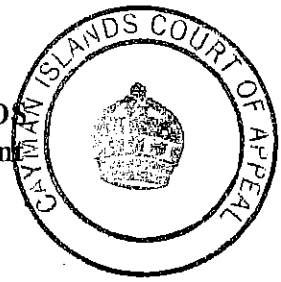
15/7/2002

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal Nos. 19 of 2001 and 2 of 2002
(Grand Court No. 379 of 1999 and P.C.C.L. No. 1 of 1999)

BETWEEN:



THE ATTORNEY-GENERAL OF THE CAYMAN ISLANDS
Appellant

Custody file.

- and -

EUROBANK CORPORATION
(IN LIQUIDATION)

First Respondent

- and -

ROBB EVANS AND ROBB EVANS AND ASSOCIATES
as Receiver of certain companies and the affairs of Kenneth Taves

Second Respondent

BEFORE: The Rt. Hon. Mr. Justice E. Zacca, P.C., President
The Hon. Mr. Justice G. Collett, J.A.
The Hon. Mr. Justice I. Rowe, J.A.

The Attorney-General, David Ballantyne, Andrew Mitchell Q.C., and Kennedy Talbot for the Appellant. Ali Malek Q.C. and Colin McKie for the First Respondent. Ramon Alberga Q.C., Graham Ritchie and Rosie Whittaker Myles for the Second Respondent.

Heard: April 2nd – 5th, 8th and 9th 2002. Delivered: July 15th 2002

JUDGMENT

COLLETT, J.A.

1. These consolidated appeals are brought by the Attorney-General of the Cayman Islands against three separate rulings of the Grand Court (Smellie C.J.), respectively given on 4th April 2001, 24th September 2001 and 22nd October 2001. The background to the issues canvassed in these appeals covers the period 1998 - 2001 and has been encapsulated in a Joint Statement of Facts agreed by all parties and handed in at

the hearing. Rather than seek to distil a précis of these facts, I have instead attached it in its entirety as an appendix to this judgment.

2. Essentially the first issue for determination here is whether or not the learned Chief Justice was correct to hold, in his 4th April ruling, that the appellant was obliged to seek the leave of the Grand Court for the institution of criminal proceedings against a company already in liquidation subject to the supervision of the court, pursuant to section 101 of the Companies Law (2001 second Revision); or whether, in reliance upon section 16A of the Constitution, he was entitled to institute and undertake such proceedings without any such leave. The learned Chief Justice held that leave was indeed required. A secondary issue, dependent upon the resolution of the first, is whether or not if he was correct in so holding, he was also correct in granting leave to impose specific conditions in relation to the prosecution and its conduct and whether or not the conditions so imposed are reasonable in all the relevant circumstances.

3. There is a third and entirely discrete issue between the appellant and the second respondent in regard to the discharge of a restraint order made pursuant to the Proceeds of Criminal Conduct Law in relation to an account in the name of Kenneth Taves at the bank. This account contains monies alleged to have been fraudulently obtained by him and placed in that account as an act of money laundering allegedly with the complicity of the bank and of some of its former officers. The receiver represents the interest of victims of the fraud. This issue will involve a detached examination of the

terms and purposes of this Law ('the PCCL') and in particular of section 17 thereof. The order of discharge which is now appealed was made as part of the 22nd October ruling of the Chief Justice.

4. Mr. Malek in his skeleton submission on behalf of the first respondent has helpfully identified three separate sub-issues in relation to the question of leave:

(i) whether section 154 of the Companies Law makes section 101 of that Law applicable to the winding up of the bank subject to the supervision of the court;

(ii) whether, if section 101 applies, it extends to criminal proceedings; and,

(iii) whether, if so, that conclusion offends against section 16A of the Constitution.

Each of these points was addressed by the learned Chief Justice in his 4th April ruling and each now needs to be considered in turn.

