being not a truthful witness", thus possibly prejudicing the minds of the jury to the detriment of the Appellant.'

In support of this ground counsel referred to a passage in the learned trial judge's summing-up in which he said:

> 'We got Sophia Thompson as one of his witnesses. It is not a thing that I usually do to comment on witnesses and what not, but she struck me as being not a truthful witness, but that is a matter for you to determine. So you can't judge by me. I remember specifically on an occasion when as I tell you when people not looking at you. She was answering questions looking directly on the ground and not at you when there was some sensitive things being talked.'

It is always open to a trial judge to comment and if need be, to comment strongly, on the evidence as long as he makes it clear to the jury that the ultimate decision on questions of fact is for them. We cannot say that in making the comment that he did the learned trial judge exceeded the permissible limits.

The final ground of appeal is that 'in all the circumstances of the case the conviction is unreasonable and unsafe'.

It is true that two witnesses Sophia Thompson and Greg Archer gave evidence supporting the appellant's evidence that he and the complainant were known to each other and according to Sophia Thompson may have been on intimate terms. Sophia Thompson was however on her own evidence a former girl friend of the appellant with whom she hoped to resume a relationship. Greg Archer was on his own evidence a good friend of the appellant. It was for the jury to assess the credibility of these witnesses and ultimately to decide whether they accepted the complainant's evidence. We cannot say that it was unreasonable for them to accept the complainant's evidence as they must have done and to reject that of the appellant and his witnesses.

For these reasons the appeal is dismissed. The appeal as to sentence was abandoned, the sentence imposed being the mandatory minimum. The conviction and sentence are therefore affirmed.

Appeal dismissed.

International Dutch Resources Ltd and another v Attorney General

Supreme Court, Criminal Side (No 667/1988)
Georges CJ
11 November 1988

Court of Appeal (No 32/1988)
Henry P, Smith and Melville JJA
2 March 1990

Company law – Lifting veil of incorporation to uphold restraint and charging orders.

Constitutional law – Breach of fundamental rights – Retrospective application of criminal statute – Possession of property derived from proceeds of drug trafficking – Whether possession continuous – Protection from deprivation of property – Acquisition resulting from restraint and charging orders excepted – Whether restraint and charging orders could be placed on properties not owned by person charged – Constitution of The Bahamas, arts 20(4), 27(2)(b), (j) – Criminal Procedure Code Amendment Act 1987, s 5 – Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986, s 20(2).

Drug trafficking – Restraint and charging orders – Locus standi of applicants to apply for discharge – Application for restraining order before making of rules – Necessity to specify particulars of offence – Realisable property – Validity of placing restraint and charging orders on properties owned by companies in which defendant has beneficial interests – Customs Management Act 1976, ss 115, 116 – Dangerous Drugs Act (ch 223), ss 3, 8(a), 10, 14(4), 15(5), 21A(1), 21B(1), (2), 25(4), (5), 26 – RSC Ord 81, r 3(1) – Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986, ss 1-4, 9-11, 20(2).

A notice in the Gazette published on 10 March 1987 stated that the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the Act) was deemed to have been effective since 6 January 1987. The respondent on 30 June 1988 by an ex parte application, and before the rules under the Act were made, applied for and obtained restraining and charging orders on certain properties in The Bahamas owned by the applicants which were beneficially owned by Carlos Enrique Ledher (the defendant). The orders were based on certain charges which were brought against the defendant in The Bahamas and the fact that the respondent intended to institute within a fortnight an information charging the defendant under s 20(2) of the Act. After the restraint and charging orders were obtained they were served on the applicants. Applications were then made by the applicants to have the orders discharged on the grounds that the Act could not be applied retrospectively to acts which occurred before it came into force, that they were constitutionally invalid by virtue of art 20(4) of the Constitution, that the orders deprived the applicants of their properties contrary to art 27 of the Constitution and that the properties vested in the applicants were not realisable

properties under the Act as the same were not held by the defendant. The Chief Justice, dismissing the applications, held that there was no breach of the Constitution and that on lifting the veils of incorporation the reality was that the properties were owned by the defendant. The applicants appealed.

Held – dismissing the appeal:

(1) The charges brought against the defendant under s 20(2)(a) and (b) of the Act did not offend art 20(4) of the Constitution because the words 'derived from his participation in drug trafficking' are merely descriptive of the nature of the property of which possession is made an offence and descriptive of the nature of the proceeds.

(2) The fact that the term 'drug trafficking' under s 2 of the Act includes an activity (money laundering under s 20(1) of the Act), which was not previously a crime could not make participation in that particular form of drug trafficking a constituent element of the offence under s 20(2)(a) of the Act retrospectively a crime.

(3) Although prima facie the granting of the restraint and charging orders under ss 10 and 11 of the Act may appear to contravene art 27 of the Constitution as the property was not held by the defendant, the court in this case would be prepared to lift the veil of incorporation so that the applicant companies are not successfully used as an instrument to protect gains from drug trafficking. *Lee v Lee's Air Farming Ltd* [1961] AC 12 distinguished.

Cases referred to in judgment

A-G v Luckner [1987-88] 1 LRB 115.
A-G of The Gambia v Jobe [1984] 1 AC 689, [1984] 3 WLR 174, PC.
Bata Shoe Co Guyana Ltd v Comr of Inland Revenue (1976) 24 WIR 172, CA.
Butchers Hide Skin and Wool Co Ltd v Seacome [1913] 2 KB 401, 82 LJKB 726, 108 LT 969, 29 TLR 415.
Gilford Motor Co Ltd v Horne [1933] Ch 935, [1933] All ER Rep 109, 102 LJ Ch 212, 149 LT 241, CA.
Jones v Lipman [1962] 1 All ER 442, [1962] 1 WLR 832.
Lee v Lee's Air Farming Ltd [1960] 3 All ER 420, [1961] AC 12, [1960] 3 WLR 758, PC.
Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes) [1969] 3 All ER 855, [1969] 1 WLR 1241, CA.
R v Levine (1926) 46 CCC 342.
R v Reah [1968] 3 All ER 269, [1968] 1 WLR 1508, CA.
Salomon v Salomon & Co Ltd [1897] AC 22, [1895-9] All ER Rep 9, 66 LJ Ch 35, 75 LT 426, HL.
Waddington v Miah [1974] 2 All ER 377, [1974] 1 WLR 683, HL; *affg sub nom R v Miah* [1974] 1 All ER 1110, [1974] 1 WLR 683, CA.

Authorities also cited in judgments

44 *Halsbury's Laws of England* (4th edn) para 922.
Pennington's Company Law (4th edn) p 51.

Summons

By a summons dated 26 August 1988, the applicants, International Dutch Resources Ltd and Fernandez Ltd, applied to the Supreme Court to have the

restraint and charging orders on their respective properties at Norman's Cay discharged. The facts are set out in the judgment of the Chief Justice.

Charles W Mackay and *James Moxey* for the applicants.
Deonaraine Biscessar for the respondent.

11 November 1989. The following judgment was delivered.

GEORGES CJ. On 31 December 1986, the Governor-General assented to the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (No 3 of 1986) (the Act). Section 1 of the Act provided that it should come into operation on such date as the minister responsible for legal matters might appoint by notice published in the Gazette. It is noted in the intituling of the Act that it did come into force on 6 January 1987. This was, however, questioned since in fact there had been no publication in the Gazette fixing that date. Malone Snr J so decided in *A-G v Luckner* [1987-88] 1 LRB 115. An amending Act No 2 of 1987 was passed, s 5 of which fixed the date of the Act coming into operation as 6 January 1988, but provided that—

> 'Nothing in this section shall thereby render a person liable for an offence committed prior to the 10th March, 1987 to any penalty greater than that which could have been imposed upon him had that Act not come into operation.'

Mr Mackay for the applicant in this case while expressing reservations as to the constitutionality of that amending Act was prepared to accept that the Act was in force on 10 March 1987, the date on which the amending Act became law.

The long title of the Act states that it was to make provision for the tracing of the proceeds of drug trafficking, the confiscation of those proceeds and ancillary amendments to the Dangerous Drugs Act.

Section 4 of the Act provides:

> '(1) Upon conviction for one or more drug trafficking offences committed after the coming into operation of this Act a person shall in addition to any other penalty prescribed by any law for that offence be liable at the time of sentencing in respect of that conviction or at any time thereafter to have a confiscation order made against him in accordance with the provision of this Act.'

Confiscation orders are made with respect to 'realisable property', such property being defined by s 3(1) of the Act to include 'any property held by the defendant'. The term 'defendant' is defined in s 4(8)(b) as—

> 'a person against whom proceedings have been instituted for a drug trafficking offence . . . whether or not he has been convicted.'

Sections 10 and 11 make provision for restraint orders and charging orders. They read in part –

'10.(1) The Court may by order (in this Act referred to as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the Order . . .

(5) A restraint order—(a) may be discharged or varied in relation to any property . . .

11.(1) The Court may make a charging order on realisable property for securing the payment to the Crown – (a) where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged; and (b) in any other case, of an amount not exceeding the amount payable under the confiscation order.

(2) For the purposes of this Act, a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown under a confiscation order.

