplated dealing with in relation to mutual legal assistance.

[39] Cresswell contends that while the MLPA contemplates international co-operation and the provision of mutual legal assistance in matters concerning money laundering offences, it does not set out the procedure for the provision of such assistance. In that regard, Cresswell argues that the MLPA and MACMA do not substantively address the same content, are not in conflict, are stand-alone enactments, and that there is no basis on which they can be read in *pari materia*.

Accordingly, Cresswell claims that there is nothing to be gained from comparing the MLPA with MACMA, or attempting to interpret the Acts in *pari materia*, with a view to avoiding the procedure set out under MACMA for the registration of foreign restraint orders.

[40] In order to assess the arguments of counsel on the effect of the MLPA, and its alleged conferral of jurisdiction on the court to register the Moro Order, some consideration must be given to sections 19, 19A and 23 of the MLPA. Section 19 of the MLPA provides, inter alia, as follows:

> "(1)Where a person (referred to in this Part as "the defendant")-
>
> (a) has been convicted of a money laundering offence; or
>
> (b) has been, or is about to be charged with a money laundering offence, the Supervisory Authority may apply to the High Court for an order freezing property in which there is a reasonable suspicion that the defendant has an interest.
>
> (2) Subject to subsection (3), an application referred to in subsection (1) may be made against one or more of the following:
>
> (a) specified property of the defendant;
> (b) all the property of or in the name of the defendant (including property acquired after the making of the order);
> (c) all the property of or in the name of the defendant (including property acquired after the making of the order) other than specified property;
>
> (d) specified property of a person other than the defendant.
>
> …
>
> (4) Where the Supervisory Authority applies to the High Court for an order under this section, the High Court may, subject to section 19A, by order:
>
> (a) direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order; and
>
> (b) if the High Court is satisfied that the circumstances so require - direct a trustee to take custody and control of the property,

or of such part of the property as is specified in the order." (underlining supplied)

[41] Section 19A of the MLPA, to which the marginal note "conditions for making freezing order" is appended, states *inter alia* as follows:

> "(1) If the defendant has not been convicted of the money laundering offence the High Court shall not make a freeze order unless:
>
> (a) the application for the order is supported by an affidavit of an authorized officer stating that he suspects that the defendant committed the offence; and
>
> (b) the court is satisfied, having regard to the matters contained in the affidavit, that there are reasonable grounds for holding that suspicion.
>
> …
>
> (4) The High Court may make a freeze order in respect of property whether or not there is any risk of the property being disposed of, or otherwise dealt with, in such manner as would defeat the operation of this Act." (underlining supplied)

[42] Section 23 of the MLPA forms part of Part V of the MLPA which is entitled: "International Cooperation". Section 23 states *inter alia* as follows:

> "(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 or other competent authority 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 Part IVA or IVB of this Act.
>
> (3) A final judicial order or 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 in accordance with the law.

(4) The court or the Supervisory Authority in consultation with the central authority for Antigua and Barbuda under any mutual legal assistance treaty may receive and take appropriate measures with respect to a request from a court or other competent authority from another State, for assistance related to a civil, criminal or administrative investigation, prosecution or proceedings, as the case may be, involving money laundering offences, or violations of any provisions of this Act."(underlining supplied)

[43] Sections 19 and 19A are concerned with the court's power to grant an injunction in respect of the property of a person who has been charged or convicted of a money laundering offence. That is the scope of sections 19 and 19A. It is clear that neither section was intended to, or does in fact clothe the court with jurisdiction to make a registration order. The sections relate altogether to an entirely separate power vested in the court, which is the power to grant injunctive relief in support of proceedings under the MLPA. As such, the Authority is not correct in its assertion that section 19A empowered the judge to grant the registration order. The judge therefore did not err in failing to grant the registration order on the basis of that section.