5. The learned Attorney-General submits that section 101 of the Companies Law applies only to companies being wound up compulsorily by order of the court and not to those in a voluntary liquidation subject to the court's supervision, as is the bank in this case. Voluntary liquidations are dealt with in a separate set of sections of the Law. Mr. Malek on the other hand demonstrates that the genesis of this section was section 87 of the English Companies Act 1862 and that section 154 of the Bermuda Law is in almost

identical terms to section 151 of that Act. Thus he submits that, although supervised liquidations no longer form part of English company law, the contemporary authorities from that jurisdiction ought to be applied in these Islands and that they predominantly favour the view that section 101 applies.

6. The Chief Justice found in favour of the first respondents on this point. His reasons are set out at paragraphs 5 – 15 of his ruling where he drew attention to the wording of sections 151 and 154 of the Companies Law. Section 151 provides that a petition for a supervised voluntary winding up "shall for the purpose of giving jurisdiction to the Court over suits and actions be deemed to be a petition for winding up the company by the Court". Section 154, while preserving the authority of the original liquidators appointed by resolution of the company, provides that any order made by the Court shall "for all purposes (including the staying of actions, suits and other proceedings) be deemed to be an order of the Court for winding up the company by the Court ...."

7. The text books of English company law including Palmer's Company Law 24th Ed., and Gore-Brown on Companies 44th Ed., all regard the rules applicable to compulsory winding up as applicable also to supervised winding up and the views there expressed are fortified by observation of Brightman. L. J., in *Re Ano Co. Ltd.* (1980) 1 Ch. 196 at p. 204. No authority was cited in support of the Attorney-General's argument to the contrary. Both for that reason and on account of the plain wording of the relevant

sections just quoted, it appears to us that the learned Chief Justice was clearly correct in holding that section 151 is applicable to the winding up of the respondent bank.

8. The next point requiring consideration is whether or not section 101 includes criminal as well as civil proceedings. The section provides as follows:

> "When an order has been made for winding up a company no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose". [emphasis added].

9. The learned Attorney-General submits that this phrase ought to be construed *ejusdem generis*; the *genus* being constituted by the words 'suit' and 'action', both of which refer to civil proceedings only, the words 'other proceedings' should be confined to civil proceedings only. Mr. Malek, however, contends that 'other proceedings' is a phrase apt in its ordinary meaning to comprise proceedings of every description including criminal. The context of the Law itself does not disclose any definite priorities as to which of these contending interpretations ought to prevail. Section 109 draws a clear distinction between civil and criminal proceedings absent in section 101. It is also suggested that the logic of compulsory liquidation situations requires that all kinds of proceedings against the company should be stayed unless leave is specifically granted in the interest of protecting the available assets in the liquidator's hands for orderly distribution *pari passu* to creditors in due course.

10. The learned Chief Justice dealt with this question at paragraphs 16-32 of his ruling and exhaustively there reviewed the English authorities which are relevant to it.

It is correct to say that none of them are precisely on point. The first in time, *Briton Medical and General Life Assurance Association* (1886) 32 Ch. D. 503, concerned an attempt by a private prosecutor to recover statutory penalties against an association in liquidation. Kay, J. refused leave to institute such proceedings which he described as quasi-criminal in nature on account of the embarrassment which they would tend to cause to the orderly winding up of the association. However, the learned Judge left open the question whether or not the Court would have power to restrain the Attorney-General from instituting a public prosecution against it and in an *obiter dicta* seemed to suggest it might not.

11. The question was next considered by Slade, J. in *In re J. Burrows (Leeds) Ltd.* (1982) 1 WLR 1177, where a company in liquidation was prosecuted for failure to pay social security contributions. While refusing to stay the proceedings, the learned Judge endorsed the concession made by counsel for the prosecutor there that criminal proceedings were indeed comprised within the term 'proceedings' used in the relevant English legislation. Subsequently, in *R. v. Dickson* (1991) 94 C.A.R. 7, the English Court of Appeal endorsed these comments of Slade, J. whilst holding that leave was indeed required for the institution of criminal proceedings against a company in liquidation pursuant to section 130 (2) of the U.K. Insolvency Act 1986. The relevant wording of that subsection, however, is "no action or proceeding ..." which is insufficient on its face to constitute a '*genus*' restricted to civil proceedings, for which reason the inclusion of criminal proceedings within the ordinary meaning of the words used is clearly indicated

as a matter of construction. This case also is not conclusive as the proper interpretation of section 101.