(3) A charging order—(a) may be made only on an application by the Attorney-General; and (b) may be made on an ex parte application to a judge in chambers.

(4) Subject to subsection (6), a charge may be imposed by a charging order only on—(a) any interest in realisable property, being an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Act . . .

(7) The Court may make an order discharging or varying the charging order and shall make an order discharging the charging order if the amount, payment of which is secured by the charge, is paid into court.'

On 24 June 1988, the Attorney-General by an ex parte originating summons intituled in part—'In the matter of Carlos Enrique Ledher-Rivas a/k/a Joe Ledher' sought among other remedies—

'(a) a restraint order under section 10 of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 prohibiting dealings with property held by the Defendant;

(b) a charging order under section 11 of the aforementioned 1986 Act imposing a charge over the property of the Defendant including areas of land including land at Norman's Cay, Exuma, the Bahamas held in the name of International Dutch Resources Limited and shares or interests held in Air Montes Limited, Titanic Aircraft Sales Limited, Chelique IV Limited and Fernandez Limited being companies incorporated in the Bahamas.'

This summons was supported by an affidavit with annexures sworn by Asst Supt John Sydney Rolle, a police officer attached to the Narcotics Unit of the Criminal Investigation Division. Asst Supt Rolle stated that he had, on 9 February 1987, filed an information against Carlos Ledher-Rivas (the defendant) alleging charges of conspiracy to import dangerous drugs, namely cocaine, into The Bahamas and also of possession of dangerous drugs namely cocaine at Norman's Cay, Exuma with intent to supply. On that information he had obtained a warrant for the arrest of the defendant.

He had testified in a United States District Court in Florida against the defendant who appeared to answer an indictment containing a number of counts alleging importation into the United States of America and possession there with intent to distribute quantities of cocaine. The defendant was found guilty on 11 counts.

The conduct of the defendant had also formed part of the proceedings of a commission of inquiry constituted by the Government of The Bahamas on 20 November 1983, to inquire into the extent and methods employed in the illegal use of The Bahamas for the transhipment of dangerous drugs destined for transmission to the United States of America. In its report the commission had found that from the middle or latter part of 1978 to 1980 the defendant had used Norman's Cay extensively to facilitate the transhipment of drugs through The Bahamas to the United States of America and that a large part of Norman's Cay was owned by International Dutch Resources Ltd, a company of which the defendant was beneficial owner.

Assistant Supt Rolle also stated that he had examined the records at the Registrar General's Department and had seen that on a return on behalf of International Dutch Resources Ltd filed for 1980 the defendant had been named as a director and president of that company. He itemised the blocks of land at Norman's Cay shown on the records as being owned by that company.

The affidavit concluded:

'13. From enquiries conducted by me, from the Report issued by the Commission of Inquiry, from reports of investigations by officers of the Criminal Investigation Department of the Royal Bahamas Police Force and excerpts at JR-2 I verily believe that the Defendant engaged over the period commencing from mid 1978 onwards in the illegal trafficking of drugs through The Bahamas and thereby derived substantial economic benefit enabling him to accumulate assets in the form of money, real estate and interests in companies.

14. It is my intention on the advice of the Attorney-General to institute within a fortnight an information charging the Defendant under section 20(2) of the Tracing and Forfeiture Act 1986 with offences of being in possession of property and of living off proceeds derived from his participation in drug trafficking.'

On the basis of this document I made an order on 30 June 1988, restraining the defendant and certain named companies including International Dutch Resources Ltd and Fernandez Ltd from dealing with—

'any property in the Bahamas in which the defendant Carlos Enrique Ledher Rivas a/k/a Joe Ledher has interest, including any shares, stock or equity in companies incorporated in the Bahamas but excluding the lots of land specified in paragraph 2 of this Order.'

A charging order was also made charging certain plots specified by number in an amount equal to their respective market value for the time being for—

'securing to the Crown of the amount payable under any confiscation order made against the Defendant . . .'

Copies of the order were to be served on the defendant and named companies including International Dutch Resources Ltd and Fernandez Ltd.

On 26 August 1988, the defendant and International Dutch Resources and Fernandez Ltd (the applicants) applied by summons to have the restraint order and the charging order discharged. The summons was supported by an affidavit by an attorney, Frederick Nigel Bowe, who stated that he was president of the applicants and entitled to make the affidavit on their behalf. No affidavit was sworn on behalf of the defendant and I did not understand that Mr Mackay, who appeared for the applicants, represented him.

At the outset Mr Biscessar, who appeared for the Attorney General, took the preliminary objection that the applicants, in effect, had no standing to make this application. The restraint order and the charging order had not purported to affect any other interest in the properties to which they attached but the interest of the defendant. If the defendant held 100% beneficial ownership of the properties then the applicants had no interest on which to base an application for variation or discharge of the orders.

As Mr Mackay pointed out under RSC Ord 81 any person on whom a restraint order or charging order has been served or who is notified of such an order can apply by summons to have such orders varied or discharged. The orders had been served on the applicants and they were accordingly entitled to apply.

Mr Bowe's affidavit in effect stated that the applicants did own the property, the subject matter of the restraint and charging orders. Documents annexed to the affidavit confirmed that the applicants were also beneficially owned by the defendant. The applicant, International Resources Ltd had acquired the plots, the subject matter of the charging order, from the Island Company on 31 January 1979.

Mr Bowe further stated that having read the affidavit of Asst Supt Sydney Rolle he had requested from the Department of Legal Affairs copies of the charge sheets for the offences allegedly committed by the defendant. He had been supplied with three charge sheets.

The first was signed by Cpl Moss as complainant, was dated 14 September 1979, and was in respect of two charges – being in possession of a quantity of dangerous drugs namely Indian hemp at Norman's Cay on 14 September 1979 and being in possession of a quantity of a dangerous drugs viz cocaine at the same time and place. In each case the defendant was charged as 'being concerned with another'.

The second complaint was signed by Asst Supt John Sydney Rolle and was dated 9 February 1987. It alleged three offences namely importation of dangerous drugs, conspiracy to import dangerous drugs and possession of dangerous drugs with intent to supply, all of which were laid as being contrary to specified sections of the Dangerous Drugs Act (ch 223). The particulars stated that between June 1979 and July 1982 the defendant being concerned with another had conspired to import cocaine into The Bahamas and had imported cocaine into The Bahamas. The possession was stated to have been at Norman's Cay, Exuma.

The third complaint as exhibited was unsigned and undated. Clearly it was the charge which Asst Supt Rolle in his affidavit stated that he intended to lay. A

warrant for the arrest of the defendant on that charge had been issued on 8 July 1988, and averred that the information had been sworn before the magistrate on that day. It charged the defendant with possession of property derived from participation in drug trafficking contrary to s 20(2)(a) of the Act and alleged that the defendant was possessed of property in The Bahamas derived from his participation in drug trafficking. The property, the subject matter of the restraint order and the charging order were then itemised.

Mr Bowe stated that the defendant had been taken into custody by the Colombian police on 4 February 1987, and had been extradited to the United States of America. He had been in custody there since 5 February 1987. Having been found guilty at his trial he had been sentenced to imprisonment for life plus 135 years. All the offences with which he had been charged on the informations had been committed prior to 10 March 1987, since it had not been alleged that he had either imported or possessed dangerous drugs in The Bahamas after July 1982.

The thrust of the argument for the appellants is that the orders made contravened art 20(4) of the Constitution of The Bahamas in that they were made with respect to offences alleged to have been committed by the defendant prior to 10 March 1987.

Article 20(4) reads:

'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed.'

Clearly no steps under the Act could be taken against the defendant in respect of the information filed by Cpl Moss on 14 September 1979 nor that by Asst Supt Rolle on 9 February 1987. Those informations were in respect of acts which at the outside had been completed by July 1982 well before the Act had been passed. The validity of the orders depended on the third information laid on 8 July 1987, and alleging possession of property obtained by drug trafficking.

Section 20(2) and (3) of the Act provides as follows:

'(2) It shall be an offence for a person to – (a) be in possession of property . . . derived from participation in drug trafficking.

(3) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.'

'Drug trafficking' and 'drug trafficking offence' are defined in s 2 of the Act as follows:

' "drug trafficking" means doing or being concerned in any of the following, whether in The Bahamas or elsewhere – (a) cultivating, manufacturing or supplying a dangerous drug where the cultivation,

manufacture or supply contravenes or constitutes an offence under section 3, 8(a) or 21B(1) of the Dangerous Drugs Act, or any rule made under section 10 of that Act, or a corresponding law; (b) transporting or storing a dangerous drug where possession of the drug constitutes an offence under section 25(5) of that Act or a corresponding law; (c) importing or exporting a dangerous drug where the importation or exportation contravenes section 14(4) or 15(5) of that Act or a corresponding law; and include a person doing the following, whether in The Bahamas or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby – (i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment;

"drug trafficking offence" means any of the following – (a) an offence of cultivating under section 3 of the Dangerous Drugs Act; (b) an offence of manufacturing under section 8(a) of that Act or in contravention of any rule made under section 10 of the Act; (c) an offence under section 21A(1) or 21B(1) of that Act; (d) an offence relating to dangerous drugs under section 115 or 116(e) of the Customs Management Act; (e) an offence under section 20; (f) aiding, abetting, counselling or procuring the commission of any of the offences in paragraphs (a) to (e); (g) an offence under section 25(4) or 26 of the Dangerous Drugs Act of attempting, soliciting, inciting or conspiring, to commit any of the offences in paragraphs (a) to (e).'