[44] It is true that section 23 is concerned with the provision of legal assistance in criminal cases, particularly money laundering cases, but it is clear from the underlined portions quoted above that the section intends only to create a general power to facilitate the provision of legal assistance to entities outside of Antigua and Barbuda. In so far as section 23 refers to the "limits of their respective legal systems", it is clear that the section intends to defer to the procedural and substantive requirements of the laws of Antigua and Barbuda and to the laws of the relevant foreign state when it is that legal assistance falls to be provided. In the context of this appeal, section 23 therefore redirects one's focus to the substantive and procedural rules which relate to the registration of the Moro Order (a freezing order made in support of a money laundering investigation in Brazil). The rules of procedure for the registration of foreign orders set out in Part 72 of the CPR therefore become relevant. Part 72 of the CPR however is purely procedural and

does not confer jurisdiction to make a registration order. As such, one must refer to the specific legislation that enables the enforcement of judgments. This leads one back to sections 27 and 30 of MACMA, which confer jurisdiction and specifically set out the substantive requirements for the registration of orders like the Moro Order. In the context of the present case therefore, it can safely be said that sections 27 and 30, along with Part 72 of the CPR, would circumscribe and regulate the power of the Government of Antigua and Barbuda to give legal assistance under section 23 of the MLPA. It would therefore not be possible for the court to register the Moro Order under section 23 without proof that the requirements of sections 27 and 30 of MACMA had been satisfied. Given my determination that the requirements of sections 27 and 30 of MACMA were not satisfied, it is not possible for the Authority to obtain a registration order on the basis of section 23 of the MLPA. Accordingly, the judge did not err in failing to grant the registration order on the basis of that section, and the grounds of appeal in relation to the judge's failure to consider the provisions of the MLPA, must fail.

Jurisdiction pursuant to international treaties

[45] The Authority argues that the court has jurisdiction to register a restraint or freezing order under 3 international treaties:

(i) The United Nations Convention Against Transnational Organised Crime.

(ii) The Inter-American Convention for Mutual Assistance in Criminal Matters; and

(iii) The Inter-American Convention Against Corruption.

[46] The Authority contends that by signing these treaties, Antigua and Barbuda consented to be bound by them, and undertook to perform the obligations under the treaties in good faith. In addition, the treaties were ratified in accordance with

the Ratification of Treaties Act,[10] were entered into force and were binding in Antigua and Barbuda. The Authority contends that no action had been taken by Antigua and Barbuda to denounce or withdraw consent to be bound by the treaties, and as such, the treaties remained binding and were capable of forming a basis on which the Moro Order could be registered.

[47] Cresswell disagrees with the Authority's position and says that, in any event, these treaties themselves do not speak to the procedure to have an order registered in these circumstances, and merely defer to the laws of signatory states on the procedure to be followed. In making this submission, Cresswell relies on the substantive provisions of each treaty, which include Article 18(17) of the United Nations Convention Against Transnational Organised Crime.

[48] Pollard J in his judgment in The Attorney General of Barbados and others v Jeffery Joseph and Lennox Boyce,[11] succinctly sums up the constitutional reality of Commonwealth Caribbean states as it relates to the relationship between international treaties and domestic law. At paragraph 21 of his judgment, Pollard J notes:

> "Treaties normally have legal incidence only at the international plane. Given that international law and municipal law are ordinarily conceived as two non-convergent normative regimes, municipal courts maintain that unincorporated treaties are incapable of creating legal rights for private entities."

[49] It is trite that the points of convergence of international treaties and domestic law are matters provided for in laws of each state. In that regard, Oppenheim**'s** International Law[12] states:

> "From the standpoint of international law states are generally free as to the manner in which, domestically, [states] put themselves in the position to meet their international obligations; the choice between the direct

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[10] CAP 364, Revised Laws of Antigua and Barbuda 1992.
[11] [2006] CCJ 3 (AJ).
[12] L. F. L Oppenheim: Oppenheim's International Law (9th edn., 1992), Vol.1, Part 1, 82 – 83, quoted by this Court in Harvis Francios et al v Cardinal Airlines Limited et al, Commonwealth of Dominica HCVAP 2006/019 (delivered 22nd September 2008, unreported).

reception and application of international law, or its transformation into national law by way of statute is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices."