12. The final authority relied upon by the learned Chief Justice in reaching his conclusion on the point was *Environmental Agency v. Clark Administrator of Rhondda Waste Disposal Ltd.* (2000) BCC 653 where the English Court of Appeal had to construe the words "no proceedings and no execution or other legal process may be commenced or continued ... against the company or its property" as used in sections 10 and 11 of the U.K. Insolvency Act 1986. Rejecting the submission that these words should be constructed '*ejusdem generis*' the Court went on to hold that criminal proceedings were encompassed in the natural meaning of that provision, with the result that the prosecution under consideration in that case could not proceed without leave.

Having considered the trend of authority disclosed in an examination of the cases cited as well as the public policy aspects of the question whether criminal proceedings ought reasonably to be comprised within the ambit of section 101 so as to require the grant of leave for prosecutions of companies in compulsory or supervised liquidations, the learned Chief Justice held in favour of the liquidators on this point. Having carefully examined his reasons in the light of the full argument addressed to us by both counsel at the hearing of this appeal, we have concluded that he was correct in his determination that section 101 does indeed encompass criminal proceedings and that, where the section is applicable, its provisions apply (or before 1993 applied) to any prosecution so as to require leave to be obtained and to empower the Court to impose terms upon the prosecutor.

13. The third sub-issue in relation to the question of leave is based upon the bold proposition, advanced by the learned Attorney-General, to the effect that section 101, construed as we have held as encompassing criminal prosecutions of companies in compulsory liquidation, is now repugnant to section 16A of the Constitution insofar as it requires the Attorney-General to seek leave to institute or undertake such a prosecution. The argument so advanced has two complimentary limbs, the first based upon the internal machinery of the Constitution itself, the second upon the Colonial Laws Validity Act 1865 of the United Kingdom.

14. The Cayman Islands, as is well known, enjoys the international law status of an autonomous but still dependent territory of the United Kingdom. As such it does not yet itself enjoy the status of sovereignty but is subject to the sovereignty of Her Majesty the Queen in Parliament, the sovereign entity of the United Kingdom. The emanation of that sovereignty insofar as these Islands are concerned is contained in the Cayman Islands (Constitution) Order 1972 made by Her Majesty in Council pursuant to powers conferred by the West Indies Act 1962 of the United Kingdom Parliament. The Constitution was annexed to that Order and came into force upon the dissolution of the Legislative Assembly next following 22nd August, 1972. The Constitution has been subsequently amended, in particular by a further Order in Council in 1993 which contained a new section 16A, the foundation of the Appellant's present arguments.

15. It is to be noted that section 101 of the present Companies Law (2001 Revision) was first introduced into Cayman Law in 1964 by an enactment of the local legislature. It is therefore part of the "existing laws" of the Islands as defined in section 57 (4) of the Constitution. Section 57 (2) provides that:

> "Subject to the provisions of the next following subsection, the existing laws shall on and after the appointed day [for coming into force of the Constitution] be construed with such modifications, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Constitution."

Section 16A in force as part of the Constitution since the 1993 Amendment reads, insofar as relevant, as follows:

> "16A (1) The Attorney General shall have power in any case in which he considers it desirable so to do –
>
> (a) To institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in the islands;
> (b) ....
> (c) ....
>
> (2) The powers conferred upon the Attorney General under subsection (1) of this section may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions.
> (3) ....
> (4) ....
> (5) In the exercise of the powers conferred upon him by this section ... the Attorney General shall not be subject to the direction or control of any other person or authority."

16. It is the case for the Appellant that the provisions of subsection (1) (a) read with those of subsection (5) of section 16A empower him to proceed with a prosecution of Eurobank for offences of money laundering without the necessity for him to seek the leave of the Court under section 101 of the Companies Law, notwithstanding that the bank has been at the relevant times in liquidation under the court's supervision. He further submits that it is necessary for section 101 to be construed, in order to bring it into conformity with section 16A of the Constitution, as subject to an exception in favour of any criminal proceedings which he considers it necessary to bring against any company notwithstanding that it is in compulsory/or supervised liquidation.

17. As an alternative but parallel submission he contends that, insofar as section 101 purports to require him to seek leave under that section, its provisions are void and inoperative as being repugnant to an Order made under an Act of Parliament, namely the Constitution Order as amended in 1993, pursuant to section 2 of the Colonial Laws Validity Act 1865. As the learned Chief Justice acknowledged in his ruling, acceptance of either of these alternative contentions would leave the Attorney-General free to prosecute the bank without seeking the leave of the Court. It would also follow that the imposition of any conditions limiting the ambit of his discretion to prosecute the bank would be made without jurisdiction and that the purported exercise of the Court's discretion to impose such conditions would necessarily lack any legal force.

18. The Chief Justice, however, sought in his ruling to escape from the conclusion logically stemming from the apparent clash of these provisions by pointing to a further amendment of the Constitution contained in the 1993 amending Order. This was the introduction of a new section 49H, subsection (1) of which redefines the jurisdiction and powers of the Grand Court as follows:

> "49H (1) There shall be a Grand Court for the Cayman Islands which shall be a superior Court of Record and shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law".

Attention was also drawn in his ruling to the provisions of section 11 of the Grand Court Law which invest the Grand Court with "the like jurisdiction which is vested in or capable of being exercised in England by the High Court of Justice and the Divisional Courts of that Court".

19. The ruling proceeds to suggest that the solution to the apparent conflict might not simply be to regard the section 16A powers vested in the Attorney-General as taking precedence, but instead as requiring an interpretation which would lead to a reconciliation of the apparent conflict between them.

20. With the greatest respect, this view of the conflict seems to ignore the respective status of section 16A as a specific provision of the Constitution itself and of the other provisions as laws of the subordinate Legislature of the Islands. The reference

in section 49H to jurisdiction and powers vested in the Court by "any other law" cannot reasonably be construed as conferring constitutional status or force upon any provision of the local legislature which is seen to be in conflict with any other specific provision of the Constitution itself. Inevitably, such provisions of local laws, including section 101 of the Companies Law and section 11 of the Grand Court Law, enjoy the force of a law of the local legislature only and cannot be elevated by a mere reference to "any other law" in section 49H to constitutional status. If in actual conflict with a provision of the Constitution itself, such as section 15A, these local provisions are bound to give way to the extent of the conflict disclosed.

When, therefore, in paragraph 53 of his April ruling the learned Chief Justice concludes that the powers contained in the cited local laws "are shown to be elevated to the same constitutional validity as are the powers given in section 16A", we are unable to agree. They are not so shown for the reasons just advanced and the apparent conflict does not disappear. The only way in which it could be made to disappear is if the phrase "any other person or authority" in section 16A(5) could legitimately be construed as not including a court of law or any judge thereof.

21. Mr. Malek has sought to make good this construction of section 16A(5), despite its apparent departure from the basic rule of construction, that words used in a statute should be given their ordinary and natural meaning. Firstly, he argues that the clear intention of section 16A is to shield the Attorney-General in the exercise of those powers from improper political influence and not from the control of the Courts. It does

not seem to me, however, that this laudable intention can be fully achieved if the construction for which he contends is indeed correct. It would leave a legislature predominantly controlled by local politicians free by passing local legislation to circumscribe the discretion to institute criminal proceedings by requiring the leave of the Court in any number of unnecessary and undesirable ways. That possibility, far-fetched though it might appear, would always remain open if his argument is correct.