It is indisputable that the applicants are in possession of the property, the subject matter of the orders. This possession continued after the date of the coming into force of the Act. Presumably on the hearing of the charge there will be evidence that the properties were purchased with the proceeds of drug trafficking. Mr Mackay contends that any such evidence must be evidence of trafficking which took place prior to the Act coming into force since the defendant has been in custody since 4 February 1987. To escape the taint of retrospective criminal legislation it would have to be shown that both the possession and the drug trafficking through which they had been obtained had taken place after the Act had come into force.

He placed much reliance on *Waddington v Miah* [1974] 2 All ER 377, [1974] 1 WLR 683. In that case the respondent, probably a native of Bangladesh, had entered the United Kingdom in October 1970 using a passport suspected to have been forged in that the picture of the original holder had been removed and that of Miah substituted. He was seen by the police in September 1972 and they immediately took possession of that passport. He was later charged under two sections of the Immigration Act 1971, which did not come into force until 1 January 1973, with knowingly entering the United Kingdom without leave between 22 October 1970 and 29 September 1972 and with having in his possession on 29 September 1972 for the purposes of the Immigration Act 1971 a passport which he had reasonable cause to believe to be false.

Lord Reid held that the Immigration Act 1971 was not retrospective and that the respondent should not have been convicted, as the acts in respect of which he had been charged were not offences when they had taken place.

It should be noted that the respondent was charged with having entered the United Kingdom on a certain day. Once he had entered the act was complete. In like manner he had never been in possession of the passport believed to be false beyond September 1972 when the police had taken it from him. The Immigration Act 1971 was not then in force. No act which constituted an ingredient of the offences had occurred after the coming into force of the Immigration Act 1971.

Butchers' Hide Skin and Wool Co Ltd v Seacome [1913] 2 KB 401 is also illustrative of that principle. By s 112 of the Public Health Act 1875:

'Any person who after the passing of the Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say the trade of [then follow six specified trades] or any other noxious or offensive trade, business or manufacture, shall be liable to a penalty not exceeding £50 in respect of the establishment thereof, and anyone carrying on a business so established shall be liable to a penalty not exceeding 40s. for every day on which the offence is continued.'

By s 51(1) of the Public Health Act Amendment Act 1907 the words 'any other noxious or offensive trade, business or manufacture' were struck out and the words—

'any other trade, business or manufacture which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board direct, to be an offensive trade.'

The appellants had been carrying on the business of dealing in hides and skins. Following the appropriate procedure the local authority declared that business to be an offensive trade. The appellants were charged and convicted of carrying on a business which had been declared an offensive trade.

The issue was illuminatingly analysed by Ridley J (at 407):

'The question which we have to determine is whether the appellants committed an offence in carrying on this business after the making and confirmation of the order declaring the trade to be an offensive trade. Have they carried on a business so established within the meaning of s 112 of the Public Health Act, 1875? The words "a business so established" may be construed in one of two ways. On the one hand it may be said that the words mean a business established within the district of the urban authority after the passing of the Act. On the other hand it may be said that they mean a business established within the district of the urban authority after the passing of the Act and after the making and confirmation of the order of the local authority declaring it to be an offensive trade. In my opinion the latter is the more natural meaning of the words.'

The decision seems with respect clearly sound since the Public Health Act 1875 did not apply to businesses established before the Act even if they fell within

the six specified trades. The offence was in establishing such a business after the passing of the Act and carrying on the business 'so established'. The position would have been otherwise had the Act merely made it an offence to carry on any of the specified trades after the passing of the 1875 Act.

The issue here centres on the approach to be adopted when a state of affairs, hitherto not an offence, is made an offence. In *R v Levine* (1926) 46 CCC 342 Prendergast JA, speaking for a majority of three of five members of the Manitoba Court of Appeal stated (at 348):

> 'It appears from Sedgewick On the Construction of Statutory and Constitutional Law 2nd ed. p 160, that it is not enough to make a statute retrospective, that it "takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability", but that such change or alteration must be "in respect to transactions already past".'

In that case the appellant occupied premises in respect of which a permit could be granted for the keeping and storing of spirits since they qualified under the existing law as being her residence though partly used as a store. On 23 April 1926 the legislature passed an Act amending the law so that residence was defined as meaning 'a private dwelling house' and did not include premises used partly as a store and partly as a residence. About two weeks prior to the date on which the amendment came into force she had purchased liquor from the Liquor Commission under the permit which she held. On 27 April 1926, four days after the amending Act came into force she still had stored on her premises some of that liquor. She was charged with having liquor in a place other than a private dwelling house without a licence therefor. She was convicted and the conviction was sustained on appeal.

Having quoted from Sedgewick Prendergast JA stated (at 348-349):

> 'none of the ingredients of the offence charged are "in respect to transactions or considerations already past". The existence or presence of the liquor on the premises only refers to its existence or presence there on the 27th. The appellant's possession of it is merely her possession of it on that day. The condition or lay out of the premises which made them "a place then the private dwelling house in which she resides" (being the inclusion of a store) is also the condition of the premises on the same day. So that all the things and matters that are either formally set forth or implied in the information, happened or existed on the 27th, quite independently of anything that had existed or happened before.'

In my view this is the position here though in this field of interpretation divergences of view are to be expected. the Manitoba Court of Appeal divided three to two.

An example might help illustrate what I consider to be the correctness of the approach. Research discloses that a drug hitherto considered harmless is in fact potentially dangerous. A law is passed making possession of it an offence. A person possessing that drug immediately on the enactment of the law would be

guilty of an offence though he or she had performed no act. Something which had heretofore not attracted legal sanction now did.

I appreciate the force of Mr Mackay's submission that the term 'drug trafficking' as a term of art (so used in the Act) did not exist until the Act became law. Nonetheless each of the elements set out in the Act as constituting drug trafficking had, prior to the enactment of the law, been an offence and would have been understood in ordinary language as an activity comprised in the concept of drug trafficking. The nature of property as property obtained by drug trafficking attaches to it from the moment of its acquisition and remains unchanged. Making possession of such property subject to legal sanction is not, in my view, retroactive legislation.

Mr Mackay contended that the person drafting the Act had followed the English Act dealing with the same subject without paying due regard to the constitutional constraints resting on us here. Although there is no constitutional prohibition against retroactive criminal legislation in England the principle that a person should not be found guilty of a crime in respect of an act which was not an offence at the time it was done is deeply embedded in the common law and retroactive criminal legislation is disapproved by the courts there and generally avoided by the legislature as unfair. Further art 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) prohibits retroactive criminal legislation in terms nearly identical with art 20(4) of the Constitution of The Bahamas. The United Kingdom has accepted the compulsory jurisdiction of the European Court on Human Rights. United Kingdom legislation which breaches that article would therefore be liable eventually to challenge before that court and a person drafting the comparable United Kingdom Drug Trafficking Law would certainly have been aware of this.

In the result I find that s 20(2)(a) of the Act does not offend against art 20(4) of the Bahamas Constitution. It is an offence in respect of which a confiscation order can be made and accordingly a restraint order and a charging order can be made under ss 10 and 11 of the Act to ensure that property of the defendant is available to satisfy any confiscation order which may be made.

By his amended summons Mr Mackay raised the issue of the constitutionality of the order having regard to art 27 of the Constitution. This provides protection from deprivation of property. He pointed out that the exception in para 2(b) of that article only provided for the taking of possession or acquisition of property:

> '(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of The Bahamas.'

The defendant had not been convicted of any offence in The Bahamas. As Mr Biscessar correctly pointed out the restraint and charging orders in this case are covered by para 2(j) of that article which authorises the taking or acquisition of property:

> '(j) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry . . .'

As has been mentioned the Attorney General applied by way of ex parte originating summons to have the restraint order and the charging order made. At the date of the application RSC Ord 81 had not yet been made.

Rule 3(1) of the order now provides:

> 'An application for a restraint order under section 10 or for a charging order under section 11 . . . may be made by the Attorney-General or on his behalf by originating motion.'

Mr Mackay contends that the orders are bad because the application was made by summons. There is no merit in this contention. The rule had not yet been made when the applications were filed. The court did have the power to make the orders under the Act and the exercise of that power could not be frustrated by the fact that rules had not yet been made. The Attorney General as the applicant could apply to the court by any method which was appropriate for the exercise of the power. The originating summons was an appropriate method.

It was also complained that the affidavit sworn to by Asst Supt Rolle failed to specify all the particulars of the offence or offences alleged to have been committed by the defendant. Paragraph 3 sets out full particulars of the charge laid against the defendant on 9 February 1987. That would not, however, be an offence in respect of which a confiscation order could be made. In para 14 of the affidavit Asst Supt Rolle does state that it was his intention on the advice of the Attorney General to institute within a fortnight—

> 'an information charging the Defendant under section 20(2) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 with offences of being in possession of property and of living off proceeds derived from his participation in drug trafficking.'