[50] In Antigua and Barbuda, the relationship between domestic law and international treaties, and in particular how domestic law operates to ratify and incorporate treaties, is governed by the Ratification of Treaties Act. Section 3 of the Ratification of Treaties Act provides, *inter alia*, as follows:

> "(1) Where a treaty to which Antigua and Barbuda becomes party after the coming into force of this Act is one which affects or concerns–
>
> (a) the status of Antigua and Barbuda under international law or the maintenance or support of such status, or
>
> (b) the security of Antigua and Barbuda, its sovereignty, independence, unity or territorial integrity, or
>
> (c) the relationship of Antigua and Barbuda with any international organisation, agency, association or similar body, such treaty shall not enter into force with respect to Antigua and Barbuda unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of this Act.
>
> (2) A treaty to which subsection (1) applies shall be ratified or shall have its ratification authorised or approved as follows—
>
> (a) where such treaty concerns a matter referred to in paragraph (a) or (b) of subsection (1) or contains any provisions which is to become, or to be enforceable as part of the law of Antigua and Barbuda, by Act of Parliament;
>
> (b) where such treaty concerns a matter referred in paragraph (c) by Resolution of the House of Representatives.
>
> (3) No provision of a treaty shall become, or be enforceable as, part of the law of Antigua and Barbuda except by or under an Act of Parliament." (underlining supplied)

[51] Subsections (1) and (2) of section 3 of the Ratification of Treaties Act create a regime of ratification that is substantially different from the regime under subsection (3). There are two essential differences between these two regimes of ratification. The first difference relates to the procedural requirements of the regimes. Under subsections (1) and (2) a treaty is ratified by the passage of an Act of Parliament (section 3(1)(a) and (b)) or by parliamentary resolution (section 3(1)(c)), whereas under subsection (3), a treaty is ratified "by or under an Act of Parliament". The second difference relates to the substantive effect of each regime on the laws of Antigua and Barbuda. Ratification under subsections (1) and (2) results in a treaty's entry into force. In other words, the procedure set out in the subsections results in a treaty being recognised by the Government of Antigua and Barbuda as enforceable in international law as between Antigua and Barbuda (on the one hand) and other parties to the treaty (on the other hand). Accordingly, a treaty ratified in accordance with subsections (1) and (2) does not become part of the laws of Antigua and Barbuda but merely creates enforceable rights, powers and obligations between Antigua and Barbuda and the other parties to the treaty. Quite differently, ratification under subsection (3), as clearly indicated by the words of the subsection, results in a treaty becoming "enforceable as part of the law of Antigua and Barbuda". This process is elsewhere referred to as the incorporation or transformation of a treaty into domestic law. Put differently, the procedure set out in subsection (3) results in a treaty being made part of the domestic law of Antigua and Barbuda, thus creating enforceable rights, powers, and obligations within the legal system of Antigua and Barbuda.

[52] The cumulative effect of the differences between the two regimes is that entities in Antigua and Barbuda cannot rely on a treaty unless the treaty had been ratified in accordance with section 3(3) as, without such ratification, the treaties would not form part of the laws of Antigua and Barbuda and would be of no legal incidence within the jurisdiction. It would follow that in order for the Authority's argument to succeed or (stated differently) in order for the court to rely on the treaties for jurisdiction to register the Moro Order under any of the treaties cited, the treaties

would have to be ratified in accordance with section 3(3) of the Ratification of Treaties Act and have become part of the laws of Antigua and Barbuda. As such, there would have to be evidence before this Court of an Act of Parliament which ratifies the treaties in accordance with section 3(3).

[53] In support of this contention, the Authority has relied upon three statutory instruments:

(i) Resolution Ratifying United Nations Convention Against Transnational Organized Crime;[13]

(ii) Resolution of the House of Representatives Ratifying the Inter-American Convention on Mutual Assistance on Criminal Matters;[14] and

(iii) Resolution Ratifying the Inter-American Convention Against Corruption.[15]

[54] These three statutory instruments are the only instruments in Antigua and Barbuda which purport to ratify the treaties in accordance with the Ratification of Treaties Act. The statutory instruments, as can easily be observed from their titles, contain resolutions of Parliament. The three resolutions also expressly indicate their intended legal effect, in almost identical language. For example, section 2 of S.I. No.54 of 2002 states:

> "WHEREAS the Ratification of Treaties Act, Cap. 364 provides in section 3(1) that where a Treaty to which Antigua and Barbuda becomes a party is one which affects or concerns the relationship of Antigua and Barbuda with any international organization, agency, association or similar body, such Treaty shall not enter into force with respect to Antigua and Barbuda unless it has been ratified or its ratification has been authorized or approved in accordance with the provisions of the Act; and
> …
> NOW, THEREFORE, BE IT RESOLVED by this Honourable House that the said United Nations Convention Against Transnational Organized

[13] S.I. No. 54 of 2002.
[14] S.I. No. 15 of 2003.
[15] S.I. No. 16 of 2003.