Secondly, counsel sought to rely upon judicial authority. It is not in dispute that nothing in section 16A purports to better the long established power of the Grand Court to control its own proceedings for the purpose of preventing an abuse of its process and ensuring a fair trial: see *Connelly v. D.P.P.* [1964] A.C. 568. In *Brooks v D.P.P.* [1994] 1 A.C. 568 (P.C.), Lord Woolf, in delivering the opinion of the Board, made reference at p. 579 to Section 94(6) of the Jamaica Constitution which is in substantially similar terms to section 16A(5) here. He stated –

> "Section 94(6) does not refer to a court because its primary purpose is to protect the D.P.P. from the type of objectionable interference referred to in the passage ... already cited. It is not intended to apply to judicial control of the proceedings".

22. No issue can be taken to this observation of the learned Law Lord if its purport is confined to a further vindication of the Court's inherent power to control its own process so as to prevent abuse. It does not, taken in its context, seek to extend that power to the fettering of the powers vested in the Jamaican D.P.P. under section 94. Brook's case was in fact concerned with the question whether the D.P.P. could validly

seek leave of a High Court Judge to proffer a voluntary bill of indictment in a case where an examining magistrate had refused to commit the defendant for trial after a preliminary inquiry; this despite the existence of a parallel power in the D.P.P. to prefer one without such leave. It was held that it was proper for him to do so. Significantly, Lord Woolf at letter H on the same page remarked:

> "It is, however, one thing to impose control over the appropriate law officer against his wishes and another to impose control at his request".

23. We discern in Brook's case a further pointer to the resolution of the question now being canvassed in this appeal. The Constitution of Jamaica, though not the Cayman Islands Constitution, contains a section 1(9) which specifically provides that:

> "no provision ... that any person or authority shall not be subject to the direction or control of any other person or authority in exercising functions under this Constitution shall be construed as precluding a Court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law".

This subsection is clearly intended to preserve the jurisdiction of judicial review in such cases arising in Jamaica.

24. As has been mentioned above, this provision has no parallel in the Cayman Islands Constitution. Its inclusion in the Jamaica Constitution does, however, lead to the presumption that its draftsmen entertained, at the least, some doubt that,

without it the jurisdiction of the Courts in judicial review might be circumscribed. That is only consistent with the view that "any other person or authority" in its natural meaning includes a Court of law.

Reference was also made at the hearing to a number of English authorities upon the question whether and in what circumstances prosecutorial discretion can be controlled or regulated by statute. These are of little assistance to us because of the absence of a written constitution in the United Kingdom. Thus, there is no superior body of constitutional law which is ever capable of over-riding the power of any Act of Parliament to change the law (whether consisting of previous statute, common law or Royal prerogative) and no body of rules by which the validity of any statute can be measured by the Courts.

25. We have not considered it necessary in this judgment to enter into a consideration of the numerous public policy submissions which were canvassed at the hearing by counsel on both sides as well as in the April ruling of the Chief Justice. How far the public interest in the freedom to bring public prosecutions ought or ought not to give way to the public interest in the orderly winding up of Cayman Islands registered companies are philosophical questions worthy of careful consideration. But the issues raised here are questions of pure law and must in the end be answered as such without reference to questions of public policy. Although this is a matter of first impression free from any known or reported Commonwealth authority, we have, after careful consideration, reached the conclusion that section 16A of the Constitution prevails over

section 101 of the Companies Law. It follows that in our judgement the conclusions reached in paragraphs 66, 67 and 68.3 and 68.4 of the April ruling are incorrect. No leave was required by the Attorney-General to issue the summonses against Eurobank in liquidation. When leave was subsequently granted in purported exercise of a discretion under section 101 there was no jurisdiction to impose terms, and the conditions purported to be so imposed lack any validity. The question of whether or not they are reasonable conditions is therefore moot and need not be given further consideration in this judgment.