Section 10(2) of the Act specifically provides that the powers conferred on the court by ss 10(1) and 11(1) are exercisable where the court is satisfied among other matters that an information is to be laid under the Criminal Procedure Code charging a person with having committed a drug trafficking offence.

Such an information was laid. The particulars given of that information appear to me adequate. The inference seems clear that the possession would relate to the date of the filing of the information.

Finally there was the argument that the property charged was not 'realisable property' under the Act. As has been noted earlier ss 10 and 11 of the Act permit restraint orders and charging orders to be made only against 'realisable property' and s 3 provides that realisable property is property held by the defendant or by a person to whom the defendant had made certain gifts caught by the Act. Because of this Mr Mackay contended that though the shares in the applicant company which were owned by the defendant could be the subject matter of a restraining order or charging order, the plots owned by the companies could not be. He relied on the principle in *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 9.

At issue is the question whether the court in this instance would be prepared to lift the veil and decide on the realities of the situation rather than on the

indisputable jurisprudential principle that a company has a juristic personality separate from those who procure its incorporation and control it.

In *Pennington's Company Law* (4th edn) p 51 the following statement appears:

> 'The American Courts have been far readier to disregard a company's separate legal personality when it was clearly formed or acquired to facilitate a breach of the general law or of a contractual obligation. Their attitude is summed up in the words of Sanborn J. in a passage which further litigation in this Country will probably show represents English law too: ". . . A corporation will be looked upon as a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons".'

There are English cases in which the courts have lifted the veil to prevent a company being used as a method of evading a legal obligation. Thus in *Gilford Motor Co Ltd v Horne* [1933] Ch 935, [1933] All ER Rep 109 the plaintiff company bought motor vehicle parts, assembled them and sold the products. They also sold separate parts to customers. The defendant was their managing director and he entered into a restrictive covenant not to interfere with or attempt to entice away the company's customers on the termination of his employment. Shortly after the termination of his employment the plaintiff formed a company to carry on the business of the sale of spares for Gilford vehicles. The central point of the case was whether the covenant in restraint of trade was too wide but an issue also arose as to whether the company could also be enjoined.

Lawrence LJ stated ([1933] Ch 935 at 965, [1933] All ER Rep 109 at 119):

> 'Secondly, as to the question whether the injunction ought to extend to restraining the defendant company from soliciting the plaintiff's customers, I am of opinion that the evidence amply justified the learned judge in drawing the inference that the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation.'

Lord Harmworth MR and Romer LJ used similar language.

In *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832 the defendant sought to evade a threatened action for specific performance of a contract for the sale of land by transferring the land to a company with a capital of £100 formed by law stationers with its registered office at their address. Shortly before the land was transferred to that company it had been 'sold' to the defendant and his solicitors.

Russell J held that the defendant company was—

> 'the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.' (See [1962] 1 All ER 442 at 445, [1962] 1 WLR 832 at 836.)

In this case the application to the Central Bank on behalf of the applicant, International Dutch Resources, for resident status (non-resident owned) stated

that it would be beneficially owned by the defendant who lived in Colombia. It would not borrow Bahamian funds. It was purchasing unit 5 at Norman's Cay worth $US 400,000 but its capital was to be $US 5,000, divided into 5,000 shares of $1 each. Only five shares were to be issued to five employees of Guardian Trust Co Ltd who were to hold these shares in trust for the defendant. Eventually International Dutch Resources purchased units 4 and 5 and 16 lots for $ 875,000.

In his affidavit Mr Bowe states that in May 1978 the issued shares of Fernandez Ltd were transferred to persons employed at Guardian Trust Co Ltd in trust for the defendant. Fernandez Ltd owned Lot 2 Block 35 unit 3 on Norman's Cay.

The defendant, therefore, beneficially owned the entire issued share capital of the applicant companies which own the lots, the subject matter of the charging orders.

Mr Mackay contends that there is no evidence to suggest that the applicant companies were actually used improperly by the defendant – a feature which can be found in all the cases in which the veil has been lifted. He stresses that the conviction of the defendant in the United States of America avails nothing here since a confiscation order can only be made on conviction by a court in The Bahamas.

While this is so, the conviction in the United States of America is relevant at this interlocutory stage where restraint orders and charging orders are being sought. It is one of the bases as the affidavit of Asst Supt Rolle makes clear on which he rests his conclusion that there is evidence available to be placed before a Bahamian court which is likely to result in a conviction here. Assistant Supt Rolle also referred to evidence led before the Commission of Enquiry on which the commission found that Norman's Cay was used as a drug entrepot by the defendant.

Charging and restraint orders in respect of property are not made because the property, the subject matter of such orders, has been used for the purpose of drug trafficking. They are made to ensure that property beneficially owned by the defendant is available to satisfy any confiscation order which may be made against him on his conviction. If such property is not held directly by him but by a company which he beneficially controls then in such circumstances, in my view, the veil should be lifted so that the company is not successfully used as an instrument to protect gains from drug trafficking. Accordingly the contention fails.

The application to discharge the restraint order and the charging order is dismissed with costs to be paid by the applicant.

Application dismissed.

After I had delivered the above ruling Mr Mackay drew to my attention that the proceedings in which this application had been made were criminal proceedings and were intituled on the Criminal Side. For that reason he submitted that no order should be made as to costs.

RSC Ord 59, r 2, provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the court. The proceedings before me are proceedings in the Supreme Court and accordingly in my view there is power to award costs in accordance with that order.

Generally, however, the practice has not been to make orders for costs in criminal proceedings. Additionally in this case important issues of the

constitutionality of the Tracing and Forfeiture of the Proceeds of Drug Trafficking Act 1986 arose which merited examination.

Accordingly I varied the order made at the conclusion of the judgment to provide that there should be no order as to costs.

Appeal from Georges CJ

The applicants appealed against the judgment of Georges CJ principally on the grounds that the restraint and charging orders were in breach of arts 20 and 27 of the Constitution of The Bahamas.

Charles Mackay for the appellants.
Deonaraine Biscessar for the respondent.

2 March 1990. The following judgments were delivered.

HENRY P. On 30 June 1988 on the ex parte application of the Attorney General orders were made under ss 10 and 11 respectively of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the Act) (a) restraining one Carlos Enrique Ledher-Rivas a/k/a Joe Ledher (the defendant) and the appellant companies from dealing with—

> 'any property in The Bahamas in which the Defendant Carlos Enrique Ledher-Rivas a/k/a Joe Ledher has interest, including any shares, stock or equity in companies incorporated in The Bahamas but excluding the lots of land specified in para 2 of this Order;'

and (b) charging certain specified plots in an amount equal to their respective market value—

> 'for securing to the Crown of the amount payable under any confiscation order made against the Defendant.'

Copies of these orders were served on the appellants who then applied by summons to have the orders discharged. On 11 November 1988 the Chief Justice in a written judgment refused their application. This is an appeal against that judgment.

Some 26 grounds of appeal were filed but one was withdrawn and several were argued together under four main heads of appeal, namely:

1. That the orders were in breach of art 20 of the Constitution.
2. That the orders were in breach of art 27 of the Constitution.
3. The reference in the Chief Justice's judgment to the likelihood of the Defendant being convicted in The Bahamas was a contradiction of the presumption of innocence provided for in art 20(2)(a) of the Constitution.
4. The Chief Justice erred in giving effect to a complaint which was unsigned and undated.

Section 1 of the Act provides for it to come into operation on a day to be appointed by the minister by notice published in the Gazette. A notice purporting to do so with effect from 6 January 1987 was not, however, published

in the Gazette until 10 March 1987. Act 2 of 1987 was enacted, s 5 thereof providing as follows:

> '5. Notwithstanding anything to the contrary in any law, the Tracing and Forfeiture of Proceeds of Drug Trafficking Act, 1986 shall be deemed to have come into operation on 6th January, 1987 but nothing in this section shall thereby render a person liable for an offence committed prior to the 10th March, 1987 to any penalty greater than that which could have been imposed upon him had that Act not come into operation.'

The principal object of the Act is to ensure that persons who lay up for themselves treasure derived from their activities in relation to trafficking in dangerous drugs do not continue to enjoy the fruits of these activities. To this end s 4 of the Act in so far as is relevant provides:

> '4.(1) Upon conviction for one or more drug trafficking offences committed after the coming into operation of this Act a person shall in addition to any other penalty prescribed by any law for that offence be liable at the time of sentencing in respect of that conviction or at any time thereafter to have a confiscation order made against him in accordance with the provisions of this Act.
>
> (3) The Court shall first determine whether he has benefited from drug trafficking.
>
> (4) For the purposes of this Act, a person who has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.
>
> (5) If the Court determines that he has so benefited, the Court shall determine in accordance with section 7 the amount to be recovered in his case by virtue of this section.
>
> (6) The Court shall then, in respect of the conviction or convictions concerned order him to pay that amount, but no such order shall be made where the conviction is subject to appeal . . .
>
> (8) In this Act – (a) an order under this section is referred to as a "confiscation order; and (b) a person against whom proceedings have been instituted for a drug trafficking offence is referred to (whether or not he has been convicted) as "the defendant".'