> Crime which was adopted by the member States of the United Nations and attached hereto as a Schedule be ratified as a Treaty under section 3 (1) (c) of the Ratification of Treaties Act, Cap. 364."

[55] These statutory instruments, by their titles, contents and references to subsection (1)(c), evidence ratification of the treaties by way of parliamentary resolution in accordance with subsections (1) and (2) of section 3 of the Ratification of Treaties Act, and not by way of Act of Parliament in accordance with subsection (3). As such, they would not have formed part of the laws of Antigua and Barbuda, and could not confer jurisdiction on the courts to register the Moro Order.

[56] In any event, as Cresswell pointed out in its submissions, the treaties themselves defer to the domestic laws of signatories in the making and processing of mutual legal assistance requests from other countries. The United Nations Convention Against Transnational Organized Crime for example, at Article 18(17), says:

> "A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request."

[57] The other treaties to which the Authority referred contain provisions which are similar to Article 18(17); in particular, Article 5 of the Inter-American Convention for Mutual Legal Assistance in Criminal Matters and Article XIV of the Inter-American Convention Against Corruption. The ineluctable conclusion is that these treaties were not a basis upon which the Moro Order could have been registered.

Jurisdiction pursuant to the Black Swan Principle

[58] At the hearing of the appeal, learned Senior Counsel Mr. Reginal Armour argued on behalf of the Authority that the judge could have registered the Moro Order under the Black Swan Principle. His argument appears to be that the Black Swan Principle concerns the grant of ancillary injunctive relief to a claim for substantive relief in another jurisdiction; that the registration of the Moro Order was tantamount to the provision of ancillary injunctive relief in support of substantive foreign

proceedings (the Brazilian money laundering proceedings); and that, accordingly, the registration order was permissible under the Black Swan Principle.

[59] There are at least two clear limitations on this argument. First, the Black Swan Principle appears to invoke the court's inherent jurisdiction to give ancillary relief in support of civil proceedings in another jurisdiction in which a money judgment is given or is expected to be given, and not in support of criminal (or quasi-criminal) proceedings like the money laundering proceedings which gave rise to the Moro Order. Second, there is a question of whether the Black Swan Principle is capable of circumventing the procedure set out in MACMA. That question, more generally framed, is whether the inherent jurisdiction of the court at common law may be invoked instead of a specific statutory regime. The general approach to questions of this nature is well summarised in the following passage by Baker J in Health Service Executive of Ireland v Z and others:

> "It is well established that the High Court may in appropriate circumstances use its inherent jurisdiction to supplement a statutory scheme. As Lord Hailsham of St Marylebone LC observed in *Richards v Richards*:
>
> > '… where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case, it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes.'"[16]

[60] More recently, the English Court of Appeal in Re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No.2)[17] approved the pronouncements in this regard by Roderic Wood J in Westminster City Council v C and others,[18] which were as follows:

> "consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction

[16] [2016] 3 WLR 791.
[17] [2012] EWCA Civ. 253.
[18] [2009] 2 WLR 185.

should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework."

[61] Expressed differently, the position is that more general common law principles which seek to invoke the inherent jurisdiction of the court are not intended to circumvent or derogate from the statutory regimes that operate toward the same end. Applying this to the present case, the Black Swan Principle would be precluded from application by the detailed process for the registration of foreign orders set out in sections 27 and 30 of MACMA which contain the will of Parliament in relation to the registration of the specific class of foreign orders set out therein. Accordingly, the Black Swan Principle could not be utilised to register the Moro Order, or any order which falls within the purview of sections 27 and 30 of MACMA, in so far as the registration of these orders is governed by requirements of sections 27 and 30 of MACMA, the compliance with which was clearly intended by parliament.