26. Let us now turn to the second of the major issues which these appeals present. It revolves about the proper construction of the Proceeds of Criminal Conduct Law (2000 Revision) ('PCCL'). Two restraint orders were made against Eurobank in the course of proceedings in the Grand Court against the bank at the instance of the Attorney-General. Both have subsequently been discharged by orders of the Court but one only of these discharges is the subject of this appeal. At the outset it is necessary to consider the purpose as well as some of the detailed provisions of the P.C.C.L. Its main purpose is not in dispute. The Law is designed to enable the Grand Court at the instance of the Attorney-General in any appropriate case to order the confiscation of the property of an offender convicted of any indictable offence in addition to any other sentence passed upon him, to the extent that he can be shown to have benefited from that offence. The only exception is in relation to drug trafficking offences, to which a similar but not identical regime is prescribed under the Drug Trafficking Law. In order to prevent the dissipation or removal of assets prior to a conviction, the Law provides for the Court to make a restraint order against the property of a person charged or about to be charged

with any such indictable offence. Such an order may only be made *ex parte* upon the application in Chambers of the Attorney-General whenever it appears to the Judge that there are reasonable grounds for thinking that a confiscation order may eventually be made. There is machinery provided for any person affected by the making of such an order to seek its discharge by application to the Court.

27. Confiscation orders are limited in amount to the extent of the offender's realisable property, which is defined as the sum total of his property and of any property which he has gifted to a third party. It is also limited by the extent of the benefit derived from the offence by the convicted person and this is defined in section 5(3) of the Law as comprising the value of property obtained as a result of or in connection with its commission. One of the questions which arise for determination here is the proper interpretation of this definition.

28. A special regime applies under section 17 of the P.C.C.L. in respect of restraint orders made in respect of the property of a company which is subsequently, or which has previously become the subject of an order or resolution for its winding up. No difficulty arises in the former case since section 17(1)(a) makes it clear that the functions of the liquidator are not exercisable in respect of any property which is subject to a restraint order made before the commencement of the winding up. Difficulty has arisen, however, in respect of section 17(2) which applies where the resolution or order for winding up has preceded the making of the relevant restraint order. In such a case that subsection provides that:-

> "the powers conferred upon the Grand Court ... shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable –
>
> > (a) so as to inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
> >
> > (b) so as to prevent the payment out of any expenses ... properly incurred in the winding up in respect of the property".

29. The relevant restraint order concerned in this appeal was made on 2nd November 2000 which was subsequent to the order for supervised winding up of Eurobank. Its terms were to prohibit the bank from dealing with a considerable body of numbered accounts at the bank the most notable being account number 33169 in the names of Kenneth and Teresa Taves. This account is said to contain approximately 2.8 million U.S. dollars which is alleged to be part of the proceeds of the fraud for which Kenneth Taves has already been convicted in the United States. Other parts of these proceeds passed through the bank and were routed overseas, comprising an even larger sum. Their precise whereabouts are still uncertain.

30. The second respondent, the receiver, now lays claim to these 2.8 million dollars. He derives his authority from an order of the U.S. District Court for California, having been so appointed to represent the interests of the very large number (in excess of 300,000) of the victims of the fraud each of which have lost approximately $20 or

upwards. His status as such receiver has been acknowledged in these Islands by an order of the Grand Court and he asserts both a moral and a legal claim to the assets on behalf of these victims, for whose benefit he has organised in the United States a compensation scheme designed to ensure restitution.

31. At the instance of both respondents, the learned Chief Justice in his ruling dated 22nd October 2001 discharged the restraint order of 2nd November 2000. His reason for so doing was a perceived conflict between the terms of that order and the requirements of section 17(2) of the P.C.C.L. The order would in his judgement inhibit the liquidators from exercising the functions of their office for the purpose of distributing the property of the company by way of dividends to a creditor of the bank, here the receiver, second respondent.

32. Recognising that without more the discharge of the restraint order might leave the liquidators carte blanche to pay a dividend out of account number 33169 which on no account should be allowed to go to Mr. Taves, the Chief Justice then proceeded to give directions to the liquidators not to admit the proof of debt of the receiver in whole or in part until such time as they are satisfied that proper arrangements have been made to pass on such dividend to the victims of the fraud and not to pay over the dividend to the receiver until satisfied that such arrangements are operational. This further order is relied upon by the respondents as showing that any possibility of the Taves recovering these funds is quite illusory despite the discharge of the restraint order formerly preventing it.

33. Mr. Mitchell, who argued on behalf of the Attorney-General on this issue, nevertheless contends for a restoration of the restraining order, arguing that, in its absence these liquidators will be able to employ the previously restrained funds in the numbered accounts in various ways which he stigmatised as undesirable. This would include topping up of the 80% dividend which they are presently authorised to pay to legitimate creditors whose proofs have already been accepted, thus placing them in a better position than if no money laundering charges had been preferred against the bank. This would leave little or no funds remaining in the bank from which a confiscation order could be satisfied in the event of a conviction of the bank and the making of such an order.

34. Be that as it may, the question whether the restraint order was properly discharged or ought to have been let to remain in force must essentially be answered in light of the correct construction of section 17(2) of the P.C.C.L. and of its application to the facts of this case. Mr. Mitchell contends for what he described as a 'purposive' construction of the subsection. It could never have been the intention of the Legislature to have left a loophole in the scheme of the Law whereby, even in theory, assets identified as the product of money laundering could be returned by liquidators to the perpetrators of crime under the guise of 'creditors' within the subsection. Creditors in this connection should only mean legitimate creditors of the bank. Mr. Alberga sought to counter this line of argument by suggesting that this would still fall foul of the subsection by depriving liquidators of their function of deciding who was and who was not a lawful creditor. There is no authority which can assist in any meaningful way in the resolution

of this question, either from local or Commonwealth sources or, indeed, from the Courts of the United Kingdom upon whose parallel legislation the P.C.C.L. is closely modelled including section 17.

35. One is obliged to begin the examination of the question by asking, who is a creditor in law? This can only be answered by saying that it is a person who can assert a legal claim against another. '*Ex turpi causa non oritur actio*': A claim based upon or involving crime can never give rise to a judgment against an alleged debtor; hence the claim is bound to be rejected and the claimant cannot be recognised as a creditor. When this analysis is applied to a company liquidation situation, it follows that the liquidator(s) are obliged to reflect any proof which relies upon such an unlawful claim and have no duty to pay any part of the assets of the company to any such alleged creditors as a dividend or otherwise.

36. This surely must supply the answer to the question of a proper construction of section 17(2). A restraint order cannot inhibit the payment out of dividends to lawful creditors whose proofs have been properly accepted by the liquidators but it can indeed restrain the payment out of suspected illicit funds which could never have been the subject matter of a judgment against the company concerned. It is necessary, therefore, to ask the further question, is there a lawful creditor of Eurobank in respect of the funds, lodged in account number 33169 or any of the other numbered accounts specified in the restraint order before its discharge?

37. We have reached the conclusion that no such lawful creditors exist. These funds are the alleged proceeds of fraud and money laundering. Clearly the Taves are not the lawful creditors of the bank in this respect. The receiver on the other hand has a lawful claim recognised by the Courts both here and in the U.S.A. on behalf of the victims but it is a claim it second hand. The primary claim of the receiver is against the Taves for misappropriation and, only if that claim succeeds as it is likely to do, is the receiver entitled then in a tracing action to pursue the bank for the funds in Taves account. This does not in our judgement constitute the receiver as a lawful creditor of the bank; he is at most a prospective creditor in respect of a prospective claim. Money laundering, like possession of an unlicensed firearm or importation of a controlled drug, is essentially a victim-less crime. This has perhaps been overlooked here because of the vast number of victims which the receiver represents; but they are victims of the Taves' fraud and not of the bank's alleged offence. So, they are not direct creditors of the bank and the receiver's proof cannot yet be properly admitted for payment.

38. We have to conclude, therefore, that there was no actual conflict between the terms of the receiving order and no justification for its discharge. Its reinstatement will obviate the need for the elaborate machinery put in place by the Chief Justice's ruling to prevent the leakage of the bank's available assets. It will, as Mr. Mitchell has pointed out, allow the funds in account 33169 to remain under restraint until in due course the bank is either convicted or acquitted. In the event of conviction, the Court in its criminal jurisdiction can then be asked to consider a confiscation order, a compensation order in favour of victims represented by the receiver under section 28 of

the Penal Code or a combination of both. Machinery has been identified under the P.C.C.L. to make these orders, and the existence of the restrained funds will ensure that they are effective and realisable.

39. It remains to consider the further contention which has been advanced by the second respondent but which was rejected by the Chief Justice in his October ruling, concerning the proper interpretation of benefit in relation to compensation orders. That term as we have seen is interpreted in section 5(3) of the P.C.C.L. Mr. Alberga on behalf of the second respondent contends that 'benefit' in this connection should be restricted to the gross profits made by Eurobank in and about the administration of account number 33169 and the other formerly restricted accounts. Mr. Mitchell on the other hand argues that benefit includes all the monies, proceeds of fraud, which have passed into those accounts as part of the money laundering process operated by the bank. In practice, however, the Attorney-General is content to limit his potential claim to the 2.8 million dollars or so which still rest in the account, a somewhat less than generous concession since the realisable property of the bank if convicted is unlikely to exceed that amount. Mr. Alberga, however, points out that if the wider meaning of benefit is accepted then, in other cases, the interests of innocent depositors could be in jeopardy as a result of enormous compensation orders being made. There is some merit in that submission.

40. The learned Chief Justice's approach was, correctly in our view, to examine the statutory interpretation provided by section 5(3) in the light of the English authorities decided upon the similar question arising under the parallel English legislation. The value of property obtained by an offender as a result of or in connection

with the commission of the relevant offence cannot, in the ordinary connotation of that phrase, be confined to the gross profit which the offender has obtained as a result of its commission. Money paid into a bank becomes the property of that bank and its depositor has only a contractual right to recover an equivalent amount in due course with or without stipulated interest. Thus if Eurobank has received tainted money in connection with a money laundering scheme to which it is party, the whole amount so obtained must be regarded as its benefit of the offence for the purposes of the P.C.C.L.

41. The Chief Justice considered the recent English authority upon the point, including *In re K.*, T.L.R. 1/10/90 p. 629 and *In re Metcalfe*, Court of Appeal May 18th, 2001 but not yet reported. The unanimous view of the English Courts was that benefit for the purposes of the corresponding U.K. legislation should be given the wider construction. We can see no good reason from departing from this clear line of authority and consider that it ought to be applied in the interpretation of section 5(3) as the learned Chief Justice held. The contentions of the respondents' notice filed by the second respondent must therefore be rejected.

42. In the result, therefore, we make the following orders:

(i) Both Appeals are allowed;

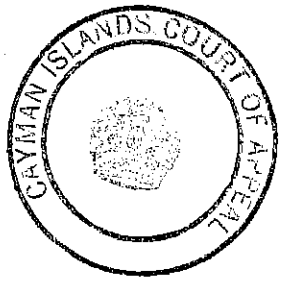
(ii) It is hereby declared that the Attorney-General did not require leave to issue the summonses directed to Eurobank in liquidation and the finding to the contrary of the Grand Court in April, 2001 is quashed; the conditions

applied to the subsequent grant of leave to the Attorney-General are null and void;

(iii) It is hereby declared that the restraint order dated 22nd October, 2000 ought not to have been discharged; it is restored with immediate effect;

(iv) Benefit for the purposes of the P.C.C.L. has the meaning ascribed to it by the learned Chief Justice in his ruling of 2nd November, 2001 and the contentions of the respondents' notice are rejected;

(v) By consent there shall be no order as to the costs of these appeals.



Zacca, P.

Collett, J.A.

Rowe, J.A.