Sections 10 and 11, in so far as is relevant, provide for the making of restraint orders and charging orders as follows:

> '10.(1) The Court may by order (in this Act referred to as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.
>
> (2) A restraint order may apply – (a) to all realisable property held by a specified person, whether the property is described in the order or not; and (b) to realisable property held by a specified person, being property transferred to him after the making of the restraint order.
>
> (3) This section shall not have effect in relation to any property for the time being subject to a charge under section 11.
>
> (4) A restraint order – (a) may be made without prejudice to the other provisions of this Act on an application by the Attorney-General; (b) may be made on an ex parte application to a judge in chambers; and (c) shall provide for notice to be given to persons affected by the order.
>
> (5) A restraint order – (a) may be discharged or varied in relation to any property; and (b) shall be discharged when proceedings for the offences are concluded.
>
> (6) Where the Court has made a restraint order, the Court may at any time appoint a receiver – (a) to take possession of any realisable property; and (b) in accordance with the directions of the Court, to manage or otherwise deal with any property in respect of which he is appointed, subject to such exceptions and conditions as may be specified by the Court; and may require any person having possession of property in respect of which a receiver is appointed under this section to give possession of it to the receiver.
>
> 11.(1) The Court may make a charging order on realisable property for securing the payment to the Crown – (a) where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged; and (b) in any other case, of an amount not exceeding the amount payable under the confiscation order.
>
> (2) For the purposes of this Act, a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown under a confiscation order.
>
> (3) A charging order – (a) may be made only on an application by the Attorney-General; and (b) may be made on an ex parte application to a judge in chambers.
>
> (4) Subject to subsection (6), a charge may be imposed by a charging order only on – (a) any interest in realisable property, being an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Act – (i) in any asset of a kind mentioned in subsection (5), or (ii) under any trust; or (b) any interest in realisable property held by a person as trustee of a trust if the interest is in such an asset or is an interest under another trust and a charge may by virtue of paragraph (a) be imposed by a charging order on the whole beneficial interest under the first-mentioned trust.
>
> (5) The assets referred to in subsection (4) are – (a) land in The Bahamas . . .
>
> (7) The Court may make an order discharging or varying the charging order and shall make an order discharging the charging order if the amount, payment of which is secured by the charge, is paid into court.'

'Realisable property' is defined in s 3(1) of the Act as (a) any property held by the defendant; and (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act. Section 3(9) provides as follows:

> '(9) A gift (including a gift made before the commencement of this Act) is caught by this Act if—(a) it was made by the defendant at any time since the beginning of the period of six years ending when the proceedings were instituted against him; or (b) it was made by the defendant at any time and was a gift of property – (i) received by the defendant in connection with drug trafficking carried on by him or another, or (ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.'

Section 9 sets out the circumstances in which orders under ss 10 and 11 may be made. It provides in part:

> '9.(1) The powers conferred on the Court by sections 10(1) and 11(1) are exercisable where—(a) the defendant has been convicted for a drug trafficking offence committed after the coming into operation of this Act; or (b) proceedings instituted in The Bahamas against the defendant for a drug trafficking offence have not been concluded; and (c) the Court is satisfied that there is reasonable cause to believe that the defendant has benefited from drug trafficking.
>
> (2) Those powers are also exercisable where the Court is satisfied—(a) that an information is to be laid under the Criminal Procedure Code Act charging a person with having committed a drug trafficking offence; and (b) that there is reasonable cause to believe that he has benefited from drug trafficking.
>
> (3) For the purposes of sections 10 and 11, at any time when those powers are exercisable before proceedings have been instituted—(a) references in this Act to the defendant shall be construed as references to the person referred to in subsection (2)(a); and (b) references in this Act to realisable property shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (2)(a) for a drug trafficking offence.'

In this case the learned Chief Justice made the orders on the authority of s 9(2) on the basis that an information was to be laid charging the defendant with possession of property derived from participation in drug trafficking contrary to s 20(2)(a) of the Act.

The expression 'drug trafficking' is defined in s 2(1) of the Act as follows:

> ' "drug trafficking" means doing or being concerned in any of the following, whether in The Bahamas or elsewhere—(a) cultivating, manufacturing or supplying a dangerous drug where the cultivation, manufacture or supply contravenes or constitutes an offence under sections 3, 8(a) or 21B(1) of the Dangerous Drugs Act, or any rule made under section 10 of that Act, or a corresponding law; (b) transporting or storing a dangerous drug where possession of the drug constitutes an offence under section 25(5) of that Act or a corresponding law; (c) importing or exporting a dangerous drug where the importation or exportation contravenes section 14(4) or 15(5) of that Act or a corresponding law; and includes a person doing the following, whether in The Bahamas or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby – (i) the retention or control by or on behalf of another person of the person's proceeds of drug trafficking is facilitated, or (ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment.'

Section 20(2) of the Act provides as follows:

> '(2) It shall be an offence for a person to—(a) be in possession of property, or (b) be living off of proceeds derived from his participation in drug trafficking.'

Counsel for the appellants submits that there are two constituent elements to the offence created by s 20(2)(a) namely, possession of property and the participation by the defendant in one of the activities described in the definition of 'drug trafficking'. One of these activities, however, which is commonly known as money laundering, was not a criminal activity prior to the enactment of s 20(1) of the Act. This, he argues, provides additional support for his basic submission that both possession of the property and participation in drug trafficking must occur after the coming into force of the Act if the constitutional embargo created by art 20(4) of the Constitution is to be avoided. That article provides as follows:

> '(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . .'

In the present case the defendant has been in custody in the United States since 1987 so that any possible participation by him in drug trafficking would have been prior to the commencement of the Act. The property the subject of the restraint order and charging order was also acquired prior to the commencement of the Act. In these circumstances, counsel submits, Article 20(4) of the Constitution would preclude the defendant's conviction on any charge now to be laid for an offence against s 20(2)(a) of the Act. If there could be no conviction there could be no confiscation order and therefore no restraint order or charging order.

There are, in my view, two answers to these submissions. First, it seems to me that the words 'derived from his participation in drug trafficking' are merely descriptive of the nature of the property possession of which is made an offence by s 20(2)(a) of the Act. Similarly, in s 20(2)(b) the act which constitutes the offence is living off of certain proceeds and the words 'derived from his

participation in drug trafficking' are descriptive of the nature of those proceeds. Participation in drug trafficking may constitute a separate drug trafficking offence but it is not the act which constitutes the offence under s 20(2)(a) and would not therefore in so far at that offence is concerned be subject to art 20(4) of the Constitution. It should be observed that although 'drug trafficking offence' is defined in s 2(1) of the Act to include an offence under s 20, participation in drug trafficking could not, having regard to the definition of drug trafficking, include participation in an offence under s 20(2) but could include participation in an offence under s 20(1). In so far as the phrase 'be in possession of' is concerned it seems to me that this expresses a legal concept and cannot properly be said to describe any 'act or omission' by the person charged. But even if it could, the act or omission constituting the offence would have to be an act or omission after the commencement of the Act and there would then be no breach of art 20(4).

Second, if participation in drug trafficking is regarded as a constituent element of the offence under s 20(2)(a) of the Act, it is necessary to consider whether it retrospectively creates an offence in relation to previously lawful activities. The only activity in the definition of drug trafficking which was not prior to the commencement of the Act a crime is that in connection with money laundering. The fact that possession of property derived from a particular activity is a crime does not by itself make the activity a crime. Consequently if an activity is lawful the fact that possession of property derived from it is subsequently made a crime does not retrospectively make the activity a crime. Therefore the fact that 'drug trafficking' includes an activity (money laundering) which was not previously a crime could not make participation in that particular form of drug trafficking as a constituent element of the offence under s 20(2)(a) of the Act retrospectively a crime. The grounds of appeal which rely on the proposition that the charge against the defendant and the consequential orders under ss 10 and 11 of the Act are in breach of art 20(4) therefore fail.

I turn now to the second proposition – that there has been a breach of art 27 of the Constitution. The relevant provisions of that article are as follows:

> '27.(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied . . .
>
> (2) Nothing in this Article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property . . . (j) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry . . .'

Counsel for the appellants submits that a restraint order under s 10 although temporary is nevertheless a deprivation of property and prohibited by art 27(1) unless it falls within the exception expressed in art 27(2)(j) of the Constitution. It cannot fall within that exception, he submits, because no charges have been laid against the appellants who are separate legal entities, are not 'defendants' within the meaning of s 4(8)(b) of the Act and do not hold 'realisable property' within the meaning of s 3(1)(a) of the Act.

In *A-G of The Gambia v Jobe* [1984] 1 AC 689 at 701, [1984] 3 WLR 174 at 183, Lord Diplock observed in relation to similar provisions in the Constitution

of The Gambia 'compulsory "acquisition" of any right over or interest in property includes . . . temporary as well as permanent requisition'. A restraint order under s 10 of the Act is therefore a compulsory acquisition under art 27(1) of the Constitution. The important question for consideration is whether, having regard to the fact that on the well established principle of *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 9 the appellants are separate legal persona, and no charges have been laid against them, orders under ss 10 and 11 of the Act can be made in respect of property which is in their possession.