[62] In any event, the circumstances of this case would not be fit for the exercise of the court's inherent jurisdiction under the Black Swan Principle or any other inherent jurisdiction principle. The provision of mutual legal assistance by states is a matter that is heavily informed by executive policy and the existence and condition of diplomatic relationships between states. The underpinnings of this particular area should cause the court, in cases like the present one, to defer to the express intention of parliament and the executive, made manifest in legislation and regulations. By virtue of section 30 of MACMA, and by virtue of parliament's power to make law generally, the Government of Antigua and Barbuda is empowered to determine the countries with which the state undertakes to give a particular form of legal assistance. It would not be proper for this executive and parliamentary function to be undertaken by the court. For all these reasons, Mr. Armour's argument that the judge could have registered the Moro Order on the basis of the Black Swan Principle, must fail.

Conclusion

[63] I will conclude my analysis on the several jurisdiction arguments made, by iterating that the Authority has failed to provide any good basis upon which this Court could fault the judge's finding that he did not have jurisdiction to register the Moro Order. This Court would therefore have no basis upon which to reinstate the registration order which was set aside by the judge on 30th January 2017.

[64] In light of my conclusion that the registration order was made without jurisdiction and was properly set aside by the judge, and in light of section 2 of the 2016 Regulations which states that the regulations were made in support of the Moro Order which was registered by "Order dated the 22nd day of July, 2016", the 2016 Regulations fall away and are of no legal effect, because they purport to apply to an invalid registration order. There is also no need to consider the other issues raised in grounds (6) to (8) of the Authority's refashioned grounds of appeal, since the finding that the judge did not have jurisdiction to register the Moro Order is determinative of the appeal.

[65] I am also of the view that the freezing order made by the judge was not a freestanding one and was made solely on the basis of the registration order which he made. I am fortified in my view by the fact that the judge set aside the freezing order as a matter of course upon his finding that the registration order was made without jurisdiction, and by the fact that the freezing order was never specifically requested by the Authority in its original registration application. The freezing order, therefore, being part and parcel of the judge's registration of the Moro Order, cannot exist without a finding that the registration order was properly made, and accordingly fell away once the registration order was set aside.

[66] In the circumstances, I will dismiss the appeal and affirm the order made by the judge on 30th January 2017 setting aside the previous order made by him on 22nd July 2016.

Costs

[67] The appeal having been dismissed in its entirety, the Authority is liable to both Cresswell and Meinl Bank for costs in the appeal. The issue of costs in cases involving the exercise of a statutory function was recently considered by this Court in Friar Tuck Limited et al v The International Tax Authority.[19] In that case, Michel JA stated as follows:

> "…I take the view that the quantum of costs to be awarded in cases like the present one should more closely resemble prescribed costs awards than costs assessed on an indemnity basis. It may well be that companies, like the appellants in this case, may spare no expense in resisting requests for information made by entities like the respondent, but such entities may be hard-pressed to carry out their functions if they are to face the prospect of massive cost awards because a court finds that they ought not to have made the requests for information which they did or should not have made them at the time or in the manner they made them. It may be different if it is found that the Authority had acted capriciously or maliciously in the purported discharge of its functions, in which case it may be visited with large cost awards, but not so if it is simply doing what it is statutorily mandated to do, which appears to be the situation in the present case."

[68] It appears to me, as it did in the Friar Tuck case, that the Authority, being a statutory body, would be hard-pressed to carry out its statutory functions if it was to be visited with a massive cost award against it in a case like this for reasonably carrying out its statutory function, by challenging an order made by the court below. It also appears to me that the Authority acted neither capriciously nor maliciously in the purported discharge of its functions.

[69] Being guided by the view which I expressed in Friar Tuck, with which the other members of the Court agreed, I will award costs to Cresswell in the amount of $7,500.00 in the court below and $5,000.00 on the appeal, to be paid by the Authority. I make no award of costs to or against Meinl Bank, which took no part in the proceedings here or in the court below.

[19] BVIHCVAP2017/0003 (delivered 12th March 2019, unreported).

Order

[70] The appeal is dismissed, with costs to the First Respondent to be paid by the Appellant in the sum of $7,500.00 for the proceedings in the court below and $5,000.00 for the proceedings in this Court.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar