

RESTRAINT AND CONFISCATION

A PRACTICAL GUIDE FOR THE EASTERN CARIBBEAN

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“Confiscating criminal assets delivers a wide range of benefits, from depriving criminals of capital to reducing the incentives for crime and the harm caused by crime, as well as promoting fairness and confidence in the criminal justice system.”

- Baroness Scotland of Asthal

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FOREWORD

Acquisitive crimes are almost invariably committed for one simple motive – profit

It is a truth universally acknowledged that without the financial rewards on offer then precious few, if any, people would be motivated to ship drugs across continents; to launder the proceeds of crime; to defraud and steal from the vulnerable, the innocent or the gullible; to commit copyright offences or to extort money from others. This region of the world, in common with all other jurisdictions, faces an ever-increasing threat from those involved in serious organised crime. Their offending is global and, in order to combat it, every country must play its part. Drug trafficking, in particular, is a perniciously thriving industry that threatens the stability, wellbeing and growth of every single society – and all levels of society are detrimentally affected by the effects of crime.

The most effective weapon against such crimes is not, however, detection – but prevention; the removal of the incentive to commit the crime in the first place. After all, if the putative criminal assesses that he will reap no benefit from his crime there would be no incentive to commit it?

It is the removal of the hope for financial gain, which the confiscation of the proceeds of crime regimes are aimed. The legislation is intended to deprive defendants of the totality of the benefit they have gained from criminal conduct, whether or not they have retained such benefit, within the limits of what they can prove are their available means. It does not provide for confiscation of assets in the ordinary manner of speaking (for otherwise it would have little real effect). Rather, it can strip a defendant not only of the boat that he used for his drug running but also, if necessary and his criminality is sufficiently serious, of the house that he inherited from his parents as well as the entirety of his otherwise legitimately acquired assets.

In keeping with many other jurisdictions, most Commonwealth countries now have laws in place to ensure that once a person has been convicted of serious

acquisitive crimes, then, not only will his gross benefit from the indicative criminality be assessed and that amount confiscated but, additionally, his income and expenditure over preceding years (generally six) will be looked at with a critical eye. Should the defendant be unable to prove that such income and expenditure was legitimately funded then those funds will be assumed to have been derived from crime.

It is from the foregoing perspective that, worldwide, courts are asking three essentially simple questions in confiscation and forfeiture proceedings:

1. Has the defendant benefited from crime?
2. If so, what is the gross value of the benefit that the obtained?
3. Has the defendant proved that he or she cannot repay that amount to society?

The defendant is liable to repay if, ultimately, the answer to the third question is in the negative. It is difficult to think of a simpler method of removing the incentive to commit acquisitive crimes

This Practical Guide on Confiscation and Restraint in the Eastern Caribbean is a highly commendable work. Its hallmarks are its simplicity, as well as the comprehensive guidance, which it provides to assist Judges of our Court, prosecutors and counsel for the State, in particular, in these matters. The Guide is thus an invaluable and highly practical contribution to the fight against money laundering and acquisitive crimes. I commend it for use by all persons who have an interest in fighting this scourge

**His Lordship The Honourable Chief Justice Mr Hugh A. Rawlins
Chief Justice of the Eastern Caribbean Supreme Court**

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RESTRAINT ORDERS

1. Introduction

- 1.1 The purpose of a restraint order is to preserve the defendant's assets pending the making of a confiscation order. The entire confiscation process would be defeated if the defendant had sold or transferred all of their assets before the confiscation order was made. As such, restraint is usually the first and most fundamental step taken in the confiscation process.
- 1.2 A restraint order does not have to be made at the outset of a case (although in most instances it should be and unnecessary delay in making the application should not be tolerated by the court) and can even be applied for after a confiscation order has been made if appropriate.
- 1.3 A restraint order may be made against the defendant (or suspect if your legislation permits pre-charge restraint), a third party if the defendant's assets are jointly owned, and any other person to whom the defendant has made a tainted gift.
- 1.4 Some jurisdictions throughout the Eastern Caribbean also allow for a restraint order to be made against specific property belonging to someone other than the defendant if that property is or has been

tainted by the commission of the offence and is under the effective control of the defendant.

1.5 It is only appropriate to grant a restraint order if the defendant (or suspect) has benefited from their criminal activity or if there is a reasonable belief that he will be found to have so benefited.

1.6 The object is to strike a balance at the interlocutory stage between keeping the defendant's assets available to satisfy any confiscation order which may be made in the event of conviction and meeting the defendant's reasonable requirements in the meantime (**Re Peters** [1998] 3 All ER 46, CA).

2. Appropriate Bodies

2.1 The Director of Public Prosecutions is the appropriate person to apply to the court for a restraint order¹ apart from Grenada where a 'prosecutor' can apply.²

2.2 In every jurisdiction, except St Christopher and Nevis, the appropriate court to hear the restraint application is specifically defined as being the High Court.³

¹ Antigua and Barbuda: Section 31(1) Proceeds of Crime Act 1993; Barbados: Section 31(1) Proceeds of Crime Act Cap 143; Dominica: Section 30(1) Proceeds of Crime Act 1993; Saint Vincent and the Grenadines: Section 26(4)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 14(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 30(1) Proceeds of Crime Act Cap 3.04.

² Grenada: Section 21(4)(a) Proceeds of Crime Act 2012 – also see section 25(1) Financial Intelligence Unit Bill 2012, that when enacted will allow the Director of the Financial Intelligence Unit to apply for a restraint order.

2.3 The legislation in St Christopher and Nevis, however, defines ‘*court*’ as *including* the High Court.⁴ Restraint and confiscation attach to ‘*serious offences*’ which are defined as any indictable or hybrid offence which attract a penalty of imprisonment for more than one year.⁵ As such, prosecutors in Saint Christopher and Nevis can arguably apply to the Magistrates’ Court for a restraint order where the offence is a hybrid offence that has been dealt with summarily, and attracts a penalty of imprisonment for more than one year.

3. Nature of the Application (Ex Parte or Inter Partes)

3.1 The legislation governing restraint throughout the Eastern Caribbean provides that an application for restraint *may* be made *ex parte*. It is for the judge to make a ruling on whether the application will be heard *ex parte* or *inter partes*.⁶

³Every country in the Eastern Caribbean States that an application for restraint must be made to the court. In every jurisdiction except Saint Christopher and Nevis, the court is defined as the High Court. Antigua and Barbuda: Sections 31(1) and 3 Proceeds of Crime Act 1993; Barbados: Sections 31(1) and 3 Proceeds of Crime Act Cap. 143; Dominica: Sections 30(1) and 2 Proceeds of Crime Act 1993; Grenada: Sections 20(1) and 21(1) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 26(4)(a) and 2 Proceeds of Crime and Money Laundering (Prevention) Act 2001; and Saint Lucia Sections 30(1) and 2 Proceeds of Crime Act Cap. 3.04.

⁴ Court is defined under section 2 of the Proceeds of Crime Act 2000.

⁵ The definition of serious offence was amended by section 3 of the Proceeds of Crime (Amendment) (No.2) Act 2008.

⁶ Antigua and Barbuda: Section 31(2) Proceeds of Crime Act 1993; Barbados: Section 31(2) Proceeds of Crime Act Cap 143, Dominica: Section 31(2) Proceeds of Crime Act 1993; Grenada: Section 21(4)(b) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 26(4)(b) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 14(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 30(2) Proceeds of Crime Act Cap. 3.04

3.2 The use of the word '*may*' vests some discretion in both the applicant and the court, but it is clear that Parliament anticipates that cases will arise where an ex parte application is appropriate, particularly when the preservation of the assets may be placed at risk if the defendant is given notice of what is being proposed.

3.3 It is difficult to imagine an instance where the risk of dissipation of assets, which is a pre-requisite for the making of the order, would not be exacerbated should the defendant be notified of the application for a restraint order.

3.4 The provision to hear an application for restraint ex parte is clearly meant to be used; there would be no point in putting such a proviso into the legislation otherwise. The court should take comfort from the fact that there are checks and balances to ensure fairness to the recipient of an ex parte restraint order since:

- (a) The court itself can refuse the order;
- (b) The legislation provides that a restraint order may be varied or discharged upon an application by the recipient; and
- (c) Evidence obtained inappropriately or in a misleading way is unlikely to be admissible and could amount to an abuse of process or a costs award against the applicant.

3.5 In many cases, where the prosecutor applies for a restraint order without notice, there will not be a formal hearing and the judge will consider the application in private. The judge will ordinarily only require the prosecutor to attend if there are aspects of the application which they find concerning. It is always open to a prosecutor to request a hearing if they are of the opinion that there are aspects of the application which call for detailed explanation.

3.6 Where a hearing does take place, it is best practice for the prosecutor to take detailed notes of the hearing and subsequently serve the note on the defendant (**Interroute Telecommunications (UK) Ltd v Fashion Group Ltd [1999] TLR 762** and **Director of Asset Recovery Agency v Singh [2004] EWHC Admin 2335**).

4. Duty of Full and Frank Disclosure

4.1 As with any application where the defendant is not provided with the opportunity to make representations, the prosecution have a duty to make full and frank disclosure to the court of all material facts, whether those support the defendant's case or not.

4.2 The duty to make full and frank disclosure in the context of restraint applications was set out by Hughes LJ in **Director of the Serious Fraud Office v A [2007] EWCA Crim 1927**. He stated:

‘Because the initial application is commonly made without notice, the court will not at that stage hear evidence on both sides. For this reason, as with other without notice applications, the court insists on full and complete disclosure by the applicant of everything that might affect the decision whether or not to grant the order. There is a high obligation on the applicant to put everything relevant before the judge, whether it may help or hinder his cause’

- 4.3 The list of matters that should be disclosed is not exhaustive and will depend upon the facts of the particular case. Certainly the particulars of any defence put forward in interview or any innocent explanations offered by the defendant should be included in the affidavit.
- 4.4 The duty to make full and frank disclosure of all material facts does not cease once the restraint application is made. The duty extends for the entire period that the restraint order is in place. If further information comes to light that may be relevant to whether the court would have exercised their discretion to grant the restraint order, or would maintain its existence, the prosecutor has a duty to make full and prompt disclosure to the court.
- 4.5 Failure to disclose material facts should, in serious cases, result in a discharge of the restraint order. The court does however have a further discretion and may, depending on the seriousness of the non-

disclosure, direct that the order be varied or discharged and a new order made on different terms.

5. Appropriate Cases for Restraint

5.1 It is not necessary, or even possible, to grant a restraint order in every set of proceedings. Restraint and confiscation attach to certain '*gateway offences*'. It should be noted that in Saint Vincent and the Grenadines, all offences are gateway offences. The gateway offences are the same for both restraint and confiscation.

5.2 In Saint Vincent and the Grenadines it is possible to apply for a restraint order for a drug trafficking or relevant offence.⁷ What constitutes a drug trafficking or relevant offence is clearly defined under the Act.⁸ Due to the amendment to the Act in Saint Vincent and the Grenadines, all offences now fall within the definition of drug trafficking or relevant offence.⁹

5.3 The gateway offences in the other jurisdictions are more limited. In Antigua and Barbuda, Barbados and Dominica, the legislation provides that it is only possible to apply for restraint for scheduled

⁷ Saint Vincent and the Grenadines: Section 25(1)(a) Proceeds of Crime Money Laundering (Prevention) Act 2001

⁸ Saint Vincent and the Grenadines: Section 2 of the Proceeds of Crime and Money Laundering (Prevention) Act 2001

⁹ In Saint Vincent and the Grenadines the definition of relevant offence has been amended to include all indictable, hybrid and summary offences by the Proceeds of Crime and Money Laundering (Prevention) (Amendment) Act 2005.

offences.¹⁰ Again, what constitutes a scheduled offence is clearly defined under each Act.¹¹ It is worth noting that scheduled offences in Barbados have recently been amended to encompass a far greater range of offences than previously.

5.4 In Saint Lucia, it is possible to apply for a restraint order for offences which are defined as criminal conduct.¹²

5.5 Saint Christopher and Nevis permits restraint for serious offences.¹³ Again, these offences are clearly defined under the Act.¹⁴

5.6 In Grenada, the gateway offences are very limited and include only indictable offences other than drug trafficking offences.¹⁵

¹⁰Antigua and Barbuda: Section 31(1)(a) and (b) Proceeds of Crime Act 1993; Barbados: Section 31(1)(a) and (b) Proceeds of Crime Act Cap. 143; and Dominica: Section 30(1) Proceeds of Crime Act 1993

¹¹ It should be noted that in Dominica the definition of a scheduled offence was amended by the Proceeds of Crime (Amendment) Act 2010. In Antigua and Barbuda the definition of a scheduled offence was amended by the Proceeds of Crime (Amendment of Schedule) Order 2009. In Barbados the scheduled offences have been amended by the Money Laundering and Financing of Terrorism (Prevention and Control) Act 2011.

¹² Section 30(1)(a) and (b) Proceeds of Crime Act Cap. 3:04 as amended by the Proceeds of Crime (Amendment) Act 2010. The Proceeds of Crime (Amendment) Act did away with the term scheduled offence and substituted it with the term criminal conduct. It should be noted that the definition of criminal conduct includes offences set out under the revised schedule.

¹³ Section 14(1)(a) and (b) Proceeds of Crime Act 2000 as amended by the Proceeds of Crime (Amendment) (No. 2) Act 2008.

¹⁴ The definition of serious offence was amended by section 3 of the Proceeds of Crime (Amendment) (No. 2) Act 2008. Pursuant to section 3 of the Act, hybrid offences remain serious offences however only in cases where the hybrid offence carries a penalty of a term of imprisonment for more than one year.

¹⁵ Sections 20(1)(a) and 2(6)(d) of the Proceeds of Crime Act 2012.

5.7 Even if the offence is a gateway offence for the purposes of restraint, it still may not be appropriate to apply for a restraint order. The court must also consider whether the application for restraint has been made at the appropriate time (more at section 6 below), whether the defendant has benefited from the offence (more at section 8 below), the status of the assets to be restrained (more at section 7 below) and the risk of dissipation of the assets (more at section 10 below).

6. Appropriate Time To Apply For Restraint

6.1 Whether or not to apply for a restraint order and if so, the timing of that application, are important strategic decisions in the case and should only have been taken after careful consideration of the effect on the case, whether at the investigative or at the prosecution stage.

6.2 The earliest possible time a prosecutor may apply for a restraint order differs throughout the region. In all jurisdictions *except* Saint Christopher and Nevis, Saint Vincent and the Grenadines and Grenada, the earliest possible time to apply for restraint is when the defendant has either been convicted or charged with a gateway offence.¹⁶

6.3 The legislation in Saint Christopher and Nevis, Saint Vincent and the Grenadines and Grenada permits pre-charge restraint. The wording

¹⁶Antigua and Barbuda: Section 31(1)(a) and (b) Proceeds of Crime Act 1993; Barbados: Section 31(1)(a) and (b) Proceeds of Crime Act Cap 143; Dominica: Section 31(1)(a) and (b) Proceeds of Crime Act 1993; and Saint Lucia: Section 30(1)(a) and (b) Proceeds of Crime Act Cap. 3:04

of the legislation in these countries requires that the person is either ‘*to be charged*’ (Saint Vincent and the Grenadines and Grenada) or ‘*about to be charged*’ (Saint Christopher and Nevis) with the gateway offence.¹⁷

6.4 If the restraint application is made pre-conviction (the most common scenario), the court should, before granting the order, be satisfied that there is a reasonable prospect that the defendant will be convicted of the offence and a confiscation order will subsequently be made.¹⁸

6.5 The legislation in Grenada and Saint Vincent and the Grenadines is explicit that the court should not exercise the powers to grant a restraint order if there has been undue delay in bringing the restraint application.¹⁹

6.6 When considering undue delay in the context of restraint, it is important for the court to keep in mind that in some cases the prosecutor and investigator may decide not to make the application for

¹⁷ Grenada: Section 20(3)(a) Proceeds of Crime Act 2012; Saint Christopher and Nevis: Section 14(1)(a) Proceeds of Crime Act 2000; and Saint Vincent and the Grenadines: Section 25(3)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁸ Antigua and Barbuda: Section 32(1)(b) and (e) Proceeds of Crime Act 1993; Barbados: Section 32(1)(b) and (e) Proceeds of Crime Act Cap 143; Dominica: Section 31(1)(b) and (e) Proceeds of Crime Act 1993; Grenada: Section 20(2)(b) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 25(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001; and Saint Lucia: Section 31(1)(b) and (e) Proceeds of Crime Act Cap. 3.04

¹⁹ Grenada: Section 20(2)(a) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 25(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

restraint at the earliest opportunity, not because they have delayed, but for strategic reasons.

6.7 This situation will usually arise if a jurisdiction allows for a restraint order to be applied for pre-charge. In such cases, it is obvious that once a suspect has been served with a restraint order, he or she will be aware of the criminal investigation and may be in a position to abscond and/or to destroy evidence or otherwise interfere with the course of the investigation. In such cases, it will necessarily fall upon the investigator to weigh up the pros and cons of an early application. If a decision is taken not to proceed at that stage, but later, then the court will need to consider whether the delay is undue or not.

6.8 Grenada and Saint Vincent and the Grenadines also permit an application for restraint in cases where the prosecution intends to proceed with confiscation against an absconded defendant and/or where there is a reconsideration of benefit or realisable amount under an existing confiscation order.²⁰ The section relating to undue delay also applies to such applications.

7. What Can Be Restrained?

7.1 Realisable Property

²⁰ Grenada: Section 20(1)(b) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines Section 25(1)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001

7.1.1 It is possible to restrain any and all realisable property held by the defendant which includes the value of any tainted gifts made by the defendant to another person.²¹

7.1.2 Realisable property means property held by the defendant (whether jointly, or solely or in some cases, in the name of a third party) together with property held by a person to whom the defendant has made a gift, up to the value of the gift.²²

7.1.3 Realisable property will not include property subject to an extant forfeiture order (or in Grenada subject to any other order under any enactment).²³ In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia, realisable property will not even include property subject to an application for a forfeiture order.²⁴

²¹ Antigua and Barbuda: Section 31(1) Proceeds of Crime Act 1993; Barbados: Section 31(1) Proceeds of Crime Act Cap 143; Dominica: Section 30(1) Proceeds of Crime Act 1993; Grenada: Section 21(1) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 26(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 14(1)(a) Proceeds of Crime Act 2000; and Saint Lucia: Section 30(1) Proceeds of Crime Act Cap. 3.04

²² Antigua and Barbuda: Section 4(3)(a) and (b) Proceeds of Crime Act 1993; Barbados: Section 4(3)(a) and (b) Proceeds of Crime Act Cap 143; Dominica: Section 3(3)(a) and (b) Proceeds of Crime Act 1993; Grenada: Section 3(1)(a) and (b) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 2 Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 3(3)(a) and (b) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(3)(a) and (b) of the Proceeds of Crime Act Cap. 3.04

²³ Antigua and Barbuda: Section 4(4)(a) Proceeds of Crime Act 1993; Barbados: Section 4(4)(a) Proceeds of Crime Act Cap. 143; Dominica: Section 3(4)(a) Proceeds of Crime Act 1993; Grenada: Section 3(2) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 2 Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 3(4)(a) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(4)(a) Proceeds of Crime Act Cap. 3.04.

²⁴ Antigua and Barbuda: Section 4(4)(b) Proceeds of Crime Act 1993; Barbados: Section 4(4)(b) Proceeds of Crime Act Cap. 143; Dominica: Section 3(4)(b) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 3(4)(b) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(4)(b) Proceeds of Crime Act Cap. 3.04

However, should such an application fail, then the property would be likely to fall back into the restrained assets.

7.1.4 Property includes all property, wherever situated, and includes money, real or personal property, a thing in action, or other intangible or incorporeal property.²⁵

7.1.5 Antigua and Barbuda has broadened their definition of property to include legal documents and instruments evidencing title to, or interest in, assets.²⁶

7.1.6 A person holds property if he holds an interest in it. A person obtains property if he obtains an interest in it, and one-person transfers property to another, if the first one transfers or grants an interest in it to the second. References to an interest, in relation to property other than land, include references to a right (including a right to possession).²⁷

7.1.7 Limited companies may also be considered realisable property in certain circumstances. As a general rule, limited companies enjoy a legal personality of their own, however if it can be shown that the limited company is itself a 'sham' designed only to facilitate the

²⁵ Barbados: Section 3 Proceeds of Crime Act Cap 143; Dominica: Section 2 of the Proceeds of Crime Act 1993; Grenada: Section 2 Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 2 Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 2 Proceeds of Crime Act 2000; and Saint Lucia: Section 2 Proceeds of Crime Act Cap. 3.04

²⁶ Section 2(b) Proceeds of Crime (Amendment) Act 2008

²⁷ Grenada: Section 2(6) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 2(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

defendant's criminal activity, then the court may lift the corporate veil and treat the assets of the company as realisable assets.

7.1.8 The court may even lift the corporate veil if the company is involved in some legitimate trading activity (**Re K [2005] EWCA Crim 619**). The leading UK authority on lifting the corporate veil for the purposes of restraining property is **Re H [1996] 2 ALL ER 391**.

7.2 Tainted Gifts

7.2.1 A gift is made if the defendant transfers property to another person for a consideration whose value is nil or significantly less than the value of the property at the time of the transfer.²⁸

7.2.2 Whether a gift is tainted depends upon *when* it was gifted as well as on *what* was gifted. In Antigua and Barbuda, Barbados, Dominica, Saint Lucia and Saint Christopher and Nevis, a gift will be tainted if the defendant made it at any time after the date on which the offence concerned was committed, or the earliest date if two or more offences are alleged to have been committed and if the court thinks it is appropriate to take the gift into account in the circumstances.²⁹

²⁸ In Antigua and Barbuda what constitutes a gift: Section 4(14) Proceeds of Crime Act 1993; Barbados: Section 4(14) Proceeds of Crime Act Cap 143; Dominica: Section 3(14) Proceeds of Crime Act 1993; Grenada: Section 4(3) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 4(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 3(14) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(14) of the Proceeds of Crime Act Cap. 3.04

²⁹ Antigua and Barbuda: Section 4(12)(a) Proceeds of Crime Act 1993; Barbados: Section 4(12)(a) Proceeds of Crime Act Cap. 143; Dominica: Section 3(12)(a) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 3(12)(a) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(12)(a) Proceeds of Crime Act Cap. 3.04

7.2.3 If the gift made represents, either directly or indirectly, the proceeds of a gateway offence carried on by the defendant or another, the gift is tainted, regardless of when it was made.³⁰

7.2.4 In Grenada and Saint Vincent and the Grenadines, the definition of tainted gift differs from the rest of the region. In relation to drug trafficking offences, the gift becomes tainted if it was made by the defendant at any time up to six years prior to when the proceedings were instituted, or, in cases where proceedings have not yet been instituted, six years prior to when the application for restraint is made. If the gift represents, either in whole or part, the proceeds of drug trafficking carried on by the defendant or another, the gift is tainted regardless of when it was made.³¹

7.2.5 In relation to relevant or gateway offences, a gift will be tainted if the defendant made it at any time after the date on which the offence concerned was committed, or the earliest date if two or more offences are alleged to have been committed, and the court thinks it appropriate to take the gift into account in the circumstances.³²

³⁰ Antigua and Barbuda: Section 4(12)(b) Proceeds of Crime Act 1993; Barbados: Section 4(12)(b) Proceeds of Crime Act Cap 143; Dominica: Section 3(12)(b) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 3(12) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(12)(b) Proceeds of Crime Act Cap 3.04

³¹ Grenada: Section 4(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 4(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

³² Grenada: Section 4(2) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 4(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

7.2.6 If the prosecution is able to show that the defendant has made a tainted gift of property to a limited company then that property may be considered realisable property.

7.3 Property of A Person Other Than The Defendant

7.3.1 The legislation in every jurisdiction *except* Saint Vincent and the Grenadines and Grenada, explicitly provides that, in limited circumstances, the prosecutor may apply to restrain property of a person *other* than the defendant. This provision only applies if there are reasonable grounds to believe that the property is under the effective control of the defendant, and that the property is tainted.³³

7.3.2 In Antigua and Barbuda, Barbados, Dominica and Saint Lucia, property is defined as being under the effective control of the defendant if it is property belonging to a company which the defendant has shareholdings in, debentures over, or directorships in, or belonging to a trust which the defendant has a relationship with.³⁴ The legislation in Saint Christopher and Nevis is silent about what constitutes effective control.

³³ Antigua and Barbuda: Section 31(2)(g) Proceeds of Crime Act 1993; Barbados: Section 31(2)(g) Proceeds of Crime Act Cap 143; Dominica: Section 30(2)(g) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 14(2)(h) Proceeds of Crime Act 2000; and Saint Lucia: Section 30(2)(g) Proceeds of Crime Act Cap. 3.04

³⁴ Antigua and Barbuda: Section 23(2) Proceeds of Crime Act 1993 ; Barbados: Section 23(2) Proceeds of Crime Act Cap 143; Dominica: Section 22(2) Proceeds of Crime Act 1993; and Saint Lucia: Section 22(2) Proceeds of Crime Act Cap 3.04

7.3.3 This situation should not be confused with realisable property held by the defendant or held by a person to who the defendant has made a tainted gift (including those made to limited companies).

7.3.4 In Antigua and Barbuda, Barbados, Dominica and Saint Lucia, where the prosecution seeks to restrain property of a company or trust, the court may require that the application be served upon them and they have the liberty to appear and be heard at the hearing.³⁵

8. Extent of A Restraint Order

8.1 In every jurisdiction, except Grenada and Saint Vincent and the Grenadines, an application will usually be made to restrain all of the realisable property of the defendant.

8.2 In each case, before a restraint order is sought, it must first have been established that the defendant has **benefited** from their criminal activity.³⁶

8.3 The reason the application will generally be made to restrain *all* of the realisable property of the defendant, is because the assumptions apply to every case when considering benefit, with the exception of some

³⁵ Antigua and Barbuda: Section 32(6) Proceeds of Crime Act 1993; Barbados: Section 32(5) Proceeds of Crime Act Cap 143; Dominica: Section 31(5) Proceeds of Crime Act 1993; and Saint Lucia: Section 31(5) Proceeds of Crime Act Cap 3.04.

³⁶ In Antigua and Barbuda the requirement to show benefit is set out in section 31(2)(f) Proceeds of Crime Act 1993; Barbados: Section 31(2)(f) Proceeds of Crime Act Cap 143; Dominica: Section 30(2)(f) Proceeds of Crime Act 1993; Grenada: Section 20(1)(c)(ii) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 25(1)(c)(ii) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 14(2)(g) Proceeds of Crime Act 2000; and Saint Lucia: Section 31(1)(c) Proceeds of Crime Act Cap. 3.04

cases in Grenada and Saint Vincent and the Grenadines (this is explained further at paragraph 8.7 and 8.8 below).

8.4 This means that in every confiscation case, when determining the total value of the defendant's benefit from the commission of the offence, the court will be required to look not only at what the defendant benefited from the offence on the indictment (the particular benefit) but also to make certain assumptions about his property (the extended benefit). The court will be required to assume that all property held by the defendant at the time the application for confiscation is made, plus all property held and expenditure made at any time during the period dating back at least six years from the date the application for confiscation is made, is also the proceeds of crime, unless the contrary is proved. This concept is covered thoroughly in the confiscation section below.

8.5 As the benefit assumptions apply in every case, it would be extremely rare for the exact amount of benefit to be known before the particular and extended benefit are finally determined at the confiscation hearing. As such, all realisable property, including tainted gifts, must be preserved so that the defendant has the means to pay whatever confiscation order might against him or her be made in the future.

8.6 It should be noted that the requirement for full and frank disclosure will apply to this section. If the prosecutor is aware that the defendant has only benefited by a certain, defined amount, then best practice dictates that they should only apply to restrain to the value of the benefit. To

restrain more than the highest possible benefit amount would be to abuse the restraint process. It must be stressed that this course of action is only appropriate in situations where the exact amount of the benefit is clear.

8.7 As mentioned above, there are exceptions in Grenada and Saint Vincent and the Grenadines where the confiscation order will be limited to the amount of the particular benefit. In such cases, the amount that may be restrained must be similarly limited to the value of the particular benefit.

8.8 This exception in Saint Vincent and the Grenadines applies to all relevant offences with a particular benefit amounting to less than \$100,000.³⁷ In Grenada, the exception applies to all cases except those where the defendant is convicted of two or more '*qualifying offences*' in the relevant proceedings or, if convicted of only one *qualifying offence* in the relevant proceedings, at least one other the period of six years before proceedings were instituted against him. A '*qualifying offence*' is any indictable offence, other than drug trafficking, which was committed after the Act came into force and from which the defendant has benefited.

³⁷ Section 8(1)(a) and (b) Proceeds of Crime and Money Laundering (Prevention) Act 2001. The defendant will be considered to have a particular benefit of \$100,000 or more if their particular benefit, taken with any benefit obtained from any other relevant offences committed within the preceding 6 years, equals \$100,000 or more. The Director of Public Prosecutions must serve a notice that the case is an appropriate one for this provision to be engaged.

8.9 The court may make an order prohibiting the defendant or any person from disposing of, or otherwise dealing with property, or such part thereof or interest therein as may be specified in the order.³⁸ For example, any person who holds assets jointly with the defendant may be specifically restrained from dealing with those jointly held assets. The recipient of a tainted gift may be restrained from dealing with any property they hold up to the current value of the gift. It matters not whether they hold the particular gift itself.

9. Does the Realisable Property Have To Be Tainted?

9.1 No. It is common-place to restrain untainted assets. The primary test when applying to restrain assets in the Eastern Caribbean is that the defendant has *benefited* from his criminal activity and that the assets to be restrained are in reality to be treated as his.

9.2 Some confusion may arise from the legislation in Antigua and Barbuda, Barbados, Dominica, Saint Lucia and Saint Christopher and Nevis where there is a requirement for the prosecutor to set out grounds for believing any property is tainted in relation to the

³⁸ Antigua and Barbuda: Section 32(1)(f) Proceeds of Crime Act 1993; Barbados: Section 32(1)(f) Proceeds of Crime Act Cap 143; Dominica: Section 31(1)(f) Proceeds of Crime Act 1993; Grenada: Section 21(1) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 26(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001; and Saint Lucia: Section 3(3)(a) and (b) Proceeds of Crime Act Cap. 3:04

offence.³⁹ There are also provisions relating to restraining property of another if it is tainted (as set out in paragraph 7.3 above).

9.3 It is important to note that this requirement to show taint is not in *addition* to the requirement to show benefit, but an alternative test. That is to say, a prosecutor can restrain assets if they can show that the defendant has benefited from the commission of the offence and, in some cases, may also be able to show that the assets are directly tainted by the offending.

9.4 In specific cases involving assets belonging to trusts or companies, the prosecutor will be required to prove the assets are tainted. Again, this is an alternative test in a particular situation.

9.5 The legislation in Saint Vincent and the Grenadines and Grenada does not refer to the issue of taint at all. In these jurisdictions, the court should exercise their power to grant a restraint order upon being satisfied that the defendant has benefited from a gateway offence.⁴⁰

9.6 At the time of applying for a restraint order, there should exist a reasonable prospect that the defendant will be, or has been, convicted of an offence and will have a confiscation order made against him. The

³⁹ Antigua and Barbuda: Section 31(2)(e) Proceeds of Crime Act 1993; Barbados: Section 31(2)(e) Proceeds of Crime Act Cap 143; Dominica: Section 30(2)(e) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 14(2)(f) Proceeds of Crime Act 2000; and Saint Lucia: Section 31(1)(c) Proceeds of Crime Act Cap. 3:04

⁴⁰ Grenada: Section 20(1)(c)(ii) Proceeds of Crime Act 20012; and Saint Vincent and the Grenadines: Section 25(1)(c)(ii) Proceeds of Crime and Money Laundering (Prevention) Act 2001 – both permit the court to exercise the power to make a restraint order provided that the defendant has benefited from the qualifying offence.

assets are restrained, not because they themselves are tainted, but as an interim measure to protect the defendant's assets, thereby ensuring that he has sufficient means with which to pay that order.

9.7 If the defendant has some other *legitimate* means to pay the confiscation order in full (for example their parents remortgage their own house to pay the debt) the restraint order would be discharged upon payment.

9.8 It is important to keep in mind what the proceeds of crime legislation is trying to achieve in your country. The principle object of the legislation is to deprive criminals of their benefit from crime. Criminals must pay back to the Government the value of their benefit by whatever means, even if that means paying back the benefit with legitimately earned assets.

9.9 There would be little point in going to time and expense of making a confiscation order, if at the end of the day the assets have been dissipated and they cannot pay the confiscation order. It is for this reason that a restraint order applies to *all* realisable property, not just that which is tainted.

9.10 This point is neatly expressed by Lord Justice Laws in the case of **Jennings v CPS [2005] ECWA Civ 746** where he states:

'I think it important to have in mind that in deciding whether to make a restraint order... the court's task is not to reach firm conclusions as to

the precise extent of a respondent's benefit, or realisable property... though of course if those matters are plain they will be put before the judge. Rather...the court's duty is to decide whether to make a protective order so that in the particular case the satisfaction or fulfilment of any confiscation order made, or to be made, will be efficacious'

10. Risk of Dissipation

- 10.1 An application for a restraint order should satisfy the court that there is a risk of dissipation of assets, in order to be entitled to relief, despite the fact that there is no express provision to establish that such a risk exists in any restraint legislation in any Eastern Caribbean jurisdiction.
- 10.2 In the UK case **Re AJ and DJ** (*Unreported 9 December 1992*) the Court of Appeal held that despite there being no express requirement to show a risk of dissipation of assets, it was incumbent upon the prosecution to do so. In that case the restraint order was discharged due to any risk of dissipation of the assets. The assets had remained untouched by the defendant throughout the investigation and up until just before the trial when the restraint was applied for, and there were no grounds for believing the defendant would suddenly dissipate the assets at that late stage.
- 10.3 The court may be minded to accept a risk of dissipation in cases where there has been a significant benefit to the defendant, the

defendant has been charged with a dishonesty offence or the assets are easily liquidated (such as funds in bank accounts) **AJ v DJ** (*unreported 9 December 1992*) and **Jennings v CPS [2005] 4 All ER 391**.

10.4 In cases where there has been a delay in obtaining the restraint order (for whatever reason) and no assets have been dissipated at the time the application for restraint is made, it will be more difficult for the prosecution to establish risk of dissipation.

11. Documents Lodged With A Restraint Order.

11.1 The application for a restraint order should be lodged with the following documents:

- a) Application Form;
- b) Draft Restraint Order;
- c) Supporting Affidavit

11.2 Some courts in the Eastern Caribbean have been stipulating that applications for restraint orders to be lodged with a fixed date claim form as opposed to an application form. It is suggested that this practice is not one that should be maintained. First and foremost, a fixed date claim form puts the respondent on notice of the hearing which is inconsistent with the intention of the restraint process.

- 11.3 In addition, the fixed date claim form invites the respondent to avoid a hearing by making payment of the fine in full. Again, this is inconsistent with the rationale of the restraint order, which is an interlocutory measure to preserve assets pending the making of a confiscation order; given that a confiscation order is unlikely to have been made when the restraint order is sought then the respondent could not possibly know how much to pay.
- 11.4 There are several possible unhappy consequences of applying for a restraint order using a fixed date claim form, the most serious being that the Director of Public Prosecutions is pursued for damages in the event that the defendant were to sell all of the assets listed in the draft order and '*pay the fine in full*' only to be acquitted at trial.
- 11.5 It is important that the draft restraint order be sufficiently in depth and informational. It should clearly set out who is affected by the order, what those persons are restricted from doing (such as dealing with, disposing of, removing from the jurisdiction and or diminishing the value of assets), what assets are included in the order, what entitlements (such as living or legal expenses) what persons named in the order have (if any) and what the consequences of breaching the order are.

11.6 In Saint Vincent and the Grenadines and Grenada, the restraint order must specifically provide for notice to be given to those affected by the order.⁴¹

11.7 A precedent restraint order and application form is attached and marked Annex G.

12. Third Parties

12.1 Occasions will arise where realisable property is held jointly between the defendant and a third party, or held in the name of a third party. In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia, where the court is of the opinion that a third party may have an interest in property, they may give them notice of the application, and allow them to be represented at the hearing, unless the court is of the opinion that doing so may risk dissipation of the assets.⁴²

12.2 In most cases, to avoid the obvious risk of dissipation, a third party should be served with a copy of the restraint order *after* it is granted. In such cases, they may then apply to the court for a determination of their rights to restrained property should they decide to do so. Each jurisdiction permits an interested third party, who can show that they

⁴¹ Grenada: Section 21(4)(c) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 26(4)(c) Proceeds of Crime and Money Laundering (Prevention) Act 2001

⁴² Antigua and Barbuda: Section 34 Proceeds of Crime Act 1993; Barbados: Section 34 Proceeds of Crime Act Cap 134; Dominica: Section 33 Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 14(7) Proceeds of Crime Act 2000; and Saint Luvia: Section 33 Proceeds of Crime Act Cap 3.04

are the rightful owner of property, and innocent of any complicity in the commission of the scheduled offence, or offences, to apply to have property released from the restraint order.⁴³

12.3 The court may make an early determination of the rights of a third party or stay proceedings until the outcome of the confiscation proceedings. If the court is minded to make an early determination of third party rights to assets, it is bound to take into account the provisions of the legislation relating to confiscation.

13. Variation and Discharge of a Restraint Order

13.1 Any person affected by the restraint order may apply to vary or discharge it.⁴⁴ Applications for a variation should be made in writing and must be supported by an affidavit setting out the grounds for the application.

⁴³ Antigua and Barbuda: Section 39 Proceeds of Crime Act 1993; Barbados: Section 39 Proceeds of Crime Act Cap 143; Dominica: Section 38 Proceeds of Crime Act 1993; Grenada: Section 21(5)(a) and (6) Proceeds of Crime Act 20012; Saint Vincent and the Grenadines Section 26(5)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 20 Proceeds of Crime Act 2000; and Saint Lucia: Section 38 Proceeds of Crime Act Cap 3.04

⁴⁴ In Grenada and Saint Vincent and the Grenadines, any person affected by the restraint order may apply to vary or discharge it (see footnote 43). In all other jurisdictions, in addition to the specific sections relating to varying or discharging a restraint order in the case of innocent parties (set out in footnote 43 above), the legislation states that the restraint order may be subject to any conditions as the court thinks fit and may, without limiting the generality of the section, make provision for meeting certain expenses out of the restrained property. Antigua and Barbuda: Section 32(3) Proceeds of Crime Act 1993; Barbados: Section 32(3) Proceeds of Crime Act Cap. 143; Dominica: Section 31(3) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 14(8) Proceeds of Crime Act 2000; and Saint Lucia: Section 31(3) Proceeds of Crime Act Cap. 3.04

- 13.2 Where the application is for the inclusion of further realisable property in an already granted order it must, to the best of the witness's ability, give full details of the realisable property in respect of which the applicant is seeking the order and specify the person holding that realisable property.
- 13.3 All jurisdictions *except* Saint Vincent and the Grenadines specifically provide for the provision of living expenses (for the defendant and any dependants) and legal costs relating to the criminal trial and confiscation and ancillary proceedings.⁴⁵ That does not mean that such costs should not be permitted in Saint Vincent and the Grenadines, just that the legislation is less specific, making the prohibition of dealing with the assets in the restraint order subject to any '*conditions or exceptions*' specified within it.⁴⁶
- 13.4 In most cases a restraint order will need to be varied to allow persons affected by the restraint order living expenses (if none have been permitted under the terms of the restraint order) or to increase living expenses (if living expenses have been set out in the restraint order but it has been agreed that these need to be increased).

⁴⁵ Antigua and Barbuda: Section 32(3) Proceeds of Crime Act 1993; Barbados: Section 32(3) Proceeds of Crime Act Cap 143; Dominica: Section 31(2) Proceeds of Crime Act 1993; Grenada: Section 21(2) Proceeds of Crime Act 2012; Saint Christopher and Nevis: Section 14(8)(d) and (e) Proceeds of Crime Act 2000; and Saint Lucia: Section 32(2) Proceeds of Crime Act Cap 3.04

⁴⁶ Saint Vincent and the Grenadines: Section 26(1) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001

- 13.5 In some cases restrained businesses will also be permitted to continue to trade legitimately and this may require numerous variations to the restraint order.
- 13.6 The issue of what constitutes reasonable living expenses in each case will initially be determined by the prosecutor and investigator with assistance from the defendant or any other person affected by the order. In most cases the defendant will furnish the prosecutor with a breakdown of their essential living costs (evidenced with supporting documentation such as utility bills and mortgage statements).
- 13.7 Although living expenses may appear to be a way of dissipating funds *'through the back door'* it is important to remember that in almost all cases a restraint order will be in place *before* the defendant has even been convicted of a criminal offence, and they are therefore entitled to the benefit of the presumption of innocence. It is right and proper that they be allowed to meet their basic living expenses pending the outcome of the criminal proceedings. As Lawton LJ observed in **CBS United Kingdom Limited v Lambert** [1982] 3 ALL ER 537:
- 'Even if a plaintiff has good reason for thinking that a defendant intends to dispose of assets so as to deprive him of his anticipated judgment, the court must always remember that rogues have to live and that all orders, particularly interlocutory ones, should as far as possible do justice to all parties'*
- 13.8 When determining what constitutes *'reasonable living expenses'* it is important to strike a balance between allowing the defendant, or

other affected third party, their necessary living costs on the one hand, and preserving assets to satisfy any confiscation order on the other.

13.9 In the case of a variation, the application should be made *ex parte* without notice *only if* there are reasonable grounds for believing that giving notice would cause the dissipation of the realisable property which is the subject of the application. Otherwise, the application and affidavit must be lodged with the court and served on the defendant in a manner prescribed by the rules of the court.

13.10 Unless there are specific reasons for discharging a restraint order at an early stage a restraint order should not be discharged until the confiscation order is paid in full.

13.11 The legislation in Grenada and Saint Vincent and the Grenadines is explicit on this point. It states that the restraint should not be discharged until proceedings for the offence are concluded.⁴⁷ Proceedings for an offence are concluded in Saint Vincent and the Grenadines on the occurrence of one of the following events:

- (a) The discontinuance of the proceedings; or
- (b) The acquittal of the defendant; or
- (c) The quashing of the defendant's conviction for the offence; or

⁴⁷Grenada: Section 21(5)(b) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 26(5)(b) Proceeds of Crime and Money Laundering (Prevention) Act 2001

- (d) The *satisfaction* of a confiscation order made in the proceedings.⁴⁸

Proceedings for an offence are concluded in Grenada on the occurrence of one of the following events:

- (a) The defendant is acquitted on all counts or all charges against him dismissed; or
- (b) The defendant is convicted but the court decides not to make a confiscation order against him; or
- (c) The defendant is sentenced without confiscation being considered; or
- (d) The *satisfaction* of any confiscation order made in the proceedings.⁴⁹

13.12 A confiscation order is satisfied when there is no amount due under it.⁵⁰

13.13 In Antigua and Barbuda, Barbados, Dominica, Saint Lucia and Saint Christopher and Nevis, the restraint order remains in place until it

⁴⁸ Section 5(1)(b) Proceeds of Crime and Money Laundering (Prevention) Act 2001.

⁴⁹ Section 2(6)(g) Proceeds of Crime Act 2012.

⁵⁰ Grenada: Section 2(6)(i) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 5(1)(d) Proceeds of Crime and Money Laundering (Prevention) Act 2001

automatically lapses after a period of six months (see section 14 below) or, once extended past six months, for any such period specified by the court.⁵¹ Although there is no specific reference to the restraint remaining in place until the confiscation order is paid in full, to order otherwise would risk dissipation of the assets and undermine the purpose of the restraint regime.

13.14 It is worth noting that in these jurisdictions, the restraint order will also cease to be in effect if a third party successfully applies to have the property released from restraint on the grounds that they are the rightful owner of the property and innocent of any complicity of the commission of the offence or the property is held to be subject to another forfeiture or confiscation order or any other order under any enactment.⁵²

14. Duration Of The Restraint

14.1 In Antigua and Barbuda, Barbados, Dominica and Saint Lucia a restraint order will expire after a period of 6 months, unless the Director of Public Prosecution makes an application to extend the period of the

⁵¹ Antigua and Barbuda: Section 38(b) Proceeds of Crime Act 1993; Barbados: Section 38(b) Proceeds of Crime Act Cap. 143; Dominica: Section 37(b) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 19(a) Proceeds of Crime Act 2000; and Saint Lucia: Section 37(b) of the Proceeds of Crime Act Cap 3.04

⁵² Antigua and Barbuda: Section 38(a)(c) or (d) Proceeds of Crime Act 1993; Barbados: Section 38(a)(c) or (d) Proceeds of Crime Act Cap. 143; Dominica: Section 37(a)(c) or (d) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 19(a)(b) or (c) Proceeds of Crime Act 2000; and Saint Lucia: Section 37(a)(b) or (c) Proceeds of Crime Act Cap. 3.04

order.⁵³ Such an application must be made before the period of the existing order lapses.⁵⁴ If such an application is granted, the court may extend the restraint order for any specified period.⁵⁵

14.2 In St Christopher and Nevis, Saint Vincent and the Grenadines and Grenada the restraint order will not automatically expire after a particular period but remain in place until it has been discharged.⁵⁶

15. Physical Control of the Assets and Contempt of Court

15.1 A restraint order prohibits a person from dealing with the assets listed in the order. The restraint order does not of itself bestow the prosecutor with a right to possession of the assets.⁵⁷

15.2 In Antigua and Barbuda, Dominica, Saint Lucia and Barbados, the court may, on the application of the Director of Public Prosecution, and

⁵³ Antigua and Barbuda: Section 40(1) Proceeds of Crime Act 1993; Barbados: Section 40(1) Proceeds of Crime Act Cap 143; Dominica: Section 39(1) Proceeds of Crime Act 1993; Saint Lucia: Section 39(1) Proceeds of Crime Act Cap. 3.04

⁵⁴ As above at footnote 53.

⁵⁵ Antigua and Barbuda: Section 40(2) Proceeds of Crime Act 1993; Barbados: Section 40(2) Proceeds of Crime Act Cap 143; Dominica: Section 39(2) Proceeds of Crime Act 1993; and Saint Lucia: Section 39(2) Proceeds of Crime Act Cap. 3.04

⁵⁶ Saint Christopher and Nevis: Section 19 Proceeds of Crime Act 2000; Grenada: Section 21(5)(b) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 26(5)(b) Proceeds of Crime and Money Laundering (Prevention) Act 2001

⁵⁷ Antigua and Barbuda: Section 32(1)(f) Proceeds of Crime Act 1993; Barbados: Section 32(1)(f) Proceeds of Crime Act Cap 143; Dominica: Section 31(1)(f) Proceeds of Crime Act 1993; Grenada: Section 21(1) Proceeds of Crime Act 2012, Saint Vincent and the Grenadines: Section 26(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001; and Saint Lucia: Section 31(1)(f) Proceeds of Crime Act Cap 3.04

where the court is satisfied that the circumstances so require, order that a Trustee or Registrar or other such person as the court may direct, should take custody of, manage, or otherwise deal with property.⁵⁸

15.3 There is no explicit power to grant a custodial order in Saint Christopher and Nevis. The court itself does however have the power to make directions regarding the management of assets throughout the period of the restraint order and so a custodial order could be sought via that route.⁵⁹

15.4 The only other right to possession of assets is achieved by way of a receivership order. The legislation in Saint Vincent and the Grenadines and Grenada provides that where the court has made a restraint order, it may at any time appoint a receiver to take possession of, manage, or otherwise deal with property⁶⁰.

15.5 Saint Vincent and the Grenadines and Grenada also permit a police officer (in addition in Grenada a Customs Officer, Director, deputy Director and Officers of the Financial Intelligence Unit) to seize realisable property to prevent its removal from the jurisdiction. Once it

⁵⁸ Antigua and Barbuda: Section 32(1)(g) Proceeds of Crime Act 1993; Barbados: Section 32(1)(g) Proceeds of Crime Act Cap 143; Dominica: Section 31(1)(g) Proceeds of Crime Act 1993; and Saint Lucia: Section 31(1)(g) Proceeds of Crime Act Cap 3.04

⁵⁹ Section 14(8)(b) Proceeds of Crime Act 2000.

⁶⁰ Grenada: Section 21(7) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 26(6) Proceeds of Crime and Money Laundering (Prevention) Act 2001

is seized it shall be dealt with in accordance with the directions of the court.⁶¹

15.6 The legislation gives no guidance about when custodial orders should be granted. In Antigua and Barbuda, Barbados, Dominica and Saint Lucia, the legislation implies that such powers should only be used in certain circumstances where the court is satisfied that such an order is necessary.⁶²

15.7 Almost invariably, such orders will be necessary to manage businesses or other going concerns which are realisable property of the defendant and have been restrained. The Directors of Public Prosecutions in Antigua and Barbuda, Barbados, Dominica and Saint Lucia, will exercise care when applying for such orders, not only to ensure fairness to the defendant, but in light of the discretion of the court to request an undertaking from the Crown in respect of payment of damages or costs in relation to the order.⁶³

15.8 The assets listed in the restraint order should in most cases be left in the possession of the person holding them (unless they are in the custody of the police for evidential purposes). If the assets are wilfully or negligently dissipated or their value diminished in any way,

⁶¹ Grenada: Section 21(8) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 26(8) Proceeds of Crime and Money Laundering (Prevention) Act 2001

⁶² See footnote 58.

⁶³ Antigua and Barbuda: Section 33 Proceeds of Crime Act 1993; Barbados: Section 33 Proceeds of Crime Act Cap 143; Dominica: Section 32 Proceeds of Crime Act 1993; and Saint Lucia: Section 32 Proceeds of Crime Act Cap 3.04.

the person who deals with the assets is in contempt of the restraint order.

15.9 If the defendant disposes of, or otherwise deals with the asset while it is in his possession, the appropriate penalty for breaching the order should always follow. Every jurisdiction except Grenada and Saint Vincent and the Grenadines sets out the penalty for contravening a restraint order.⁶⁴

15.10 It is crucial that breaches of restraint orders are treated seriously and expeditiously and result in the appropriate penalty. Without prosecutors bringing breaches to the attention of the court, and a robust response from the court when they do, restraint orders risk losing their 'teeth' and become redundant.

16. Costs, Damages and Delay

16.1 The court is expressly given the discretion to request an undertaking from the Director of Public Prosecutions relating to costs or damages in respect of the restraint order in every country *except* Saint Vincent and the Grenadines and Grenada.⁶⁵

⁶⁴ In Antigua and Barbuda the penalty for contravening a restraint order is set out in: Section 37(1) Proceeds of Crime Act 1993; Barbados: Section 37(1) Proceeds of Crime Act Cap 143; Dominica: Section 36(1) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 18(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 36(1) Proceeds of Crime Act Cap 3.04

⁶⁵ Antigua and Barbuda: Section 33 Proceeds of Crime Act 1993; Barbados: Section 33 Proceeds of Crime Act Cap 143; Dominica: Section 32 Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 15 Proceeds of Crime Act 2000; and Saint Lucia: Section 32 Proceeds of Crime Act Cap 3.04

16.2 In all jurisdictions except Saint Christopher and Nevis, the legislation states that if a person successfully prevents the making of a restraint or confiscation order, or has property excluded from it, and is held to have had no involvement in either the criminal conduct or the commission of the offence, the court may order that they be paid all reasonable costs incurred by them in relation to the proceedings, or an amount the court deems reasonable.⁶⁶

16.3 These provisions are there to ensure that prosecutors are conscientious, fair and frank in their approach to the restraint process. Applications by third parties to vary or discharge restraint orders will therefore not be contested by the Director of Public Prosecutions unless he or she is satisfied that there is insubstantial evidence to release the assets from restraint.

16.4 The most common reasons for damages to be awarded in restraint cases include, *inter alia*:

- (a) Failure to discharge a restraint order promptly upon the criminal or confiscation proceedings being discontinued, or failure to discharge the restraint order if there has been unreasonable

⁶⁶ Antigua and Barbuda: Section 70 Proceeds of Crime Act 1993; Barbados: Section 70 Proceeds of Crime Act Cap 143; Dominica: Section 74 Proceeds of Crime Act 1993; Grenada: Section 46 Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 62 Proceeds of Crime Act and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 18(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 36(1) Proceeds of Crime Act Cap 3.04

delay in charging the suspect (if legislation allows for pre-charge restraint);

- (b) Unnecessarily contested applications by third parties to vary or discharge a restraint order; and
- (c) Damage to, or poor management of, property which has been taken into the custody of the police and must later be returned to the defendant if a conviction is not achieved or confiscation order is not made.

16.5 A restraint order can, and in most cases does, have a significant impact on a defendant and any others affected by it. The order imposes draconian restrictions on dealing with assets before a person is necessarily convicted (or in some cases even charged). Accordingly, a prosecutor is expected to proceed expeditiously once a restraint order has been obtained and prosecute the underlying criminal proceeding without undue delay. This principle has been applied for many years in civil proceedings in the UK, see, for example **Lloyds Bowmaker Ltd v Britannia Arrow Holdings Ltd** [1988] 1 WLR 1337.

16.6 Damage to restrained property can be mitigated by leaving it in the possession of the owner. The payment of costs and damages to third parties can also be avoided by a fair and considered approach to the restraint process.

17. Service and Registration of Restraint Orders

17.1 The restraint order shall be served on all persons affected by the order in such a manner as the court directs or in a manner prescribed by the rules of the court.⁶⁷

17.2 Every jurisdiction provides that only the order must be served, not the supporting affidavit.⁶⁸

17.3 Failure by the prosecutor to prove timely service of the restraint order will negate the possibility of contempt proceedings should assets be dissipated in the interim.

17.4 Where a restraint order affects land, tenements or hereditaments, it must be registered with the appropriate court in accordance with the appropriate Act. Every jurisdiction *except* Saint Vincent and the Grenadines and Grenada, clearly set out the appropriate registration process in the legislation.⁶⁹

17.5 The legislation in these jurisdictions goes on to state that until a restraint order is correctly registered, it has no effect on registered

⁶⁷ Antigua and Barbuda: Section 35 Proceeds of Crime Act 1993; Barbados: Section 35 Proceeds of Crime Act Cap 143; Dominica: Section 34 Proceeds of Crime Act 1993; Grenada: Section 21(4)(c) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 26(4)(c) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis Section: Section 14(9) of the Proceeds of Crime Act 2001; and Saint Lucia: Section 34 Proceeds of Crime Act Cap 3.04

⁶⁸ As above at footnote 67.

⁶⁹ Antigua and Barbuda: Section 36(1) Proceeds of Crime Act 1993; Barbados: Section 36(1) Proceeds of Crime Act Cap 143; Dominica: Section 35(1) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 17(1) Proceeds of Crime Act 2001; and Saint Lucia: Section 35(1) Proceeds of Crime Act Cap 3.04

land.⁷⁰ Once a restraint order has been appropriately registered, a person who subsequently deals with the land shall be deemed to have had notice at the time of dealing.⁷¹

17.6 It is worth noting that in both Saint Vincent and the Grenadines and Grenada a charging order can be applied for when a confiscation order has not been made of an amount equal to the value of the realisable property. This charging order can then be registered in the High Court Registry.⁷²

18. Conclusion.

18.1 Restraint is one of the most fundamental steps in the confiscation process. Without it, in the majority of cases, there would be no assets with which to satisfy any confiscation order.

18.2 As defendants and suspects become increasingly aware of the power of the confiscation regime and ever more savvy about how they hide their assets from the reach of investigators and prosecutors, so the importance of early restraint becomes even more pronounced.

⁷⁰ Antigua and Barbuda: Section 36(2) Proceeds of Crime Act 1993; Barbados: Section 36(2) Proceeds of Crime Act Cap 143; Dominica: Section 35(2) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 17(2) Proceeds of Crime Act 2001; and Saint Lucia: Section 35(2) of the Proceeds of Crime Act Cap 3.04

⁷¹ Antigua and Barbuda: Section 36(3) Proceeds of Crime Act 1993; Barbados: Section 36(3) Proceeds of Crime Act Cap 143; Dominica: Section 35(4) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 17(4) Proceeds of Crime Act 2001; and Saint Lucia: Section 35(3) Proceeds of Crime Act Cap 3.04

⁷² Grenada: Section 22 Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 27 Proceeds of Crime and Money Laundering (Prevention) Act 2001

18.3 The restraint procedure is not difficult but it is important to know the powers and limitations of the legislation to ensure that restraint is used early, correctly and fairly.

CONFISCATION ORDERS

1. Introduction

1.1 Confiscation is a powerful weapon against crime. In **R v Sekhon** [2002] EWCA Crim 2954, [2003] 3 All ER 508, the then Lord Chief Justice of England and Wales considered the evolving history of confiscation law, concluding that one of the most successful weapons that could be used to discourage offences that are committed in order to enrich offenders is to ensure that if the offenders are brought to justice any profit which they have made from their offending is confiscated⁷³.

1.2 This part of the Guide examines the steps that need to be taken in relation to preparing for a confiscation hearing, not just the hearing itself. Proper preparation in advance of the confiscation hearing is the key to a swift and just outcome. The Court of Appeal had this to say in **R v Baden Lowe** [2009] EWCA Crim 194:

'It is evident that many confiscation hearings are not as prepared in advance as they should be...Sometimes it is only at the last minute, either immediately before the court sits or even in the course of the

⁷³ Millington and Sutherland Williams on the Proceeds of Crime, Third Edition, Oxford University Press, 2010 at page 146.

hearing, that some matters are agreed and the real issues emerge, considerably burdening the task of the judge hearing the proceedings...'

1.3 The setting of timetables, service of prosecution and defence statements and service of skeleton arguments all assist to narrow the issues in advance of the hearing. Once these steps have been taken, the process of confiscating assets becomes faster and more efficient.

1.4 A confiscation order is made *in personam* (against the person) as opposed to *in rem* (against the property). A confiscation order is made against a defendant in respect of benefits derived by him from the commission of an offence, or offences.⁷⁴

2. Appropriate Court

2.1 The Director of Public Prosecutions is the appropriate person to apply to the court for a confiscation order to be made⁷⁵, apart from Grenada where it is a prosecutor.⁷⁶ The application must be made to

⁷⁴ Antigua and Barbuda: Section 5(1)(b) Proceeds of Crime Act 1993; Barbados: Section 5(1)(b) Proceeds of Crime Act Cap. 143; Dominica: Section 4(1)(b) Proceeds of Crime Act 1993; Grenada: Sections 6(6) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(4) and 7(4) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 52(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(1)(b) Proceeds of Crime Cap. 3.04

⁷⁵ Antigua and Barbuda: Section 5(1) Proceeds of Crime Act 1993; Barbados: Section 5(1) Proceeds of Crime Act Cap 143; Dominica: Section 4(1) Proceeds of Crime Act 1993; Saint Vincent and the Grenadines: Sections 6(1)(a) and 7(1)(a) Proceeds of Crime and Money Laundering (Prevention) Act; St Christopher and Nevis: Section 52(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(1) Proceeds of Crime Cap 3.04

⁷⁶ Grenada: Section 6(4)(a) Proceeds of Crime Act 2012

the court. Every jurisdiction *except* Saint Christopher and Nevis and Grenada defines '*court*' as the High Court.

2.2 In Saint Christopher and Nevis, the '*court*' is defined as '*including the High Court*'.⁷⁷ As with restraint, confiscation can be applied for in respect of serious offences, which are defined as any indictable or hybrid offence that attract a penalty of imprisonment for more than one year.⁷⁸ In Saint Christopher and Nevis, the Director of Public Prosecutions can arguably apply to the Magistrates' Court for a confiscation order in respect of a serious offence which has been dealt with summarily.

2.3 In Grenada '*court*' means the High Court or the Magistrates' Court⁷⁹ and a confiscation order maybe made by a magistrate in the Magistrates' Court or a judge in the High Court.⁸⁰

3. Committal From Magistrates' Court In Confiscation Cases

3.1 Committal For Confiscation

3.1.1 As stated above, Saint Christopher and Nevis and Grenada are the only jurisdictions which may permit the making of a confiscation order in the Magistrates' Court.

⁷⁷ See footnote 4 above.

⁷⁸ See footnote 5 above.

⁷⁹ Grenada: Section 2(1) Proceeds of Crime Act 2012

⁸⁰ Grenada: Section 6(1) Proceeds of Crime Act 2012 and when sentenced for a drug trafficking offence in the High Court section 7(1)

3.1.2 In Saint Vincent and the Grenadines, the legislation permits the magistrate, on the application of the Director of Public Prosecutions, or of their own motion, to send a matter which involves a qualifying offence, from which the defendant may have benefited, to the High Court for a determination as to whether a confiscation order should be made.⁸¹

3.1.3 In Grenada where a confiscation order is made by a magistrate it shall not exceed \$100,000 in monetary terms.⁸² If there is evidence before the magistrate that shows the amount to be confiscated will exceed \$100,000, the magistrate may sentence the defendant⁸³ and then commit to the High Court for a confiscation order to be made.⁸⁴ For an offence that can be tried summarily or on indictment and where the Director of Public Prosecutions intends to make an application for a confiscation order, the Director of Public Prosecutions may issue a certificate requiring the matter to be tried on indictment.⁸⁵

3.2 Committal For Sentence

⁸¹ Saint Vincent and the Grenadines: Sections 6(6) and 7(6) Proceeds of Crime and Money Laundering (Prevention) Act 2001.

⁸² Grenada: Section 6(2) Proceeds of Crime Act 2012

⁸³ Grenada: Section 6(3)(a) Proceeds of Crime Act 2012

⁸⁴ Grenada: Section 6(3)(b) Proceeds of Crime Act 2012

⁸⁵ Grenada: Section 41(1)(a) Proceeds of Crime Act 2012 – this is the only reference to the Director of Public Prosecutions rather than Prosecutor making the application for confiscation in the Act. It is advised that if this procedure is to be used that the Director of Public Prosecutions makes the decision in relation to confiscation.

- 3.2.1 In addition to committing cases to the High Court solely for the purpose of confiscation, certain cases may also be committed for sentence.
- 3.2.2 The power to commit for sentence can only be found in Barbados, Saint Vincent and the Grenadines, Grenada, Saint Christopher and Nevis and Dominica.⁸⁶
- 3.2.3 In Grenada, the Act is explicit that the magistrate *must* commit the defendant for sentence where the magistrate is of the opinion the High Court may consider a confiscation order.⁸⁷ In each of the other jurisdictions, a magistrate may commit for sentence if they are of the opinion, when dealing with an offence triable either way, that the court's sentencing powers are insufficient, after obtaining information about the character and antecedents of the defendant.
- 3.2.4 Arguably, as confiscation is considered to be part of the sentencing process, the magistrate's power to make an appropriate confiscation order should form part of their consideration when deciding whether or not to commit a matter to the High Court for sentence.

⁸⁶ Barbados: Section 65 Magistrates' Court Act 1996-27; Saint Vincent and the Grenadines: Sections 146 – 147 and 171-176 Saint Vincent Criminal Code Cap 172; Dominica: Section 52 Magistrates' Code of Procedure Cap 4.20 and section 18 – 23 and 52 Criminal Law and Procedure Act Cap 12.01; Grenada: Section 45(1)(b) Proceeds of Crime Act 2012; Saint Christopher and Nevis: Section 59 Magistrates' Code of Procedure Act Cap 46 and the Criminal Procedure (Committal for Sentence) Act Cap 21

⁸⁷ See footnote 86 above.

3.2.5 Regardless of whether the magistrate considers confiscation before committing a matter to the High Court for sentence, once a matter has been committed, it is in the appropriate jurisdiction for an application for confiscation to be made.

3.3 Application to the High Court

3.3.1 The legislation in Saint Lucia, Antigua and Barbuda, Dominica and Barbados is silent about committal of matters to the High Court for confiscation (although as set out in paragraph 3.2 above in Barbados and Dominica it may be possible to commit for sentence and apply for confiscation at that point). Despite this, the legislation in these jurisdictions clearly intends that the confiscation regime applies to persons who have been summarily convicted of qualifying offences, from which they may have benefited.

3.3.2 The first indication of this can be found in the definition of scheduled offence. Each Act states that the Director of Public Prosecutions may apply for confiscation if the defendant is convicted of a scheduled offence.⁸⁸ Each respective Act clearly states that a person is convicted of a scheduled offence whether convicted *summarily* or on indictment.⁸⁹

⁸⁸ Antigua and Barbuda: Section 5(1) Proceeds of Crime Act 1993; Barbados: Section 5(1) Proceeds of Crime Act; Dominica: Section 4(1) Proceeds of Crime Act 1993; and Saint Lucia: Section 4(1) Proceeds of Crime Act Cap. 3.04

⁸⁹ Antigua and Barbuda: Section 4(2)(a) Proceeds of Crime Act 1993; Barbados: Section 4(2)(a) Proceeds of Crime Act Cap 143; Dominica: Section 3(2)(a) Proceeds of Crime Act 1993; and Saint Lucia: Section 3(2)(a) Proceeds of Crime Cap 3.04

3.3.3 A further indication of the legislative intent in these countries is set out in the sections relating to material which may be considered when determining the application for confiscation. In each jurisdiction, the legislation states that if a confiscation order is made in respect of a person's conviction for a qualifying offence, whether the person was convicted in the High Court *or the Magistrates' Court*, the court may, when considering the application for confiscation, have regard to the transcript of the criminal proceedings.⁹⁰

3.3.4 In these cases, although the sending power is not explicit within the legislation, it is suggested that the legislation intends that an application be made to the High Court for confiscation based upon the conviction in the Magistrates' Court.

4. Appropriate Cases For Confiscation

4.1 Like restraint, it is not possible or appropriate to apply for confiscation in all cases. In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis, and Saint Lucia, the Director of Public Prosecutions (or the court of its own motion in certain jurisdictions) may apply for or proceed to consider confiscation if the defendant is *convicted* of a gateway offence. In Saint Vincent and the Grenadines

⁹⁰Antigua and Barbuda: Section 8(1) Proceeds of Crime Act 1993; Barbados: Section 8(1) Proceeds of Crime Act Cap 143; Dominica: Section 7(1) Proceeds of Crime Act 1993; and Saint Lucia: Section 7(1) Proceeds of Crime Cap 3.04

confiscation can be applied for when the defendant *appears to be sentenced in the High Court or is convicted in the Magistrates' Court.*⁹¹

4.2 A person is taken to be convicted of an offence in Antigua and Barbuda, Barbados, Dominica and Saint Lucia when:

- (a) He is convicted, whether summarily or on indictment of the offence; or
- (b) He is charged with the offence and is found guilty but is discharged without conviction; or
- (c) A court with his consent takes the scheduled offence of which he has not been found guilty, into account in sentencing him for another offence.⁹²

4.3 A person is taken to be convicted of an offence in Saint Christopher and Nevis if he is convicted pursuant to paragraph 4.2(i) or (iii) above.⁹³

⁹¹ Antigua and Barbuda: Section 5(1) Proceeds of Crime Act 1993; Barbados: Section 5(1) Proceeds of Crime Act; Dominica: Section 4(1) Proceeds of Crime Act 1993; Saint Vincent and the Grenadines: Sections 6(1) and 7(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 38(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(1) Proceeds of Crime Act Cap. 3.04

⁹² Antigua and Barbuda: Section 4(2) Proceeds of Crime Act 1993; Barbados: Section 4(2) Proceeds of Crime Act Cap. 143; Dominica: Section 3(2) Proceeds of Crime Act 1993; and Saint Lucia: Section 3(2) Proceeds of Crime Act Cap. 3.04

⁹³ Saint Christopher and Nevis: Section 3(2) Proceeds of Crime Act 2000

- 4.4 In Grenada, a prosecutor may apply for confiscation where a defendant is *convicted* of an offence in any proceedings before the Magistrates' Court or High Court or *appears before the High Court to be sentenced for one or more drug trafficking offences*.⁹⁴
- 4.5 The legislation in Grenada and Saint Vincent and the Grenadines does not make reference to discharges without conviction. However both Acts make it clear that when the defendant appears to be sentenced for an offence(s), the confiscation regime will apply not only to the principle offence but to offences of which the defendant was convicted in the same proceedings as the principal offence and offences which the court will be taking into consideration in determining his sentence for the principal offence.⁹⁵
- 4.6 In all jurisdictions except Grenada, the same gateway offences which attach to restraint also attach to confiscation (see section 5 of the restraint section).⁹⁶ In Grenada, unlike the limited offences which apply to restraint, confiscation can apply to any offence in any proceedings before the court.⁹⁷

⁹⁴ Sections 6(4) and 7(1) of the Proceeds of Crime Act 2012.

⁹⁵ Grenada: Section 6(8) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 7(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

⁹⁶ See footnotes 7-15 above.

⁹⁷ Section 6(4) of the Proceeds of Crime Act 2012.

4.7 It will only be appropriate to proceed with confiscation if the defendant has benefited from the qualifying offence⁹⁸.

5. The Application

5.1 The legislation in each jurisdiction in the Eastern Caribbean, except Grenada, states that if the defendant is convicted of a gateway offence from which they have benefited, the Director of Public Prosecutions *may apply* for a confiscation order.⁹⁹ In Grenada where the defendant has been convicted of a qualifying offence from which they have benefited, the prosecutor *must give written notice* that it would be appropriate for the court to consider confiscation.¹⁰⁰ In relation to drug trafficking matters in Grenada where a defendant appears before the High Court to be sentenced for one or more offences the court can consider confiscation after an *application* by the prosecutor.¹⁰¹

⁹⁸ Antigua and Barbuda: Section 18(1) Proceeds of Crime Act 1993; Barbados: Section 18(1) Proceeds of Crime Act Cap 143; Dominica: Section 17(1) Proceeds of Crime Act 1993; Grenada: Sections 6(5) and 7(2) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(2) and 7(2) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 52(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 17(1) of the Proceeds of Crime Cap 3.04

⁹⁹ Antigua and Barbuda: Section 5(1) Proceeds of Crime Act 1993; Barbados: Section 5(1) Proceeds of Crime Act Cap 143; Dominica: Section 4(1) Proceeds of Crime Act 1993; Saint Vincent and the Grenadines: Sections 6(1)(a) and 7(1)(a) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 52(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(1) Proceeds of Crime Cap 3.04

¹⁰⁰ Grenada: Section 6(4) of the Proceeds of Crime Act 2012

¹⁰¹ Grenada: Section 7(1) Proceeds of Crime Act 2012

- 5.2 In Saint Vincent and the Grenadines and Grenada, the court may also proceed to consider confiscation of their own motion.¹⁰²
- 5.3 It should be noted that in Saint Lucia the Director of Public Prosecutions does not have the discretion which all other jurisdictions have in this matter. Their legislation states that the Director of Public Prosecutions *shall* make such an application in appropriate circumstances.¹⁰³
- 5.4 The application is the prosecutor's statement. The prosecutor's statement should set out what the Director of Public Prosecutions says is the value of the benefit and, although it is not incumbent upon the prosecutor to show that the defendant does not have means to pay the benefit amount, it should also set out what assets of the defendant have been identified.
- 5.5 In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia, any amendments to the application (the prosecutor's statement) can only be done with the leave of the court. The Director of Public Prosecutions may apply to the court hearing the application, at any time before it is finally determined, to have it amended.¹⁰⁴

¹⁰² Grenada: Sections 6(4)(b) and 7(1)(b) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines Sections 6(1)(b) and 7(10)(b) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁰³ Saint Lucia: Section 4(1) Proceeds of Crime Act Cap 143

¹⁰⁴ Antigua and Barbuda: Section 7(1) Proceeds of Crime Act 1993; Barbados: Section 7(1) Proceeds of Crime Act Cap. 143; Dominica: Section 6(1) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 40(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 6(1) Proceeds of Crime Cap. 3.04

5.6 The court may amend the application if it is satisfied that the benefit or property could not have been reasonably capable of identification before the application (prosecutor's statement) was originally made, or the necessary evidence only became available after the application was made.¹⁰⁵

5.7 Amendments to the prosecutor's statement may become necessary once the defendant responds to it; particularly if in doing so they make admissions about their benefit from the offence or their assets. The prosecutor, having only been made aware of the information subsequent to the service of the prosecutor statement, should be able to successfully apply to amend the application where necessary.

6. Notifying The Defence

6.1 In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia, where the Director of Public Prosecutions applies for a confiscation order, they *must* give the defendant, no less than 14 days written notice of the application.¹⁰⁶ The prosecutor must therefore give 14 days written notice of the service of the prosecutor's statement. An example notice of intention to apply for confiscation is drafted at Annex C.

¹⁰⁵ See footnote 104 above.

¹⁰⁶ Antigua and Barbuda: Section 6(2) Proceeds of Crime Act 1993; and Dominica: Section 5(2) Proceeds of Crime Act 1993; Barbados: Section 6(2) Proceeds of Crime Act Cap 143; Saint Christopher and Nevis: Section 40(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 5(2) Proceeds of Crime Cap 3.04

6.2 If the Director of Public Prosecutions applies to amend the application which would have the effect of increasing the *benefit* amount, the Director of Public Prosecutions must give the defendant no less than 14 days written notice of the application to amend.¹⁰⁷

6.3 The legislation in Saint Vincent and the Grenadines and Grenada is silent about the period of notice that must be given to the defendant. It is suggested that the defendant should be notified of the application for confiscation in a manner prescribed by the rules of the court.

7. When The Application Must Be Made.

7.1 Grenada and Saint Vincent and the Grenadines are the only jurisdictions which explicitly state that a confiscation order should be made, or properly postponed prior to sentencing a defendant.¹⁰⁸ In most cases confiscation will be postponed and a timetable set for service of the application and defendant statements (the issue of postponement is covered in detail in paragraph 8 below).

7.2 In Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia, the application must be made before the end of

¹⁰⁷ Antigua and Barbuda: Section 7(4) Proceeds of Crime Act 1993; Barbados: Section 7(4) Proceeds of Crime Act Cap. 143; Dominica: Section 6(4) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 40(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 6(4) Proceeds of Crime Cap. 3.04

¹⁰⁸ Grenada: Sections 6(4) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(4) and 7(4) Proceeds of Crime and Money Laundering (Prevention) Act

the relevant application period.¹⁰⁹ The relevant application period has a common definition throughout these jurisdictions.¹¹⁰ It is defined as being the period of 12 months after:

- (a) The person is to be taken to have been convicted either summarily or on indictment of the offence, the day on which the person was convicted of the offence;
- (b) The person is to be taken to have been convicted of the offence by reason of being charged with the offence and found guilty but discharged without conviction, the day on which the person was discharged without conviction;
- (c) The person is to be taken to have been convicted of the offence by reason of the court, with the defendant's consent, taking the offence, for which they have not been found guilty, into account when sentencing him or her for another offence, the day on which the court took the offence into account when passing sentence for the other offence.

7.3 Despite that in these jurisdictions there is no requirement in law to deal with or postpone confiscation prior to sentencing the defendant, it is

¹⁰⁹ Antigua and Barbuda: Section 5(2) Proceeds of Crime Act 1993; Barbados: Section 5(2) Proceeds of Crime Act Cap 143; Dominica: Section 4(2) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 38(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(2) of the Proceeds of Crime Cap 3.04

¹¹⁰ In Antigua and Barbuda the relevant application period is defined under: Section 3 Proceeds of Crime Act 1993; Barbados: Section 3 Proceeds of Crime Act Cap 143; Dominica: Section 2 Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 2 Proceeds of Crime Act 2000; and Saint Lucia: Section 2 Proceeds of Crime Cap 3.04

best practice for the Director of Public Prosecutions to at least inform the court and the defendant that they intend to apply for a confiscation order at this stage. Confiscation should be viewed as part of the sentencing process (**R v Waya** [2010] EWCA Crim 412). The defendant may well argue that he ought to know the entirety of what he faces at the time of sentence. To fail to inform the defendant of an intention to apply for confiscation prior to sentence will leave it open to the defendant to argue that he had a legitimate expectation that he had been dealt with fully at sentence and it is unfair to pursue him for confiscation up to a year later.

7.4 It appears that the notion of dealing with confiscation before sentence was at least considered by Parliament in these countries. The legislation states that if an application for confiscation is made to the court before the defendant has been sentenced, the court may postpone sentencing the defendant until the order is made if it deems it appropriate to do so.¹¹¹

7.5 It is suggested that a written notice of intention to apply for confiscation is served on the defendant and the court before the defendant is sentenced (note the same notice as described in paragraph 6.1 above is also appropriate here). The application (prosecutor's statement) will then be served in accordance with the timetable ordered by the court. The court must keep the relevant

¹¹¹ Antigua and Barbuda: Section 8(2) Proceeds of Crime Act 1993; Barbados: Section 8(2) Proceeds of Crime Act Cap 143; Dominica: 7(2) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 41(2) Proceeds of Crime Act 2001; and Saint Lucia: Section 7(2) Proceeds of Crime Act Cap 3.04

application period in mind when ordering the timetable for service of statements by the prosecutor and defendant.

8. Postponement

8.1 As mentioned above, both Grenada and Saint Vincent and the Grenadines stipulate that a confiscation order must be made, or postponed, prior to sentencing the defendant.¹¹² In Saint Vincent and the Grenadines the Act permits multiple postponements, provided the total period of postponement does not, unless there are exceptional circumstances, total more than 12 months from the date the defendant was convicted of the criminal offence.¹¹³ In Grenada, the total period of postponement (which includes any postponements as a result of an appeal - see paragraph 8.2 below) will not exceed 18 months unless there are exceptional circumstances.¹¹⁴

8.2 If the defendant has appealed against conviction, the court may postpone for any specified period, however, unless there is a case of exceptional circumstances, should not postpone for more than 3 months after the appeal has been determined or otherwise disposed of.¹¹⁵

¹¹² In Grenada postponement is covered under: Section 8 Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 9 Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹¹³ Saint Vincent and the Grenadines: Section 9(2) and (3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹¹⁴ Grenada: Section 8(3) Proceeds of Crime Act 2012

¹¹⁵ Grenada: Section 8(6) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 9(4) and (6) Proceeds of Crime and Money Laundering (Prevention) Act 2001

- 8.3 An application for postponement may be made by either the prosecution or defence, or by the court of its own motion.¹¹⁶
- 8.4 In **R v Jagdev** [2002] 1 WLR 3017 the court considered what amounts to exceptional circumstances and decided that the purpose of postponing confiscation proceedings was to enable the judge to reach a fair conclusion. Where there was a real prospect that a hearing might be wasted or an unjust order made if the judge had proceeded to hear the case, then the judge was entitled to hold that there were exceptional circumstances.
- 8.5 It should be noted here that a more complicated situation arises in Saint Vincent and the Grenadines if the defendant was convicted in the Magistrates' Court and the matter is not committed for confiscation. In such circumstances, where the Director of Public Prosecutions requests, before the defendant is sentenced, that the matter be sent to the High Court for the purpose of confiscation, the magistrate should defer sentence and send the matter to the High Court for confiscation to be determined. Once the High Court has either determined or postponed confiscation, the magistrate can then proceed to sentence the defendant. In Grenada this issue does not arise as the Act confirms that the magistrate can sentence and then commit the defendant for confiscation to the High Court.¹¹⁷

¹¹⁶ Grenada: Section 8(5) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 9(5) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹¹⁷ Grenada: Section 6(3) Proceeds of Crime Act 2012

8.6 No other jurisdiction deals specifically with postponement in their proceeds of crime legislation. It is suggested once the notice of intention to apply for confiscation has been served by the prosecutor, best practice would be for the court to adjourn confiscation and order a timetable for the service of the relevant statements before sentencing the defendant.

8.7 Regardless of whether the legislation requires confiscation to be dealt with or postponed prior to sentence, it is important in every case, when the prosecutor informs the court that they intend to apply for a confiscation order, that the court should be clear about whether they intend to deal with confiscation proceedings immediately or postpone them (**CPS Swansea v Gilleeney** [2009] EWCA Crim 193).

9. Sentence

9.1 In Grenada and Saint Vincent and the Grenadines, where the court exercise their power to postpone confiscation under the Act, the legislation states that they may then proceed to sentence the defendant in respect of the offence(s) in question.¹¹⁸ Upon the making of the postponed confiscation order, the court may, if appropriate, go back and vary any fine or other order involving payment which was made against the defendant at the time of sentence.¹¹⁹

¹¹⁸ Grenada: Section 8(7) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 9(7) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹¹⁹ Grenada: Section 8(10) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 9(7) Proceeds of Crime and Money Laundering (Prevention) Act 2001

9.2 In all other jurisdictions, as there are no provisions regarding postponement or the power of the court to vary a fine or other financial order, best practice would dictate that if the court is minded to include a fine or other financial order as part of sentence, they should defer sentencing the defendant until confiscation has been dealt with.

10. Basis of Pleas

10.1 A basis of plea can significantly impact on confiscation. The issue of basis of plea has been considered in **R v Chambers** [2008] EWCA Crim 2467. In this case the defendant pleaded guilty on a written basis that he had been paid a specific amount to go to a warehouse and assist some friends. He stated that he was not aware that he would be handling dutiable tobacco until he arrived at the warehouse.

10.2 The prosecution did not request a *Newton* hearing before sentence but did make it clear that they would not be bound by the basis of plea in any confiscation proceedings. The defendant later argued that because there was no *Newton* hearing the court was bound to accept the defendant's limited role in the conspiracy.

10.3 The Court of Appeal rejected this argument. They held that where the Crown accepts a basis of plea, then the court considering confiscation is bound by that. Where the basis of plea is not accepted, the court considering confiscation must hear evidence and reach its own

conclusion on the defendant's role. The fact that there was no Newton Hearing before sentence was deemed to be '*neither here nor there*'.

11. Duty Of The Court To Proceed With Confiscation

11.1 In the Eastern Caribbean, confiscation is a mandatory regime. On the application of the Director of Public Prosecutions (or prosecutor in Grenada), or in certain jurisdictions, of their own motion, the court *must* proceed to determine the benefit and realisable amounts and make a confiscation order in the latter amount.¹²⁰

11.2 Saint Lucia is the only jurisdiction which makes the application for confiscation by the Director of Public Prosecutions mandatory in appropriate cases.¹²¹

11.3 All other jurisdictions provide that the Director of Public Prosecutions has discretion when determining whether to apply for confiscation.¹²² However in **Lunnon [2004] EWCA Crim 1125** the Court of Appeal held that:

¹²⁰ Antigua and Barbuda: Section 18(1) Proceeds of Crime Act 1993; Barbados: Section 18(1) Proceeds of Crime Act Cap 143; Dominica: Section 17(1) Proceeds of Crime Act 1993; Grenada: Sections 6(4) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(1) and 7(1) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 52(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 17(1) Proceeds of Crime Cap 3.04

¹²¹ See footnote 103 above.

¹²² Antigua and Barbuda: Section 5(1) Proceeds of Crime Act 1993; Barbados: Section 5(1) Proceeds of Crime Act Cap 143; Dominica: Section 4(1) Proceeds of Crime Act 1993; Grenada: Sections 6(4)(a) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(1) and 7(1) Proceeds of Crime and Money Laundering (Prevention) Act; and Saint Christopher and Nevis: Section 38(1) Proceeds of Crime Act 2000 in

“No doubt one could envisage circumstances where the Crown has discovered prior to the conclusion of a confiscation hearing that such a concession [as to limited involvement] has been wrongly made. Further information may have come to light which demonstrates this to have been the case. In such circumstances, the appropriate course would be for the Crown to notify the defendant that the concession has been withdrawn and that, accordingly, he will have the choice of proving on the balance of probabilities that he was, after all, a first-time offender, or of inviting the court to be satisfied that there would be a serious risk of injustice, for some other reason, if the statutory assumptions were to be applied. What is plainly unacceptable is for the concession to be made for part of the sentencing process, without qualification, but for reliance to be placed, tacitly, on the assumptions when it comes to the confiscation hearing.

18....Once the Crown has made a concession such as in this case unless and until it is withdrawn, there would be an apparent injustice in the court’s ignoring it for the purposes of a confiscation hearing.

12. Setting A Timetable

- 12.1 One of the most important steps in the confiscation process is to agree and set a timetable for service of statements of information and skeleton arguments. This timetable should be ordered by the court. The appropriate time to do this is after conviction and before sentence or as soon afterward as practicable.

12.2 Rule 6 of the Saint Lucia Criminal Procedure Rules sets out that the Criminal Division must actively manage cases, including setting timetables to progress cases and achieve certainty about what must be done by whom and when. Although no other country in the Eastern Caribbean has Criminal Procedure Rules, the High Court has inherent jurisdiction to set timetables which are essential to good case management.

12.3 The timetable should reflect the level of complexity of the case and how much time each party will reasonably need to gather information. It should cover the service of a response to the provision of information order (if such an order is relevant to the jurisdiction), the service of statements of information by the prosecutor and defendant, witness requirements, admissions and service of skeleton arguments (an examination of each of these documents is set out in paragraphs 13 – 18 below). A precedent timetable is attached at Annex B which may be used as a guide.

13. Provision of Information

13.1 Saint Vincent and the Grenadines and Grenada both give the court the power to order the defendant to provide information in a manner that is specified by the court to assist them in carrying out their function in relation to the making of a confiscation order.¹²³

¹²³ Grenada: Section 11(2) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 12 Proceeds of Crime and Money Laundering (Prevention) Act 2001

13.2 If the defendant fails to comply with the court's order, without reasonable excuse, the court can draw any inference it believes appropriate. Once the Director of Public Prosecutions (or prosecutor in Grenada) accepts any allegation made by the defendant in his response to the order, the court may treat that acceptance as conclusive of the matters to which it relates.¹²⁴

13.3 It should be noted that unlike the position in Saint Vincent and the Grenadines in relation to the defendant's response to a prosecutor's statement, there is no protection against self-incrimination which attaches to a provision of information order.¹²⁵

14. The Prosecutor's Statement

14.1 Grenada and Saint Vincent and the Grenadines are the only countries where service of a prosecutor's statement is mandatory once the Director of Public Prosecutions (or prosecutor in Grenada) has applied to the court for a confiscation order.¹²⁶ Although the legislation does not make service of a prosecutor's statement mandatory in other jurisdictions, best practice dictates that the prosecution should *always* provide a written statement when seeking confiscation to assist the court to determine the benefit and realisable amounts.

¹²⁴ Grenada: Section 11(5) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 12(2) and (3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹²⁵ See paragraph 16.2 below.

¹²⁶ Grenada: Section 10(2) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 11(1) Proceeds of Crime and Money laundering (Prevention) Act 2001

14.2 This statement is usually prepared by the financial investigator and approved by the prosecutor before service.

14.3 The prosecutor's statement should include (but is not limited to):

- (a) An outline of the nature of the offence(s) that the defendant has been convicted of, together with references to the indictment, the factual background, the date of conviction, any sentence that has been passed, and the timetable for confiscation;
- (b) A portrait of the defendant himself, including age, address, marital status, and dependants. This will also include reference to previous occupations, income derived from the same, and any previous relevant convictions;
- (c) The history of any restraint order proceedings, including whether a receiver has been appointed;
- (d) The extent of the benefit alleged. This will often include reference to admissions made at trial or the evidence given. It may also extend to relevant sentencing remarks and the basis of plea. It cannot be sufficiently stressed, however, that there is no onus on the Director of Public Prosecutions (or prosecutor in Grenada) to prove that a given defendant has hidden assets; it is for the defendant to show that his assets are insufficient to meet any "benefit figure" found by the court;

- (e) Reference to the assumptions that the court is being invited to draw;
- (f) The nature of the assets the Director of Public Prosecutions (or prosecutor in Grenada) maintains are realisable. Whilst there is no duty upon the Director of Public Prosecutions (or prosecutor in Grenada) to prove the available amount it is clearly helpful if it refers to what is known in terms of the defendant's property and wealth;
- (g) The extent of any allegation of hidden assets and the basis for such a belief;
- (h) The amount of the confiscation order the Director of Public Prosecutions (prosecutor in Grenada) is seeking.

15. The Defendant's Statement

15.1 Once a prosecutor's statement has been served, the court *may* order the defendant to tender a statement indicating to what extent they accept the allegations made in the prosecutor's statement and setting out any matters upon which they wish to rely.¹²⁷ It is best practice that the defendant is *always* ordered to tender such a statement.

¹²⁷ Antigua and Barbuda: Section 20(2) Proceeds of Crime Act 1993; Barbados: Section 20(2) Proceeds of Crime Act Cap 143; Dominica: Section 19(2) Proceeds of Crime Act 1993; Grenada: Section 10(5) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 11(4) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 54(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 19(2) Proceeds of Crime Cap 3.04

- 15.2 The purpose of a defendant's statement is to identify areas of dispute for the confiscation hearing, so that evidence may be adduced only in relation to the disputed points, thus narrowing the issues and saving court time.
- 15.3 If the defendant fails to respond to each allegation made in the prosecutor's statement when ordered to do so, he may be treated as having accepted every allegation in the prosecutor's statement, except any allegations to which the defendant has complied, and any allegations which relate to the benefit amount, which are for the prosecution to prove.¹²⁸ It must be noted here that if no timetable is set, or other order made by the court, the defendant is not obliged to respond to the prosecutor's statement and nothing can be implied by their failure to do so.
- 15.4 In **R v Comiskey** (1991) 93 Cr App R 227, the Court of Appeal held that once the prosecution have proved benefit, the burden then passes to the defendant to show, on a balance of probabilities, the value of his realisable property was less than this sum. If he fails to discharge that burden, the court must make a confiscation order in the full amount by which it has certified he has benefited from his crime.

¹²⁸ Antigua and Barbuda: Section 20(3) Proceeds of Crime Act 1993; Barbados: Section 20(3) Proceeds of Crime Act Cap 143; Dominica: Section 19(3) Proceeds of Crime Act 1993; Grenada: Section 10(6) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 11(5) Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Section 54(3) Proceeds of Crime Act 2000; and Saint Lucia: Section 19(3) Proceeds of Crime Cap 3.04

15.5 As a result, the Court of Appeal has shown a reluctance to interfere with confiscation orders made in circumstances where the defendant has failed to respond to the prosecutor's statement and has failed to give evidence at the confiscation hearing.

15.6 In **R v Layode** (*Unreported, CA, 12 March 1993*) the defendant failed to respond to the prosecutor's statement or give evidence at the confiscation hearing. The Court of Appeal dismissed the defendant's appeal against the confiscation order. McPhearson J, in delivering the judgment of the court, observed that:

'If the judge was wrong about the realisable assets and the bank accounts, the Appellant had nobody but himself to blame in this regard.'

15.7 He added that the case underlined the importance of a defendant submitting evidence.

15.8 When the defendant does tender a statement, the importance of obtaining independent corroboration of their assertions cannot be overemphasized. In **R v Walbrook and Glasgow** [1994] *Crim LR* 613, the Court of Appeal held that where a defendant wanted to show that the amount of his realisable assets available for confiscation was less than the amount of his benefit as certified by the court, he had to produce clear and cogent evidence. They stated that:

‘Vague and generalized assertions unsupported by evidence would rarely if ever be sufficient’.

16. Self- Incrimination

- 16.1 As stated above, if the defendant is ordered to make a statement in response to the prosecutor’s statement and fails to do so, he or she may be treated as accepting every allegation made in the prosecutor’s statement.
- 16.2 There does however exist a tension in the legislation in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia in that if a defendant accepts, in his or her defence statement, that they have received a benefit from the commission of an offence, that admission is then admissible in any proceedings against them for any offence.¹²⁹
- 16.3 This lack of protection against self-incrimination may dissuade some defendant’s from complying with a court order requiring them to tender a statement. Consequently, they will be deemed to have accepted all of the allegations in the prosecutor’s statement.
- 16.4 The legislation in Saint Vincent and the Grenadines specifically protects the defendant against self-incrimination. The relevant section states that no acceptance by the defendant that proceeds have been

¹²⁹ Antigua and Barbuda: Section 20(6) Proceeds of Crime Act 1993; Barbados: Section 20(6) Proceeds of Crime Act Cap 143; Dominica: Section 19(6) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 54(6) Proceeds of Crime Act 2000; and Saint Lucia: Section 19(6) Proceeds of Crime Cap 3.04

derived from a qualifying offence shall be admissible in evidence in any proceedings for an offence.¹³⁰

16.5 This section should encourage the defendant to be more forthcoming in their responses to the prosecutor's statement.

17. Is the Court limited to the contents of the Prosecutor's Statement?

17.1 No, the court is not limited to what is set out in the prosecutor's statement. The legislation in the Eastern Caribbean is unambiguous in its terms that it is the court who must determine the defendant's benefit and realisable amount, not the prosecutor.¹³¹

17.2 Similarly, the court is not limited to the offences for which the defendant has been charged, as long as they are satisfied, beyond reasonable doubt, that other criminal conduct has been committed (**R v Briggs-Price [2009] UKHL**).

17.3 Importantly, it was recently stressed by the Court of Appeal that the case of **Briggs-Price** should not be taken as authority for the proposition that the only way of making out the assumptions was to

¹³⁰ Saint Vincent and the Grenadines: Section 11(8) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹³¹ Antigua and Barbuda: Sections 18(1) and (2) and 21 Proceeds of Crime Act 1993 ; Barbados: Sections 18(1) and (2) and 21 Proceeds of Crime Act Cap 143; Dominica: Section 17(1) and (2) and 20 Proceeds of Crime Act 1993; Grenada: Sections 6(5) and 7(2) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 6(2) and (4) and 7(2) and (4) and 13 Proceeds of Crime and Money Laundering (Prevention) Act; Saint Christopher and Nevis: Sections 52(2) and 55 Proceeds of Crime Act 2000; and Saint Lucia: Section 17(1) and (2) and 20 Proceeds of Crime Cap 3.04

prove past criminal offences (**R v Whittington** (2009) *EWCA Crim* 1641.)

18. Service of Skeleton Arguments

18.1 Both sides should prepare and serve on the court and each other skeleton arguments prior to the confiscation hearing, in accordance with the timetable set by the court. These skeleton arguments should include all authorities upon which the parties seek to rely, areas of dispute and/or agreement and include any admission which may be made.

18.2 Issues which might be easily agreed include the particular benefit (for example the value of the drugs). In some cases parties might agree all or part of the contents of an expert report (such as a forensic accountant's report).

19. Appeal against Conviction

19.1 In Grenada and Saint Vincent and the Grenadines, the court may postpone the determination of the benefit or realisable amount for a specified period if the defendant has appealed against conviction.¹³²

19.2 In all other jurisdictions in the Eastern Caribbean, the court cannot make a confiscation order until any appeal against conviction has either lapsed or been determined. If no appeal has been lodged, the

¹³² See footnote 115 above.

confiscation order cannot be made until the period allowed by the rules of the court for lodging an appeal has expired.¹³³

19.3 There is nothing preventing the court from setting a timetable for service of documents in preparation for the confiscation hearing when an appeal against conviction has been lodged or during the period allowed for lodging an appeal. This timetable can be amended if more time is required to allow for the outcome of the appeal.

19.4 In some jurisdictions, the Director of Public Prosecutions may avoid applying for confiscation until the period allowed by the court to lodge an appeal has expired due to the cost of withdrawing the application in the event that the defendant's conviction is quashed.

The Confiscation Hearing

20. Who Should Determine the Application For Confiscation?

20.1 Restraint and confiscation are criminal proceedings. Confiscation is sometimes confused as being a civil matter due to the fact that in most jurisdictions (with some jurisdictions in the Eastern Caribbean being the exception) the burden of proof is the balance of probabilities (see section 21 below).

¹³³ Antigua and Barbuda: Section 18(3) Proceeds of Crime Act 1993; Barbados: Section 18(3) Proceeds of Crime Act Cap 143; Dominica: Section 17(3) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 52(3) Proceeds of Crime Act 2000; and Saint Lucia: Section 17(3) Proceeds of Crime Cap 3.04

20.2 The trial judge should, where possible, deal with the confiscation proceedings. Evidence adduced at trial can be taken into account at the confiscation hearing however the trial judge will be best placed to evaluate this evidence (**Sangha** [2009] *Crim LR* 212).

21. Burden and Standard of Proof

21.1 It is for the prosecution to prove that the defendant has benefited from the commission of the offence(s) and to what extent.¹³⁴ The prosecution must prove the amount of the particular benefit (this is covered in detail in section 22.1 below). The prosecution must also prove the amount of the extended benefit. For example the prosecution must prove, to the requisite standard, that property is held by the defendant, or that the defendant has made certain expenditure. Once this has been done, the assumptions are engaged and the court must apply them unless they are proven to be incorrect or there is a serious risk of injustice to the defendant (this is covered in detail in section 22.2 below). The burden of disproving an assumption rests with the defendant.

21.2 Once the amount of the benefit has been determined, it is open to the defendant to demonstrate that the available amount is less than the benefit figure or nil.¹³⁵

¹³⁴ See paragraphs 14.1 and 15.3 and footnote 128 above.

¹³⁵ Antigua and Barbuda: Section 21 of the Proceeds of Crime Act 1993; Barbados: Section 21 Proceeds of Crime Act Cap. 143; Dominica: Section 20 Proceeds of Crime Act 1993; Grenada: Section 6(11) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 13 Proceeds of Crime and Money Laundering (Prevention) Act

21.3 The standard of proof differs throughout the region. In Saint Vincent and the Grenadines and Grenada, the standard of proof in matters relating to confiscation (not matters which relate to any proceeding for the substantive offence) is the balance of probabilities.¹³⁶

21.4 In Saint Lucia, any question of fact to be decided by the court in proceedings under the Act used to be decided beyond reasonable doubt.¹³⁷ This section was later repealed.¹³⁸ The current legislation is silent about the standard of proof. It is suggested that the act of repealing the original standard of proof suggests that the burden of proof to be applied in Saint Lucia is now intended to be the balance of probabilities.

21.5 In Antigua and Barbuda, Barbados and Dominica the legislation is clear that any question of fact to be decided by the court in proceedings under the Act are to be decided beyond reasonable doubt.¹³⁹

21.6 The legislation in Saint Christopher and Nevis is silent about the standard of proof to be applied to the Act. In the absence of clarity it

2001; St Christopher and Nevis: Section 55 Proceeds of Crime Act 2000; and Saint Lucia: Section 20 Proceeds of Crime Act Cap 3.04

¹³⁶ Grenada: Sections 6(12) and 47 Proceeds of Crime Act 2012; and St Vincent and the Grenadines: Section 63 Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹³⁷ Section 62 Proceeds of Crime Act 2001.

¹³⁸ The section was repealed by Act 27 of 2003.

¹³⁹ Antigua and Barbuda: Section 66 Proceeds of Crime Act 1993; Barbados: Section 66 Proceeds of Crime Act Cap 143; and Dominica: Section 70 Proceeds of Crime Act 1993

may well be correct that the court should favour the defendant and apply the higher standard of proof.

22. Evidence

22.1 When considering an application for a confiscation order the court may have regard to any evidence at trial (**R V O'Connell 2005 EWCA Crim 1520**) as well as the contents of prosecutor's statements, defendant's statements, any evidence called at the confiscation hearing and any information the court has ordered the defendant to provide under its powers.¹⁴⁰

22.2 The financial investigator may give oral evidence regarding matters contained within their statement that are in dispute. Expert evidence may be given regarding any contentious issues such as the value of drugs or contraband or any matter in dispute from a forensic accountant's report.

22.3 The defendant may also give evidence and call experts if appropriate. It is important to remember that any assertions made by the defendant must be substantiated with evidence and vague or generalised assertions should not be sufficient to satisfy the court.

¹⁴⁰ Only the legislation in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia is explicit that the court may have regard to evidence that was adduced at trial; see footnote 90 and Section 41(1) of the Proceeds of Crime Act 2000 in Saint Christopher and Nevis.

23. Interested Third Parties

23.1 Generally a third party (such as a partner or spouse of the defendant) who is claiming an interest in property may appear as a witness for the defendant at the confiscation hearing however they themselves have no locus standi.

23.2 The legislation in Saint Vincent and the Grenadines, however, specifically sets out the mechanism for third parties to apply in their own right, either before or after the making of the confiscation order, to have their interest in property determined.¹⁴¹ Unless a third party has the leave of the court, they cannot make such an application after the confiscation order has been made if:

- (a) They had knowledge of the application for the confiscation order or appeared at the hearing; or
- (b) A period of 28 days has lapsed since the making of the confiscation order.¹⁴²

23.3 When such an application is made, the third party must give the Director of Public Prosecutions no less than seven days written notice

¹⁴¹ Saint Vincent and the Grenadines: Section 14(1)(2) and (3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁴² Saint Vincent and the Grenadines: Section 14(4) Proceeds of Crime and Money Laundering (Prevention) Act 2001

of the application and the Director of Public Prosecutions must be a party to any proceedings on the application.¹⁴³

23.4 The only situation that permits an interested third party to appear and adduce evidence at a confiscation hearing in Antigua and Barbuda, Barbados, Dominica and Saint Lucia, is when the Director of Public Prosecutions is applying to pierce the corporate veil and include property belonging to a company or trust as part of the benefit or realisable amount. In such situations the Director of Public Prosecutions must give written notice of the application to any person who they have any reason to believe may have an interest in the property and that person may appear and adduce evidence at the hearing of the confiscation order.¹⁴⁴

23.5 In Grenada an interested third party shall be entitled to appear before the court and make representations where an application is made for a confiscation order when the defendant has absconded or died.¹⁴⁵

24. The Central Issues To Be Determined

24.1 The court must ask itself six questions:

- (a) Has the prosecutor proved that the defendant benefited from any relevant criminal conduct?

¹⁴³ Saint Vincent and the Grenadines: Section 14(5) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁴⁴ See footnote 150 below.

¹⁴⁵ Section 12(6)(c) Proceeds of Crime Act 2012

- (b) If so what is the amount of that benefit?
- (c) Has the defendant proved that he does not have sufficient assets available to him to pay the “benefit figure” in full?
- (d) If so, what are his realisable assets worth?
- (e) How much time does the defendant require to pay the confiscation order?
- (f) What is the period of custody to be served in default of payment?

25. Calculating The Benefit

25.1 In the Eastern Caribbean, almost every case (except those cases in Grenada and Saint Vincent and the Grenadines outlined at paragraphs 8.7 and 8.8 of the restraint section above) requires an examination of the ‘*extended*’ benefit. This means that not only will the court consider the benefit obtained directly from the commission of the offence (the particular benefit), but it will also be required to make certain assumptions about the defendant’s property (the extended benefit).

25.2 The Particular Benefit

25.2.1 For the purposes of particular benefit, a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.

Where a pecuniary advantage is obtained the defendant is said to have benefited from that advantage to a sum of money equal to that advantage.¹⁴⁶

25.2.2 In Grenada and Saint Vincent and the Grenadines the benefit from drug trafficking is dealt with separately. A person is considered to have benefited from drug trafficking if he has, at any time (whether before or after the commencement of the Act) received any payment or reward from drug trafficking carried out by him or another person.¹⁴⁷

25.2.3 The test is objective. Has the defendant in fact obtained property in connection with the offence? Intention is irrelevant (**R v Threapleton** [2002] 2 Cr.App.R.(S.) 198).

25.2.4 The benefit may be established despite an offender being prevented from converting property to his own use. A burglar or handler can be said to have benefited even if he is caught red handed and the goods are recovered before they are passed on (**R v Wilkes** [2003] 2Cr.App.R.(S.) 105 see **R v Smith (David)** [2002] 1 W.L.R. 54, HL for a more dramatic example).

¹⁴⁶ Antigua and Barbuda: Section 19(1) and (2) Proceeds of Crime Act 1993; Barbados: Section 19(1) and (2) Proceeds of Crime Act Cap 143; Dominica: Section 18(1) and (2) Proceeds of Crime Act 1993; Grenada: Section 6(9) and 6 (10) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 7(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Sections 53(1) and (2) Proceeds of Crime Act 2000; and Saint Lucia: Section 18(1) and (2) Proceeds of Crime Act Cap 3.04

¹⁴⁷ Grenada: Section 7(3) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 6(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

25.2.5 Where there are multiple defendants it is permissible to total the sum of the benefit and divide between the number of defendants if there is no evidence relating to what share a defendant actually received (**R v Gibbons** [2003] 2 Cr.App.R (S.) 34, CA). However if the property obtained is held jointly then the defendants are each liable for the whole amount (**R v May** [2005] 3 All E.R. 523) though apportionment may be appropriate based on the circumstances.

25.2.6 If the defendant has a defined role in a conspiracy and has received a specific benefit for their role (for example a drug courier) their benefit should be the specific amount they received (**R v Green** [2008] UKHL 30).

25.2.7 Corporate structures, trusts and transfers of convenience may be used to conceal illegal activities or the proceeds of crime. Where such a structure is used as a device to conceal illegal activities, the court is entitled to '*pierce the corporate veil*' in assessing benefit.

25.2.8 The legislation in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia deals directly with the issue of piercing the corporate veil. In assessing the value of particular or extended benefit derived by a person, the court may consider any property to be the property of the defendant if it is under their effective

control, whether or not the person has any legal or equitable interest in it, or any right, power or privilege in connection with it.¹⁴⁸

25.2.9 The court may have regard to, among other things, debentures over, or shareholdings or directorships in a company that has a direct or indirect interest in property, or trusts that have a relationship with property. The court may also have regard to any relationship between the defendant and any property, companies or trusts.¹⁴⁹

25.2.10 If the Director of Public Prosecutions applies to have such property included as part of the benefit amount (whether particular or extended) or realisable amount, they must give written notice of the application to any person who they have any reason to believe may have an interest in the property and that person may appear and adduce evidence at the hearing of the confiscation order.¹⁵⁰

25.2.11 The legislation in Grenada and Saint Vincent and the Grenadines does not deal directly with mechanism of piercing the corporate veil however it is suggested that there is nothing preventing the court from doing so in order to determine the extent of the defendant's benefit.

¹⁴⁸ Antigua and Barbuda: Section 23(1) Proceeds of Crime Act 1993; Barbados: Section 23(1) Proceeds of Crime Act Cap 143; Dominica: Section 22(1) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 57(1) Proceeds of Crime Act 2000; and Saint Lucia: Section 22(1) Proceeds of Crime Act Cp 3.04

¹⁴⁹ Antigua and Barbuda: Section 23(2) Proceeds of Crime Act 1993 ; Barbados: Section 23(2) Proceeds of Crime Act Cap. 143; Dominica: Section 22(2) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 57(2) Proceeds of Crime Act 2000; and Saint Lucia: Section 22(2) Proceeds of Crime Act Cp 3.04

¹⁵⁰ Antigua and Barbuda: Section 23(5) Proceeds of Crime Act 1993; Barbados: Section 23(5) Proceeds of Crime Act Cap. 143; Dominica: Section 22(5) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 57(5) Proceeds of Crime Act 2000; and Saint Lucia: Section 22(5) Proceeds of Crime Act Cp 3.04

25.2.12 Where sham transfers are established to the requisite standard, the court may ascribe the benefit of the property subject to that sham transfer to the Defendant.

25.2.13 It is not uncommon for a defendant to operate a business. Often such a business will have a partially legitimate and partially criminal element to it. In such cases it is for the defendant to demonstrate which proportion of the business was legitimate and which was illegitimate. If the defendant fails to do so, the court will be left with no option but to invoke the assumptions in full (**R v Singh** [2009] EWCA Crim 1095).

25.2.14 If there is no evidence that a defendant actually benefited from an offence, despite being responsible for that offence and all the consequences flowing from it, no order against that defendant can be made (**R v Olubitan** [2004] 2 Cr.App.R.(S.) 14 and the more recent case of **R v Straughan** [2009] EWCA (Crim) 955).

25.3 Extended Benefit

25.3.1 In addition to the particular benefit the court must also consider the extended benefit. The court will not be required to consider the extended benefit in cases involving those exceptions in Grenada and Saint Vincent and the Grenadines set out in paragraph 8.8 of the restraint section above and again at sections 25.3.4 and 25.3.6 below.