In *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes)* [1969] 3 All ER 855 at 860, [1969] 1 WLR 1241 at 1254 Lord Denning MR observed:

> 'The doctrine laid down in *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 33 has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can and often do pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.'

The courts have in fact followed suit. In *Gilford Motor Co Ltd v Horne* [1933] Ch 935, [1933] All ER Rep 109 the defendant was managing director of the plaintiff company which assembled and sold motor vehicles and also sold parts for those motor vehicles. He entered into a restrictive covenant not to solicit, interfere with or endeavour to entice away the company's customers on the termination of his employment. Shortly after the termination of his employment the defendant formed a company to carry on the business of the sale of spare parts of Gilford vehicles. In determining that an injunction lay against the defendant's company Lord Hanworth MR held ([1933] Ch 935 at 956, [1933] All ER Rep 109 at 114):

> 'I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr. E.B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on consideration of the agreement which had been sent to him about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.'

Lawrence and Romer LJJ expressed similar views.

In *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832 the first defendant agreed to sell land to the plaintiffs. Pending completion he sold and transferred the land to a company (having a capital of £100) of which he and his solicitors' clerk were sole shareholders and directors. In ordering specific performance against both defendants Russell J held ([1962] 1 All ER 442 at 445, [1962] 1 WLR 832 at 836):

> 'The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face to avoid recognition by the eye of equity.'

Counsel for the appellants submits that in order for the veil of each appellant company to be lifted it must be shown that the company was a mere cloak or sham for the purpose of enabling the defendant to carry out illegal activities or that the company was set up in order to allow the defendant to do something illegal. There is, he submits, no evidence that the appellant companies were actually used improperly by the defendant and the fact that he is the beneficial owner of all the shares in the companies is not a basis for piercing the corporate veil. In support of this latter proposition he cites *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420, [1961] AC 12, in which, delivering the judgment of the Privy Council recognising a contract between a company and its sole governing director Lord Morris of Borth-y-Gest observed ([1960] 3 All ER 420 at 425-426, [1961] AC 12 at 26):

> 'Nor in their Lordship's view were any contractual obligations invalidated by the circumstances that the deceased was sole governing director in whom was vested the full government and control of the company. [The opening words of the next sentence in the judgment are however significant.] Always assuming that the company was not a sham, then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation.'

Counsel for the appellants also submits that the defendant's conviction in the United States of America is not relevant because under s 9(5) of the Act, it is only convictions for drug trafficking offences committed after the commencement of the Act which provide prima facie proof that the defendant has benefited from drug trafficking.

The learned Chief Justice dealt with these submissions in his judgment as follows:

> 'In this case the application to the Central Bank on behalf of the applicant, International Dutch Resources, for resident status (non-resident owned) stated that it would be beneficially owned by the defendant who lived in Columbia. It would not borrow Bahamian funds. It was purchasing unit 5 at Norman's Cay worth US$ 400,000 but its capital was to be US$ 5,000, divided into 5,000 shares of $1 each. Only five shares were to be issued to five employees of Guardian Trust Co Ltd who were to hold these shares in trust for the defendant. Eventually International Dutch Resources purchased units 4 and 5 and 16 lots for $ 875,000. In his affidavit Mr Bowe states that in May 1978 the issued shares of Fernandez Ltd were transferred to persons employed at Guardian Trust Co Ltd in trust for the defendant. Fernandez Ltd owned lot 2 block 35 unit 3 on Norman's Cay. The defendant, therefore beneficially owned the entire issued share capital of the applicant companies which own the lots, the subject matter of the charging orders. Mr Mackay contends that there is no evidence to suggest that the applicant companies were actually used improperly by the defendant – a feature which can be found in all the cases in which the veil has been lifted. He stresses that the conviction of the defendant in the United States of America avails nothing here since a confiscation order can only be made on conviction by a court in The Bahamas. While this is so, the conviction in the United States of America is relevant at this interlocutory state where restraint orders and charging orders are being sought. It is one of the bases as the affidavit of Asst Supt Rolle makes clear on which he rests his conclusion that there is evidence available to be placed before a Bahamian court which is likely to result in a conviction here. Assistant Supt Rolle also referred to evidence led before the commission of enquiry on which the commission found that Norman's Cay was used as a drug entrepot by the defendant. Charging and restraint orders in respect of property are not made because the property, the subject matter of such orders, has been used for the purpose of drug trafficking. They are made to ensure that property beneficially owned by the defendant is available to satisfy any confiscation order which may be made against him on his conviction. If such property is not held directly by him but by a company which he beneficially controls then in such circumstances, in my view, the veil should be lifted so that the company is not successfully used as an instrument to protect gains from drug trafficking. Accordingly the contention fails.'

I respectfully agree with his conclusion; and with the reasons therefor.

The last two propositions may be briefly dealt with. The reference in the learned Chief Justice's judgment to the likelihood of the defendant being convicted is in fact a reference to the conclusion of Asst Supt Rolle that there is evidence available which is likely to result in the defendant's conviction.

Finally the unsigned and undated complaint was not treated by the learned Chief Justice as a valid complaint but merely as an indication of 'the charge which Asst Supt Rolle in his affidavit stated that he intended to lay'. For these reasons I would dismiss the appeal.

SMITH JA. I have had the advantage of reading in draft the judgment prepared in this appeal by Henry P. For the reasons he has stated, with which I am in respectful agreement, and for the further reasons of my own set out below, I agree with his conclusion that the appeal should be dismissed.

I confine my observations and opinion to the contention on behalf of the appellants that in so far as the restraint and charging orders made by the Chief Justice in the formal order dated 1 July 1988 affected the appellants they were made in breach of art 27 of the Constitution and there was, generally, no power to make them as, on the evidence which was before the Chief Justice, the statutory basis for the exercise of the power prescribed in s 9 of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act, 1986 (the Act) was absent.

Both a restraint order under s 10 and a charging order under s 11 of the Act can only be made in respect of 'realisable property', defined in s 3(1) to mean, so far as is relevant, 'any property held by the defendant'. The 'defendant' in these proceedings is Carlos Ledher-Rivas against whom, the learned Chief Justice was satisfied, an information was to be laid under the Criminal Procedure Code Act charging him with possession of property derived from his participation in drug trafficking, in breach of s 20(2)(a) of the Act; a 'drug trafficking offence' as

defined in the Act. There was, therefore, a statutory basis (see s 9(2)) for the exercise of the powers conferred by ss 10 and 11 if there was prima facie evidence that there was property in The Bahamas 'held by the defendant'. The argument for the appellants is, firstly, that there is no allegation that they have committed a drug trafficking offence, so they are not 'defendants' under the Act; secondly, that in so far, at any rate, as the real property, the subject of the restraint and charging orders is concerned, the property is not 'held by the defendant' as the appellants, and not the defendant, are the legal owners. There is, therefore, no valid basis, it was argued, on which the orders could be made to affect the appellants.

The undisputed evidence is that the defendant, Carlos Ledher-Rivas, is the beneficial owner of the entire share capital in each of the appellant companies. The first-named appellant is the registered owner of several lots of land on Norman's Cay, Exuma and the second-named appellant the owner of one lot on the same Cay. By the order of 1 July 1988 the defendant and the appellant companies, among others, were restrained from—

> 'dealing with any property in The Bahamas in which the Defendant Carlos Enrique Ledher-Rivas . . . has interest, including any shares, stock or equity in companies incorporated in The Bahamas but excluding the lots of land specified in paragraph 2 of [the] Order.'

The order, in para 2, charges each of the lots of land on Norman's Cay of which the first-named appellant is registered owner—

> 'in an amount equal to its respective market value for the time being for securing the payment to the Crown of the amount payable under any confiscation order made against the Defendant Carlos Enrique Ledher-Rivas.'

Thus, all the shares in the appellant companies as well as, presumably, the lot of land on Norman's Cay of which the second-named appellant is registered owner are caught by the restraining order. As stated, all the real estate of the first-named appellant on Norman's Cay is caught by the charging order.

It should be noted that under s 10 a restraint order is made prohibiting 'any person' from dealing with realisable property. It is plain from the provisions of the section itself and from other provisions of the Act that 'any person' here includes persons other than a 'defendant', who is described in ss 4(8)(b) and 9(3)(a). A charging order under s 11, on the other hand, is made 'on realisable property', not on a defendant or other person. On the face of it, therefore, the fact that the appellants are not 'defendants' and are registered owners of the real estate, the subject of the orders, is not sufficient, by itself, to invalidate the orders made. In so far as the shares in the appellant companies are concerned, there is, in my opinion, clearly no valid basis on which the restraint order against the appellants can successfully be challenged. The real issue for decision is whether the real estate, subject of the orders, of which the appellants are registered owners, can be held to be 'realisable property' as defined in the Act.

The meaning of 'realisable property' as 'property held by the defendant' is extended by s 2(5), which provides that 'property is held by any person if he holds

any interest in it'; by s 2(1), 'interest', in relation to property, includes right. The charging order section, s 11, provides in sub-s (4)(a) that a charge may be imposed by a charging order only on 'any interest in realisable property, being an interest held beneficially by the defendant'.