25.3.2 Calculating the extended benefit requires the court to make certain assumptions.¹⁵¹

25.3.3 The assumptions to be made in Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia differ slightly from those in Grenada and Saint Vincent and the Grenadines. In the former, when the court is assessing the value of the benefit, it shall assume, unless the contrary is proved:

- (a) All property appearing to the court to be held by the person on the day on which the application is made; and
- (b) All property appearing to the court to be held by the person at any time;
 - Within the period between the day the schedule offence, or the earliest offence, was committed and the day on which the application is made; or
 - Within the period of 6 years immediately before the day on which the application is made whichever is longer;

¹⁵¹ The assumptions that the court are required to make are set out in Antigua and Barbuda: Section 19(3) Proceeds of Crime Act 1993; Barbados: Section 19(3) Proceeds of Crime Act Cap. 143; Dominica: Section 18(3) Proceeds of Crime Act 1993; Grenada: Sections 9(4) and 9(5) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Sections 8(3) and 10(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Sections 53(3) Proceeds of Crime Act 2000; and Saint Lucia: Section 18(3) Proceeds of Crime Act Cap. 3.04

To be property that came into the possession or under the control of the person by reason of the commission of that scheduled offence or those scheduled offences for which the person was convicted;

- (c) Any expenditure by the person since the beginning of that period to be expenditure met out of payments received by him as a result of, or in connection with, the commission of that scheduled offence or those scheduled offences; and
- (d) Any property received or deemed to have been received by the person at any time as a result of, or in connection with, the commission by him of that scheduled offence, or those scheduled offences as property received by them free of any interest therein.¹⁵²

25.3.4 In Saint Vincent and the Grenadines, the assumptions can only be engaged in respect of drug trafficking offences and relevant offences with a benefit over \$100,000.¹⁵³ Although the assumptions as they relate to drug trafficking offences are set out in a different section than those relating to relevant offences¹⁵⁴ the assumptions the court is required to make in both cases are in effect the same. The court is required to assume, unless the contrary is proved:

¹⁵² See footnote 151 above

¹⁵³ See footnote 37

¹⁵⁴ Section 8(3) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001 for relevant offences and section 10(3) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001 for drug trafficking offences.

- (a) All property appearing to the court to be held by the defendant at the date of conviction or at any time during the period between that date and the date of the determination in question; or
- (b) All property transferred to him at any time within the relevant period, to be property that was received by him at the earliest time when he appears to the court to have held it, as a result of or in connection with the commission of the offence; and
- (c) Any expenditure by the person since the beginning of the relevant period to be expenditure met out of payments received by him as a result of, or in connection with, the commission of the offence or those offences.¹⁵⁵

25.3.5 The only difference between the sections relating to drug trafficking and relevant offences is the definition of the 'relevant period'. Unfortunately, the 'relevant period' as it relates to relevant offences is not defined under the Act, therefore the period to which the assumptions apply for relevant offences is unclear. Arguably, the period should be the same as that applied in cases involving drug trafficking, which is defined under the Act as being the period of six

¹⁵⁵ See footnote 154 above

years, ending when the proceedings were instituted against the defendant.¹⁵⁶

25.3.6 In Grenada, the application of the assumptions is far more limited than in all of the other jurisdictions. The assumptions will only apply where the defendant is convicted of two or more '*qualifying offences*' in the relevant proceedings or, if convicted of only one *qualifying offence* in the relevant proceedings, at least one other the period of six years before proceedings were instituted against him. A '*qualifying offence*' is defined as any indictable offence, other than drug trafficking, which was committed after the Act came into force and from which the defendant has benefited.¹⁵⁷

25.3.7 Where the assumptions do apply, the court is required to make the same assumptions as those in Saint Christopher and Nevis (set out at paragraph 25.3.4 above).¹⁵⁸ The relevant period is defined in the same way that it is defined for drug trafficking offences in Saint Christopher and Nevis, that is to say, the period of six years, ending when the proceedings were instituted against the defendant.¹⁵⁹

25.3.8 The date of conviction is also defined under the Act in Grenada as being the date the defendant was convicted of an offence or, if the

¹⁵⁶ Saint Vincent and the Grenadines: Section 10(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁵⁷ Sections 9(2) and 9(3)(c) of the Proceeds of Crime Act 2012.

¹⁵⁸ Section 9(5) of the Proceeds of Crime Act 2012

¹⁵⁹ Section 9(9)(b) of the Proceeds of Crime Act 2012

defendant is convicted of more than one offence in the same set of proceedings, but the dates of the convictions are not the same, the date of the latest conviction.¹⁶⁰

25.3.9 Importantly, the legislation in Grenada states that where the assumptions are invoked, the offence(s) from which the defendant is assumed to have benefited, shall be treated, for the purposes of the Act, as comprising part of the relevant criminal conduct relating to the current proceedings.¹⁶¹ Such a section does not exist in any other legislation in the region. In the absence of such a section, it may appear, at first blush, that the assumptions will only 'bite' in limited circumstances as the property, transfer or expenditure shall be assumed to have been received *in relation to the commission of the offence* (Saint Vincent and the Grenadines) or *from that scheduled offence from which the defendant has been convicted* (Antigua and Barbuda, Barbados, Dominica, Saint Christopher and Nevis and Saint Lucia).

25.3.10 It is suggested that to interpret the section in such a narrow way would be incorrect. Scheduled offences are categories of offence (for example fraud or drug trafficking) in the same way that the statement of offence on the indictment (as opposed to the particulars of the offence) will relate to the category of offending. The legislation does not refer to specific offending, but appears to be stating that where the

¹⁶⁰ Section 9(9)(a) of the Proceeds of Crime Act 2012

¹⁶¹ Section 9(7) of the Proceeds of Crime Act 2012.

assumptions are invoked, the offence(s) from which the defendant is assumed to have benefited, will be treated as being the type or category of offence for which they have been convicted (in effect the same position as in Grenada).

25.3.11 The case of (**R v Khan, Sakkaravej and Pamarapa** *Unreported, February 26, 1996*) addresses this point. It states that when looking at the extended benefit, there is no basis for the defence arguing that there must be some evidential connection between the defendant's property and criminal activity before making an assumption.

25.3.12 It should be noted that in Grenada and Saint Vincent and the Grenadines, in order for the court to invoke the assumptions the Director of Public Prosecutions (or prosecutor in Grenada) must serve a notice stating that the case is an appropriate one for the assumptions to be applied.¹⁶²

25.3.13 It is also important to note that in Grenada and St Vincent and the Grenadines, the court should not make any assumption if they are satisfied that there would be a serious risk of injustice to the

¹⁶² Grenada: Section 9(3) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 8(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

defendant.¹⁶³ In Saint Christopher and Nevis, where the court does not make one or more of the assumptions it shall state its reasons.¹⁶⁴

25.3.14 Despite the fact that they may appear to be extremely draconian measure, there can be no leniency when it comes to the application of the assumptions. If a defendant fails to displace the assumption made against him, or relies merely upon bare assertions without documentary evidence to back them up, there is no room for mercy or discretion by the court; the order must be made **R v Croft** *TLR, July 5, 2000*.

26. Valuing the Benefit

26.1 The value of property is its market value.¹⁶⁵ If another person has an interest in the property, the value is the market value of the defendant's beneficial interest, less any amount required to discharge any encumbrance on that interest.¹⁶⁶

¹⁶³Grenada: Sections 9(6)(c) of the Proceeds of Crime Act and Saint Vincent and the Grenadines: Sections 8(3)(c) and 10(4)(b) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001.

¹⁶⁴ Saint Vincent and the Grenadines: Sections 8(4) and 10(4) of the Proceeds of Crime and Money Laundering (Prevention) Act 2001.

¹⁶⁵ Antigua and Barbuda: Section 4(7) Proceeds of Crime Act 1993; Barbados: Section 4(7) Proceeds of Crime Act Cap 143; Dominica: Section 3(7) Proceeds of Crime Act 1993; Grenada: Section 3(5) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 3(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 3(7) Proceeds of Crime Act 2000 and Saint Lucia: Section 3(7) Proceeds of Crime Act Cap 3.04

¹⁶⁶ See footnote 165 above.

- 26.2 The court is entitled to hear evidence about the market value for substances that cannot be sold legally (for example drugs) and to determine benefit from such property accordingly.
- 26.3 The case of **R v Islam** [2009] UKHL 30 involved the wholesale price of drugs. Depending on the facts of the case, there is nothing to prevent the court from using street sales prices when assessing benefit.
- 26.4 Part contribution of criminal funds to an asset may taint the whole. This is a question of fact to be determined in each case, applying the language of the statute in a commonsense way. In **R v May** [2008] UKHL 28, **R v Walls** [2002] EWCA Crim 2456 was specifically approved:
- “If D applies £10,000 of tainted money as a down-payment on a £250,000 house, legitimately borrowing the remainder, it cannot plausibly be said that he has obtained the house as a result of or in connection with the commission of his offence”.*
- 26.5 However, in a case where a substantial proportion of the mortgage is paid for using criminal funds, it may then be extremely arguable that the full value of the property should form part of the benefit figure.

27. Calculating the Available Amount

27.1 Once the amount of the benefit has been determined, the court then *must* make a confiscation order in that amount, unless it is satisfied that the amount of the confiscation order should be a lesser figure.¹⁶⁷

27.2 If the court is minded to make a confiscation order in an amount less than the benefit figure, it must issue a certificate giving its opinion as to the matters concerned.¹⁶⁸

27.3 It is important not to confuse the term available amount, or realisable amount, with realisable property. Realisable property is a pool of assets which the defendant owns, has an interest in, or includes in whole or part the value of a tainted gift made by the defendant. The term realisable property relates primarily to restraint.

27.4 The available or realisable amount means the amount of the realisable property which is owned by the defendant and may be confiscated.

¹⁶⁷ Antigua and Barbuda: Section 21 Proceeds of Crime Act 1993; Barbados: Section 21 Proceeds of Crime Act Cap 143; Dominica: Section 20 Proceeds of Crime Act 1993; Grenada: Section 6(11) Proceeds of Crime Act 2012; St Vincent and the Grenadines: Section 13 Proceeds of Crime and Money Laundering (Prevention) Act 2000; Saint Christopher and Nevis: Section 55 Proceeds of Crime Act 2000 and Saint Lucia: Section 20 Proceeds of Crime Act Cap 3.04

¹⁶⁸ Antigua and Barbuda: Section 21 Proceeds of Crime Act 1993; Barbados: Section 21 Proceeds of Crime Act Cap 143; Dominica: Section 20 Proceeds of Crime Act 1993; Grenada: Section 10(9) Proceeds of Crime Act 2012; St Vincent and the Grenadines: Section 13 Proceeds of Crime and Money Laundering (Prevention) Act 2000; Saint Christopher and Nevis: Section 55 Proceeds of Crime Act 2000 and Saint Lucia: Section 20 Proceeds of Crime Act Cap 3.04

- 27.5 For example, if a defendant legally and beneficially demonstrably owns just a one percent share in a house, then that house is realisable property, and may be restrained in totality. However at the confiscation hearing it is only the value of the one percent is the available amount, not the totality of the value of the house.
- 27.6 The legislation in each jurisdiction clearly sets out that realisable property is subject to certain obligations which must be taken out of account when calculating the available amount and lists what those obligations are.¹⁶⁹
- 27.7 Legal ownership will not determine the available amount. If the defendant and his wife own a house jointly, the defendant's available amount will not necessarily be 50%; the court will look at the beneficial ownership of the house (**Stack v Dowden** [2007] UKHL 17). Similarly if the house is in the sole name of the wife that will equally not necessarily be determinative (**Jones v Kernott** [2011] UKSC 53)
- 27.8 If the court decides to lift the corporate veil, and in doing so determines that any property of a company or trust (or other property it deems appropriate) not only forms part of the benefit amount but is also part of the available amount, the Director of Public Prosecutions must then

¹⁶⁹ Antigua and Barbuda: Section 4(5) and (6) Proceeds of Crime Act 1993; Barbados: Section 4(5) and (6) Proceeds of Crime Act Cap. 143; Dominica: Section 3(5) and (6) Proceeds of Crime Act 1993; Grenada: Section 3(3) and (4) Proceeds of Crime Act 2012; Saint Vincent and the Grenadines: Section 2(3)(4) and (5) Proceeds of Crime and Money Laundering (Prevention) Act 2001; Saint Christopher and Nevis: Section 3(5) and (6) Proceeds of Crime Act 2000; and Saint Lucia: Section 3(5) and (6) Proceeds of Crime Act Cap. 3.04

apply to the court to have that property declared as being part of the property available to satisfy the confiscation order.¹⁷⁰

27.9 Where the court declares that property is available to satisfy a confiscation order, the confiscation order may be enforced against that property as if the property were property of the defendant.¹⁷¹

27.10 Where the defendant's share in a trust fund is considered to form part of the available amount, the value will need to be determined before the making of the confiscation order (**R v Walker** [2011] EWCA Crim 103).

27.11 It cannot be over-emphasised that when it comes to the available, or realisable amount, it is for the defendant, not the prosecution, to show that this amount is less than the benefit figure (**R v Barwick** [2001] Crim LR 52).

27.12 If the court concludes that the defendant has discharged the burden on him and shown that he has insufficient assets available to meet the 'benefit figure' then the court should calculate the available, or realisable, amount by calculating:

¹⁷⁰ Antigua and Barbuda: Section 23(3) Proceeds of Crime Act 1993; Barbados: Section 23(3) Proceeds of Crime Act Cap 143; Dominica: Section 22(3) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 57(3) Proceeds of Crime Act 2000; and Saint Lucia: Section 22(3) Proceeds of Crime Act Cp 3.04

¹⁷¹ Antigua and Barbuda: Section 23(4) Proceeds of Crime Act 1993; Barbados: Section 23(4) Proceeds of Crime Act Cap 143; Dominica: Section 22(4) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 57(4) Proceeds of Crime Act 2000; and Saint Lucia: Section 22(4) Proceeds of Crime Act Cp 3.04

- (a) What realisable property the defendant holds alone? The value of property held by him alone is the market value. To this should be added;
- (b) The the value of the defendant's interest in other property? If there are third party interests in the property, the court should assess the value of the defendant's beneficial interest. The court may make a deduction for costs likely to be incurred in selling the property. From this figure should be deducted;
- (c) The value of any legitimate encumbrance secured on the defendant's beneficial interest in property, for example a mortgage. From the resulting figure should be deducted;
- (d) The value of any obligations of his having priority. To this resulting figure should be added;
- (e) The value of any tainted gifts. To this resulting figure should be added;
- (f) Any change in the value of money or other applicable uplift;
- (g) This is then the available or realisable amount.

28. Hidden Assets

28.1 When considering the available amount, there is nothing which limits the court to making a confiscation order equivalent to the value of the assets which have been identified by the prosecution. As stated in paragraph 27 above, once the amount of the benefit has been determined, it is for the defendant to prove to the court the amount of his or her available assets.

28.2 The court may, upon hearing the evidence, decide that the defendant has an amount in excess of what has been identified by the prosecution or alleged by the defence and make any order they see fit.

28.3 In the case of **R v Wright** [2006] EWCA Crim 1257, the Court of Appeal closely considered the issue of hidden assets. The judge at first instance made a confiscation order in excess of the available amount identified by the Crown, but significantly less than the benefit amount. No specific reasons were given as to how the judge arrived at the amount. It was assumed that the judge had concluded that the defendant had hidden assets.

28.4 The appellant appealed on the basis that it was not proven that he had hidden assets. The Court of Appeal reasserted the principle set out in **R v Barwick** (2001) 1 Cr App R(S) that the burden is upon the defendant to prove that his realisable assets are less than the amount of the benefit. The Court of Appeal went on to find that the judge was

entitled to conclude, on the facts, that the defendant had hidden assets and make a confiscation order in that amount.

29. Time to Pay and Interest on Unpaid Sums

29.1 No jurisdiction in the Eastern Caribbean has express provisions regarding time permitted to pay a confiscation order. Saint Vincent and the Grenadines is the only jurisdiction that refers directly to the issue of time to pay. The Act states that the confiscation order must be paid within such a period as may be specified by the court.¹⁷²

29.2 It is best practice that the court should, as part of the terms of the confiscation order, specify a time within which the defendant must pay the confiscation order. This not only gives the defendant an indication of what is expected of him, it also gives the prosecution an indication of when they should apply to have a period of imprisonment in default of payment of the order imposed. It is suggested that the time within which to pay should be set at a reasonable period and not overly long since the court will already have concluded that the defendant has the requisite amount in his possession; all that remains is for him to realise those assets.

29.3 If the court sets a time to pay and the defendant applies to have that period extended, the court has discretion as to whether to permit an extension. Arguably, such an extension should only be granted in

¹⁷² Saint Vincent and the Grenadines: Section 7(5)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001.

exceptional circumstances and only if the prosecutor is given a right to be heard and make representations on such an application.

29.4 The legislation in Grenada and Saint Vincent and the Grenadines provides that if any sum required to be paid under a confiscation order is not paid within the specified time, that person shall be liable to pay interest on that sum for the period for which it remains unpaid.¹⁷³

29.5 Any amount of interest shall for the purposes of enforcement, be treated as part of the amount to be recovered from him under the confiscation order.¹⁷⁴

29.6 The court may, on the application of the Director of Public Prosecutions (or prosecutor in Grenada), increase the term of imprisonment in default of payment of the confiscation order if the amount of the interest added to the order increases the maximum period.¹⁷⁵

29.7 The rate of interest shall be that for the time being applicable to a judgment debt under the Civil Procedure Rules.¹⁷⁶

¹⁷³ Grenada: Section 19(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 24(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁷⁴ Grenada: Section 19(2) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 24(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁷⁵ Grenada: Section 19(3) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 24(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁷⁶ Grenada: Section 19(4) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines Section 24(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

30. Imprisonment in Default

- 30.1 Once the amount of the confiscation order and the time to pay have been determined, the court must then set a term of imprisonment in default of payment of the order.
- 30.2 The penalties available for default in payment are set out within each Act.¹⁷⁷ Saint Vincent and the Grenadines and Grenada both stipulate that any sentence in default must run consecutively to any sentence of imprisonment imposed for the substantive offence.¹⁷⁸ No other jurisdiction makes express reference to the sentence in default being served consecutively, the legislation only referring to default sentences running consecutively if they are imposed under the Drug (Prevention of Misuse) Act.¹⁷⁹
- 30.3 In **R v Popple** [1992] *Crim LR* 675 the imposition of the default sentence for failure to pay a confiscation order was held to be mandatory.