The learned Chief Justice, after setting out the relevant evidence, decided the issue under discussion by holding that, in view of the purpose for which restraint and charging orders under the Act are required to be made, if the property is not held directly by the defendant but by a company which he beneficially controls then in such circumstances 'the veil should be lifted so that the company is not successfully used as an instrument to protect gains from drug trafficking'. On appeal, learned counsel for the appellants repeated submissions he made at the hearing before the Chief Justice that for the veil of the companies to be lifted, on the authorities, which he cited, it must be shown that the companies were a mere cloak or sham for the purpose of enabling the defendant to carry out illegal activities or that the companies were set up in order to allow the defendant to do something illegal; that one must show a sinister purpose behind incorporation of the companies; that the mere fact that the defendant is beneficial owner of all the shares in the appellant companies is not a basis for the court to pierce the corporate veil. It was submitted that there was no evidence that either of the appellant companies was actually improperly used by the defendant, a feature which, it was said, can be found in all cases in which the veil of incorporation has been lifted.

A letter dated 25 October 1978 to the Central Bank of The Bahamas (a copy is exhibited in the proceedings) seeking exchange control approval prior to incorporation of the first-named appellant company stated that the company was being formed to buy land on Norman's Cay; the company would not borrow Bahamian funds; it would be beneficially owned by 'Mr. Carlos E. Ledher, P.O. Box 739, Armenia, Colombia, South America'; the authorised share capital would be $US 5,000 divided into 5,000 shares of $US1 each; and that the subscribers to the company's memorandum and articles of association would be five persons, each holding one share in trust for Mr Ledher. Subsequent additional letters, dated 10 January and 26 January 1979, to the Central Bank resulted in exchange control permission being granted for the purchase by the company of lands at Norman's Cay for $US 875,000, and for the proceeds of sale in foreign currency being retained to liquidate a mortgage with Citibank NA. There is no evidence that the company was incorporated for any other purpose, or had conducted any other business, besides purchasing and holding the lands on Norman's Cay.

The second-named appellant company was already incorporated in December 1974 when a lot of land on Norman's Cay known as Lot 2 Block 35 Unit 3 was conveyed to it by way of gift. By letter dated 10 May 1978 application was made to the Central Bank for exchange control approval for the transfer of the shares in this company to Mr Carlos E Ledher, stated to be an American citizen, for a consideration of $US 100,000. The letter stated that the company's assets were limited to land on Norman's Cay. At the time of the hearing below, the evidence was that the issued shares in the company were held by staff members of the company's attorneys-at-law in trust for the defendant, Mr Ledher. As in the case of the first-named appellant company, the issued shares amounted to five, the statutory minimum.

The letter dated 10 January 1979 to the Central Bank in support of the application for exchange control approval for the purchase of land at Norman's Cay by the first-named appellant company stated that Norman's Cay was divided into lots comprised in five units numbered 1 to 5 (inclusive). The evidence is that by January 1979 the appellant companies were registered owners of all the lots in units 4 and 5, 11 lots in unit 3, two in unit 2 and one in unit 1.

The evidence before the Chief Justice, therefore, established that during the period from May 1978 to the end of January 1979, and continuing, legal ownership of a substantial portion of the lands on Norman's Cay, Exuma was held by the two appellant companies in combination. Each of the companies is totally owned by the defendant and under his absolute control. It is plain that he must have provided the purchase price for the lands as there is no evidence that the first-named company had capital in excess of $ 5 and the cost of the shares in the second-named company with its asset (land on Norman's Cay) was paid for by the defendant.

In the written judgment of the Chief Justice reference is made to the affidavit evidence of Asst Supt John Sydney Rolle, of the narcotics unit of the police force, given in support of the application for the restraint and charging orders. This evidence stated the belief of the deponent that the defendant Ledher-Rivas had engaged in the illegal trafficking of drugs through The Bahamas over the period commencing from mid-1978 onwards. The basis for this belief included findings of a commission of inquiry constituted by the government in 1983 to inquire into the extent and methods employed in the illegal use of The Bahamas for the transhipment of dangerous drugs to the United States of America. The commission found that from the middle or latter part of 1978 to 1980 the defendant used Norman's Cay extensively to facilitate the transhipment of drugs through The Bahamas to the United States of America.

This prima facie evidence of drug trafficking activities by the defendant on Norman's Cay at a time which coincided with the formation and acquisition, respectively, by him of the appellant companies – companies whose only apparent business was the acquisition and ownership of land on Norman's Cay – gave rise to the inescapable inference that the companies were formed and acquired as an integral part of the defendant's scheme of drug trafficking. Looked at in this way the evidence falls squarely within the formulation of counsel for the appellants in his submission that for the veil of a company to be lifted it must be shown that the company was a mere cloak or sham for the purpose of enabling the defendant to carry out illegal activities or to allow him to do something illegal.

In my opinion, the undisputed and the prima facie evidence before the learned Chief Justice to which reference has been made fell within the general ambit of the circumstances described by the authorities which justify a court removing the veil of incorporation of a company. If the evidence does not fall precisely within those circumstances, then there is nothing in the authorities indicating that the category of instances in which a court is justified in doing so is closed. In my judgment, there was ample evidence to justify the learned Chief Justice's conclusion that the veils of incorporation of the appellant companies should be lifted.

With the veils lifted, the defendant Ledher-Rivas is revealed as the beneficial owner of the lands on Norman's Cay registered in the names of the companies. The lands were, therefore, 'realisable property' on which the charging order and,

in the case of the second-named appellant, the restraint order, could properly be made. This would also justify the Chief Justice's conclusion that the making of the orders fell within the exception in para (2)(j) of art 27 of the Constitution and was, therefore, not in breach of that article.

MELVILLE JA. The Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (the Act) eventually became effective from 10 March 1987. It was an Act to make provision for the tracing of the proceeds of drug trafficking, the confiscation of those proceeds and ancillary amendments to the Dangerous Drugs Act. On an ex parte application by the Attorney General on 30 June 1988 orders were made (a) restraining Carlos Enrique Ledher-Rivas a/k/a/ Joe Ledher (the defendant) and the appellants from dealing with—

> 'any property in The Bahamas in which [the defendant] has any interest, including any shares, stock, or equity in the companies incorporated in The Bahamas but excluding the lots of land specified in paragraph 2 of this Order;'

and (b) charging a number of lots of land on record in the Registrar General's Department in the name of the first appellant and in an amount equal to their respective market value

> 'for securing to the Crown of the amount payable under any confiscation order made against [the defendant].'

Having been served with copies of the above orders, the appellants applied by summons on 26 August 1988 for both the restraint and charging orders to be discharged. That application was refused by the Chief Justice on 11 November 1988; this appeal is brought against that decision. It seems clear that one of the main objects of the Act is that persons who have benefited from drug trafficking offences should be made to cough up their ill-gotten gains in addition to suffering the other punitive measures provided by the Act.

Section 4(1) of the Act provides that where a person has been convicted for one or more drug trafficking offences committed after the coming into operation of the Act, he is liable to have a confiscation order made against him in addition to any other penalty prescribed by law. A confiscation order is made against 'realisable property' which is defined by s 3(1) as—

> '(a) any property held by the defendant; and (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act.'

Section 3(9) is as follows:

> 'A gift (including a gift made before the commencement of this Act) is caught by this Act if – (a) it was made by the defendant at any time since the beginning of the period of six years ending when the proceedings were instituted against him; or (b) it was made by the defendant at any time and was a gift of property – (i) received by the

defendant in connection with drug trafficking carried on by him or another, or (ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.'

Before a confiscation order is made the court has to first determine whether a defendant has benefited from drug trafficking (see s 4(3)). Section 4(4) provides:

'For the purposes of this Act, a person who has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.'

Section 4(8)(b) states—

'a person against whom proceedings have been instituted for a drug trafficking offence is referred to (whether or not he has been convicted) as "the defendant".'

'Drug trafficking offence' means inter alia an offence under s 20 of the Act. 'Restraint' and 'charging' orders may be made under the provisions of ss 10 and 11 and those powers are exercisable where the court is satisfied among other things—

'(a) that an information is to be laid under the Criminal Procedure Code Act charging a person with having committed a drug trafficking offence; and (b) that there is reasonable cause to believe that he has benefited from drug trafficking.' (see s 9(2)).

Based on the affidavit of John Sydney Rolle, an Assistant Superintendent attached to the Narcotic Unit of the Royal Bahamas Police Force, the learned Chief Justice made the restraint and charging orders on the ex parte originating summons under the provisions of s 9(2) on the understanding that an information was to be laid against the defendant charging him with possession of property derived from his participation in drug trafficking contrary to s 20(2)(a) of the Act. There is no doubt that the affidavit of Mr Rolle with the exhibits attached thereto showed that from the middle or the latter part of 1978 to 1980 the defendant had used Norman's Cay in The Bahamas extensively to facilitate the transhipment of drugs through The Bahamas to the United States of America and that a large part of Norman's Cay was owned by the first appellant, which had acquired the lots the subject matter of the charging order on 31 January 1979.

Paragraph 13 of Mr Rolle's affidavit states that from inquiries, reports, and investigations:

'I verily believe that the Defendant engaged over the period commencing from mid 1978 onwards in the illegal trafficking of drugs through the Bahamas and thereby derived substantial economic benefit enabling him to accumulate assets in the form of money, real estate and interest in companies.'

It is common ground that both appellant companies are wholly beneficially owned by the defendant.

The relevant provisions of ss 10 and 11 read thus:

'10.(1) The Court may by order (in this Act referred to as a "restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order . . .

(5) A restraint order – (a) may be discharged or varied in relation to any property; and (b) shall be discharged when the proceedings for the offences are concluded . . .

11.(1) The Court may make a charging order on realisable property for securing the payment to the Crown – (a) Where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged; and; (b) in any other case, of an amount not exceeding the amount payable under the confiscation order.

(2) For the purposes of this Act, a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown under a confiscation order . . .(4) Subject to subsection (6), a charge may be imposed by a charging order on – (a) any interest in realisable property, being an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Act – (i) in any asset of a kind mentioned in subsection (5) . . .

(5) The assets referred to in subsection (4) are – (a) Land in the Bahamas . . .

(7) The Court may make an order discharging or varying the charging order and shall make an order discharging the charging order if the amount payment of which is secured by the charge is paid into court.'

Section 20(2) reads:

'It shall be an offence for a person to – (a) be in possession of property . . . derived from his participation in drug trafficking . . .'

A number of grounds of appeal were argued, but they were grouped under four main heads namely—

(A) That the restraint and charging orders breached art 20 of the Constitution.

(B) That the orders offended art 27 of the Constitution.

(C) That it was wrong in law to state that one of the basis for obtaining a restraining order under the Act, is the likelihood of the defendant being convicted as that contravened the defendant's presumption of innocence as provided for in art 20(2)(a) of the Constitution.

(D) That a complaint in the name of the Commissioner of Police on which there was no signature of a peace officer cannot be a valid complaint under s 54 of the Criminal Procedure Code Act.

Article 20(4) of the Constitution states:

'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . .'

To substantiate an offence under s 20(2)(a) of the Act it was submitted that both the possession of the property and the participating by the defendant in 'drug trafficking' must have occurred after the Act came into force. In other words, both the actus reus and the mens rea must have occurred after 10 March 1987 for the provisions of ss 9, 10, and 11 to apply. The defendant had been in custody in the United States of America since 1987 so that any possible participation by him in drug trafficking would have been prior to the commencement of the Act. In addition, the properties which were the subject of the restraint and charging orders were acquired long before the commencement of the Act.

Although the matters defined as 'drug trafficking' by the Act, so the submission continues, were criminal offences before the Act came into force, yet one of those activities commonly referred to as 'money laundering' was not a criminal offence before the enactment of s 20. That, it was said, gave further support to the submission that both the possession of the property and participation in drug trafficking must occur after the Act came into force. Thus there could be no conviction now of any charge laid against the defendant for any offence contrary to s 20(2)(a) of the Act as that would offend against the provisions of art 20(4) of the Constitution. Ergo, since there could not properly be a conviction, there could be no confiscation order and if there could be no confiscation order there could not be a restraint and/or charging order.

It is quite clear that a confiscation order can only be made upon a conviction for one or more drug trafficking offences 'Committed after the coming into operation of this Act' (see s 4(1) of the Act). Constitutional requirements apart, there is a presumption against retrospection in relation to legislation enacted by Parliament.

44 *Halsbury's Laws of England* (4th edn) p 570, para 922 puts the matter thus:

'The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Similarly, the courts will construe a provision as conferring power to act retrospectively only when clear words are used.'

Bata Shoe Co Guyana Ltd v Comr of Inland Revenue (1976) 24 WIR 172 and *R v Reah* [1968] 3 All ER 269, [1968] 1 WLR 1508 illustrate the above rule.

In addition to the reasons given by Henry P on this aspect of the matter, and which I respectfully adopt, it seems that the situation here is similar to that which existed in *R v Levine* (1926) 46 CCC 342. Speaking for the majority in the Manitoba Court of Appeal, Prendergast JA said (at 348):

'It appears from Sedgwick on the construction of Statutory and Constitutional Law, 2nd ed., p 160, that it is not enough to make a statute retrospective, that it "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability", but that such change or alteration must be "in respect to transactions or considerations already past".'

Prendergast JA then continued (at 348-349):

'now, none of the ingredients of the offence charged are "in respect to transactions or considerations already past". The existence or presence of the liquor on the premises, only refers to its existence there on the 27th. The appellant's possession of it, is merely her possession of it on that day. The condition or lay-out of the premises which made them "a place other than the private dwelling house in which she resides" (being the inclusion of a store), is also the condition of the premises on that same day. So that all the things and matters that are either formally set forth or implied in the information, happened or existed on the 27th, quite independently of anything that had happened or existed before.'

Accordingly, I am of the view that s 20(2)(a) of the Act does not offend against art 20(4) of the Constitution; the appellants' arguments under this head cannot avail them.

As to the second head that the order offended art 27 of the Constitution, it was said that in the context of this case property can only be compulsorily taken – (i) after a conviction for a criminal offence under the law of The Bahamas; or (ii) if the matter comes within the exception expressed in the first part of art 27(2)(j) of the Constitution.

The powers of the court under ss 10 and 11 of the Act could not be invoked with respect to the real estate of the appellants because the appellants – (i) were not charged with any offence under the Act, (ii) were not holding 'realisable property' within the meaning of s 3(1)(a) of the Act; (iii) were not 'defendants' within the meaning of s 4(8)(b) of the Act.

Further, continued Mr Mackay, a company incorporated under the Companies Act is a separate legal entity from its shareholders, therefore the shareholders only hold an interest in the shares and not in any real estate which the company as a separate juristic person may hold in its own name. See *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 9. For the veil of incorporation to be lifted it must be shown that the company was a mere cloak or sham for the purpose of enabling the defendant to carry out illegal activities; or that the company was set up in order to allow the defendant to do something illegal. See *Gilford Motor Co Ltd v Horne* [1933] Ch 935, [1933] All ER Rep 109 and *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832. The mere fact that the Defendant is the beneficial owner of all the shares in the appellant companies is not a basis for the court to pierce the corporate veil. See *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420, [1961] AC 12. The submission continued that there was no evidence disclosed by the affidavit of Mr Rolle that any of the appellant companies was actually used improperly by the defendant – a feature which can be found in all the cases in which the veil of incorporation has been lifted. Nor did the conviction of the defendant in the United States of America have any

relevance to these proceedings, because by s 9(5) of the Act, only convictions for drug trafficking offences committed after the commencement of the Act would be prima facie proof that the defendant has benefited from drug trafficking. So, in so far as s 9(1)(b), (c) and (2)(a), (b) of the Act are applied to deprive a person who is not a defendant of his property, they are in conflict with art 27 of the Constitution.

Article 27(1) of the Constitution reads:

> 'No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied . . .'

Article 27(2)(j) reads:

> 'Nothing in this Article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property . . . (j) for so long only as may be necessary for the purposes of any examination, investigation, trial, or inquiry . . .'

Section 18(1) and (2)(a)(vii) of the Constitution of The Gambia are in substance the same as art 27(1) and (2)(j) quoted above. The restraint and charging order, would amount to a compulsory acquisition of a right over or interest in property even though the acquisition would only be of a temporary nature; but it would certainly be within the exception in art 27(2)(j) of the Constitution as being provisions contained in a law that made provision for the taking of possession of property for so long as might be necessary for the purposes of an investigation or trial (see *A-G of The Gambia v Jobe* [1984] 1 AC 689, [1984] 3 WLR 174).

No one would question that on the authority of *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 9 that in the normal course of things that the appellants would be prima facie considered as having a separate legal identity of its own. Was the learned Chief Justice therefore correct in making the orders which he did against property which belonged to the appellants when no criminal charges under the Act had been brought against them? *Lee v Lee's Air Farming Ltd* was a case where the separate identity of the company was recognised even though it had entered into a contract with its sole governing director, but Lord Morris of Borth-y-Gest there reminds us that it was never suggested the company was a sham or a mere simulacrum.

In *Gilford Motor Co Ltd v Horne* [1933] Ch 935, [1933] All ER Rep 109, and *Jones v Lipman* [1962] 1 All ER 442, [1962] 1 WLR 832 the veil of incorporation was lifted as the companies there were a mere cloak or sham. Russell J said ([1962] 1 All ER 442 at 445, [1962] 1 WLR 832 at 836):

> 'The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.'

On the findings of the learned Chief Justice which have been fully set out by Henry P and which I also would adopt, the above words of Russell J very aptly describe the circumstance that existed in this case. Bearing in mind the words of Lord Denning MR in *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes)* [1969] 3 All ER 855 at 860, [1969] 1 WLR 1241 at 1253-1254, it was fitting that the learned Chief Justice should pull off the mask of incorporation in this case.

The other grounds of appeal argued do not in my view call for any separate comments. I am content to adopt the reasons given by Henry P and for the various reasons stated I would dismiss the appeals.

Appeals dismissed.