¹⁷⁷ Antigua and Barbuda: Section 24 Proceeds of Crime Act 1993; Barbados: Section 24 Proceeds of Crime Act Cap. 143; Dominica: Section 23 Proceeds of Crime Act 1993; Grenada: Section 31 Proceeds of Crime Act 2012; St Vincent and the Grenadines: Section 23 of the Proceeds of Crime and Money Laundering (Prevention) Act 2001; St Christopher and Nevis: Section 49 Proceeds of Crime Act 2000; and Saint Lucia: Section 23 Proceeds of Crime Act Cap. 3.04

¹⁷⁸ Grenada: Section 31(2) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 23(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁷⁹ Antigua and Barbuda: Section 16(b) Proceeds of Crime Act 1993; Barbados: Section 16(b) Proceeds of Crime Act Cap. 143; Dominica: Section 15(b) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 49(b) Proceeds of Crime Act 2000; Saint Lucia: Section 15(b) Proceeds of Crime Act Cap. 3.04

- 30.4 It should be noted that the period of imprisonment to be served in default is expressed differently in certain jurisdictions. In Antigua and Barbuda, Barbados, Dominica and Saint Lucia, the default sentence is expressed as a mandatory term relative to the amount of the debt.¹⁸⁰
- 30.5 In Grenada, Saint Vincent and the Grenadines and Saint Christopher and Nevis, the terms of imprisonment are the maximum that may be imposed and it does not follow that the maximum term of imprisonment available for each amount should automatically be imposed in every case.¹⁸¹ In determining the proper default sentence, the court should have regard to the circumstances and overall seriousness of the case (**R v Szrajber** (1994) 15 Cr App R (S) 821).
- 30.6 In **R v Simon Price**, *Court of Appeal*, 14 December 2009, the Court of Appeal stressed that in deciding the period of imprisonment to be served in default, the court must look at the purpose of the default sentence, which is to ensure that the defendant complies with the confiscation order, and that it was wrong in principle to take into account the sentence for the substantive offence.

¹⁸⁰ Antigua and Barbuda: Section 16(a) Proceeds of Crime Act 1993; Barbados: Section 16(a) Proceeds of Crime Act Cap. 143; Dominica: Section 15(a) Proceeds of Crime Act 1993; and Saint Lucia: Section 16(a) Proceeds of Crime Act Cap. 3.04

¹⁸¹ See footnote 177 above.

31. Reconsideration of Benefit or Realisable Amount

31.1 In Antigua and Barbuda, Barbados, Dominica and St Lucia, after final determination of an application for confiscation has been made in respect of a defendant's conviction for a qualifying offence or offences, the Director of Public Prosecutions may not apply for a further determination in respect of the benefit or realisable amount in relation to that offence, or those offences, unless they are granted leave to do so by the court.¹⁸²

31.2 The court shall not grant leave for a further application unless they are satisfied that:

- (a) The property, or benefit to which the new application relates was identified after the previous application was determined; or
- (b) Necessary evidence became available after the previous application was determined; or
- (c) It is in the interests of justice that the new application be made.

31.3 It is also possible to vary the amount of a confiscation order (the realisable amount) if, at the time the confiscation order was made, the court left out of account any amount which had been forfeited, or was subject to an application for forfeiture, and an appeal against the

¹⁸² Antigua and Barbuda: Section 5(4) Proceeds of Crime Act 1993; Barbados: Section 5(4) Proceeds of Crime Act Cap 143; Dominica: Section 4(4) Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 38(4) Proceeds of Crime Act 2000; and Saint Lucia: Section 4(4) Proceeds of Crime Act Cap 3.04

forfeiture order is allowed or the forfeiture proceedings are terminated without the order being made, or any amount of tax which had been paid by the defendant and the tax is refunded.¹⁸³

31.4 In such circumstances, the Director of Public Prosecution may apply to have the confiscation order varied to increase the amount of the order by the value of the property not so forfeited or the tax refunded. The court may, if it considers it appropriate to do so, increase the order accordingly.¹⁸⁴

31.5 The legislation in Grenada and Saint Vincent and the Grenadines has quite different, and more detailed, provisions regarding reconsideration. They are set out below.

31.6 Reconsideration of Confiscation

31.6.1 Where the defendant has already appeared before the High Court to be sentenced for an offence or offences (in Grenada defendant convicted in Magistrates or High Court¹⁸⁵), and either the court did not proceed to consider confiscation, or they did consider confiscation but determined that the defendant had not benefited from the commission of the offence, the Director of Public Prosecutions (or prosecutor in Grenada) may, in certain circumstances, still make an application to

¹⁸³ Antigua and Barbuda: Section 22 Proceeds of Crime Act 1993; Barbados: Section 22 Proceeds of Crime Act Cap 143; Dominica: Section 21 Proceeds of Crime Act 1993; Saint Christopher and Nevis: Section 56 Proceeds of Crime Act 2000; and Saint Lucia: Section 21 Proceeds of Crime Act Cap 3.04

¹⁸⁴ See footnote 183 above.

¹⁸⁵ Grenada: Section 16(1)(a) Proceeds of Crime Act 2012

the court for a confiscation order. Such an application may only be made if the Director of Public Prosecutions (or prosecutor in Grenada) has evidence that was not previously available and that he believes would have led the court to determine that the defendant had benefited from the offence.¹⁸⁶

31.6.2 On such an application the court must consider the evidence and if satisfied that the defendant had so benefited, the court *must* make a confiscation order. The amount of the confiscation order should be any amount the court thinks just in all the circumstances of the case, taking into account any fine or other financial orders imposed on the defendant when he was sentenced.¹⁸⁷

31.6.3 When reconsidering confiscation, the court may take into account any payment or other reward received by the defendant up until the date of conviction (in Grenada sentence), or the date the initial determination of benefit was decided to be nil, whichever is appropriate.¹⁸⁸

31.7 Reconsideration of Benefit

31.7.1 Where the court has made a determination of the benefit amount and the Director of Public Prosecutions (or prosecutor in Grenada) has

¹⁸⁶ Grenada: Section 16(2) Proceeds of Crime Act 2012 and St Vincent and the Grenadines: Section 15 Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁸⁷ Grenada: Section 16(3) and (6) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 15(3) of Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁸⁸ Grenada: Section 16(7) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 17(1)(a) and (b) Proceeds of Crime and Money Laundering (Prevention) Act 2001

evidence that the amount of the benefit from the commission of the offence, or offences, is in fact greater than what was determined, they may apply to the court to have the evidence considered and, if appropriate, the amount of the benefit increased.¹⁸⁹

31.7.2 If, having considered the evidence, the court is satisfied that the amount of the benefit is in fact greater than what was initially determined, the court may make a fresh determination of the benefit amount.¹⁹⁰

31.7.3 Once the court has made a fresh determination of the benefit amount, they must then also reconsider the available, or realisable, amount to be paid under the confiscation order.¹⁹¹ When making such a determination, the court may consider the amount that is available at the date the determination is made.¹⁹²

31.7.4 If the available amount is found to exceed the amount ordered by the original confiscation order, the court may substitute the amount ordered by the original confiscation order for such greater amount it thinks just

¹⁸⁹ Grenada: Section 17(1) and (2) Proceeds of Crime Act 2012 and St Vincent and the Grenadines: Section 16(1) and (2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁰ Grenada: Section 17(3) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 16(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹¹ Grenada: Section 18(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 16(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹² Grenada: Section 18(6) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 16(5) Proceeds of Crime and Money Laundering (Prevention) Act 2001

in all the circumstances.¹⁹³ Where the amount of the confiscation order is increased, the court must also ensure that the term of imprisonment in default of payment of the order is set at the appropriate term as prescribed by the Act.¹⁹⁴

31.7.5 When reconsidering the benefit amount, the court may take into account any payment or other reward received by the defendant up until the date of the original calculation of the benefit.¹⁹⁵

31.8 It should be noted that no application under section 31.6 or 31.7 can be considered by the court if it is made if it is made after the end of the period of six years beginning with the date on which the defendant was convicted, or where the application relates to more than one conviction, the date of the latest conviction.¹⁹⁶

31.9 The service of prosecutor and defendant statements will apply to the applications set out under sections 31.6 and 31.7 above, as they would in any application for confiscation, but with any modifications deemed necessary.¹⁹⁷

¹⁹³ Grenada: Section 18(3) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 16(7) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁴ Saint Vincent and the Grenadines: Section 16(8) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁵ Grenada: Section 18(6) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 17(c) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁶ Grenada: Sections 16(11) and 18(7) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 19(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁷ Grenada: Section 17(11) and 18(9) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 19(4) Proceeds of Crime and Money Laundering (Prevention) Act 2001.

31.10 Increase in Realisable Property

31.10.1 If the amount of the confiscation order is less than the amount that the court assessed to be the defendant's benefit from the commission of the offence, either the Director of Public Prosecutions or a receiver appointed by the court (prosecutor in Grenada) may make an application to increase the amount of the order.¹⁹⁸

31.10.2 If the court is satisfied that the defendant's available amount is in fact greater than the amount of the confiscation order, it must issue a certificate to that effect, giving its reasons.¹⁹⁹

31.10.3 Where the court issues such a certificate, the Director of Public Prosecutions (prosecutor in Grenada) may apply to have the amount of confiscation order increased. The court may increase the confiscation order up to the amount shown to be available, and, if appropriate, impose a new term of imprisonment in default of payment of the order.²⁰⁰

31.11 Inadequacy of Realisable Property

31.11.1 If, on the application of the defendant or a receiver appointed by the court, the court is satisfied that the defendant's available amount is less

¹⁹⁸ Grenada: Sections 18(3)(a)(ii) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Sections 20(1) and (2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

¹⁹⁹ Grenada: Sections 10(9) and 18(9) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 20(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²⁰⁰ Grenada: Section 18(3)(b) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 20(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

than the amount of the confiscation order, the court shall issue a certificate to that effect, giving its reasons.²⁰¹

31.11.2 In the event that the defendant has been adjudged bankrupt, the court must take into account any amount of property that has been distributed among creditors.²⁰²

31.11.3 The court *must* disregard any inadequacy in available property which is attributable, wholly or partly to anything done by the defendant for the purpose of preserving property where it is held by the recipient of a tainted gift.²⁰³

31.11.4 Where the court issues such a certificate, the person who applies for the certificate may apply to have the amount of confiscation order reduced. The court must then reduce the confiscation order to an amount it thinks just in all the circumstances, and, if appropriate, impose a new term of imprisonment in default of payment of the order.²⁰⁴

31.11.5 Where the defendant or receiver apply to have the amount of the confiscation order reduced, they must demonstrate to the court firm

²⁰¹ Grenada: Section 26(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 21(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²⁰² Grenada: Section 26(2)(a) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 21(2)(a) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²⁰³ Grenada: Section 26(2)(b) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 21(2)(b) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²⁰⁴ Grenada: Sections 26(3) and (4) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Sections 21(3) and (4) Proceeds of Crime and Money Laundering (Prevention) Act 2001

and clear evidence of their reduced circumstances. In **Gokal v Serious Fraud Office (2001)EWCA Civ 368** Keane LJ had the following to say about applications for certificates of inadequacy:

'As has been said so many times in the authorities, it is not enough for the defendant to come to court and say that his assets are inadequate to meet the confiscation order, unless at the same time he condescends to demonstrate what has happened since the making of the order to the realisable property found by the trial judge to have existed when the order was made'

31.11.6 It is also important to keep in mind that an application to reduce the amount of the confiscation order due to inadequacy of available property cannot be used as a means of going behind the finding made by the court at the confiscation hearing. Such a finding can only be challenged by way of an appeal against the confiscation order (**Gokal v Serious Fraud Office (2001)EWCA Civ 368**).

31.11.7 The reference to available property must be to whatever available property the defendant has at the time the application for inadequacy is made. If the defendant has assets that he did not have at the time the confiscation order was made, that is by no means a reason for leaving such fresh assets out of consideration (**Re O'Donoghue (2004) EWCA Civ 1800**).

31.11.8 The fact that assets are difficult to realise does not necessarily mean they cease to be available property. In **R v Liverpool Justices ex p**

Ansen [1998] 1 All ER 692 May J agreed with the prosecution that the fact that assets are difficult to realise 'is simply not relevant'.

31.11.9 In the case of **Ansen** (above) the defendant was having difficulty realising a deposit he had put down on a property. The court held that the deposit was still an amount the defendant was entitled to recover, irrespective of any difficulty in its actual recovery.

31.11.10 The court went on to stress;

'Circumstances may arise where gifts which an Applicant has made may be practically, even legally, irrecoverable, but they are nevertheless still regarded as realisable property under this draconian Act. The purpose of these draconian procedures is obvious: they are intended, as often has been said, to make it as difficult as possible for those who traffic in drugs and get away with the proceeds of that traffic'

32. Dead or Absconded Defendants

32.1 Only the legislation in Grenada and Saint Vincent and the Grenadines permits a confiscation order to be made against a defendant who has been convicted of one or more qualifying offence and has subsequently absconded or died. The making of a confiscation order is not mandatory in either circumstances, but is at the discretion of the court.²⁰⁵

²⁰⁵ Grenada: Section 12(2) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 20(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

32.2 The court may also make a confiscation order in respect of a living defendant against whom proceedings for a qualifying offence have been instituted but not concluded, and the court is satisfied that the defendant has absconded. The powers of the court are more limited in these circumstances and they differ in each jurisdiction.²⁰⁶

32.3 In Grenada, the court may only make a confiscation order in such cases after a period of two years beginning with the date which is, in the opinion of the court, the date the defendant absconded.²⁰⁷ In Saint Vincent and the Grenadines, the court may only make a confiscation order after a period of two years beginning with the date which is, in the opinion of the court, the date the defendant absconded.²⁰⁸

32.4 When considering making a confiscation order against an absconded defendant who has not been convicted of a qualifying offence, the court will bear in mind that²⁰⁹:

- (a) The assumptions will not apply when calculating the benefit from a drug trafficking offence(s);
- (b) Service of prosecutor's statements will apply, but not the service of defence statements;

²⁰⁶ Grenada: Section 12(4) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 20(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²⁰⁷ Grenada: Section 12(5) Proceeds of Crime Act 2012

²⁰⁸ Saint Vincent and the Grenadines: Section 20(2) Proceeds of Crime and Money Laundering (prevention) Act 2001

²⁰⁹ Grenada: Section 12(6) Proceeds of Crime Act 2012; and Saint Vincent and the Grenadines: Section 20(3) Proceeds of Crime and Money Laundering (Prevention) Act 2001

- (c) The court must not make a confiscation order unless satisfied that the Director of Public Prosecutions (prosecutor in Grenada) has taken reasonable steps to contact the defendant; and
- (d) Any person who it appears to the court is likely to be affected by the confiscation order shall be entitled to appear before the court and adduce evidence.

32.5 If a confiscation order is made against an absconded defendant before he is convicted and he ceases to be an absconder, he may apply to the court to have the amount of the benefit or the amount of the confiscation order varied. The court may vary the order if it considers it just to do so in all the circumstances.²¹⁰

32.6 The court cannot consider such an application to vary a confiscation order if it is made after the end of six years beginning on the day the confiscation order was made.²¹¹

32.7 Where a confiscation order is made against an absconded defendant who has not been convicted, and the defendant is subsequently tried and acquitted of the qualifying offence, the court must cancel the confiscation order.²¹²

²¹⁰ Grenada: Section 14(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 21 Proceeds of Crime and Money Laundering (Prevention) Act 2001

²¹¹ Grenada: Section 14(4) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 21(4) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²¹² Grenada: Section 15(1) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 22(1) Proceeds of Crime and Money Laundering (Prevention) Act 2001

32.8 If a confiscation order is made against an absconded defendant who has not been convicted and the defendant later ceases to be an absconder and faces trial, the court may, upon the application of the defendant, discharge the confiscation order if they are satisfied that there has been undue delay in continuing the criminal proceedings or that the Director of Public Prosecutions (prosecutor in Grenada) does not intend to proceed with the prosecution.²¹³

33. Compensation

33.1 Consideration must be given to any victims who may have suffered any financial loss as a result of the defendant's offending. Only the legislation in Grenada deals specifically with this issue.

33.2 In Grenada, if the court is satisfied that any victim of the relevant criminal conduct has instituted, or intends to institute any civil proceedings against the defendant in respect of loss, injury or damage sustained as a result of or in connection with the criminal conduct, they may continue to make a confiscation order in any amount the court sees fit (provided that the amount does not exceed the amount determined to be the defendant's benefit).²¹⁴

²¹³ Grenada: Section 15(2) Proceeds of Crime Act 2012 and Saint Vincent and the Grenadines: Section 22(2) Proceeds of Crime and Money Laundering (Prevention) Act 2001

²¹⁴ Section 6(7) of the Proceeds of Crime Act 2012.

33.3 Where both a compensation and a confiscation order has been made and there are inadequate funds to pay both, the Court may direct that any amount owing under the compensation order due to the insufficiency of the defendant's means, may be paid out of the confiscation order.²¹⁵

34. The Constitutional Argument

34.1 By definition, restraint, freezing, confiscation and civil forfeiture laws interfere with property rights. Indeed such rights are usually destroyed. Countries in the Eastern Caribbean with constitutions protect property rights, but such protections are not absolute.

34.2 Throughout the Eastern Caribbean, it is therefore foreseeable that the argument might be made that the assumptions are incompatible with the constitution. This issue (although not based upon incompatibility with any constitution but incompatibility with the European Convention on Human Rights) was considered in **R v Benjafield and Rezvi [2002] 3 W.L.R. 235**. In that case it was held that the making of assumptions, if properly applied, is not incompatible with the European Convention on Human Rights. It was held that a confiscation order is a penalty for the offence for which the defendant is convicted and not a separate criminal charge in itself. The legislation is aimed at a legitimate object and the measures are rationally connected with that aim.

²¹⁵ Section 7(7) of the Proceeds of Crime Act 2012.

34.3 One of the seminal points considered by the court in **R v Benjafield and Rezvi** was the relationship between the legislative purpose behind confiscation and the existing societal problems. The court reasoned:

“The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest, of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused’s knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused”.

34.4 In *Raimondo v Italy* [1994] 18 EHRR 237, it was observed that:

“Confiscation which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat of this cancer. It is therefore proportionate to the aim pursued”.

34.5 In **Walsh v UK** (app 43384/05) 21st November the European Court of Human Rights said:

“The court ... does not call into question the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking”.

34.6 The principles enunciated in these cases have become key issues in similar litigation in the Eastern Caribbean and were indeed applied in

Kent Andrews et al v The Attorney General of St Vincent and the Grenadines *High Court Civil Appeal No.1 of 2010*. This appeal against a restraint order and seizure of cash, notably confirms that such provisions do not violate the principles of natural justice, due process, equal protection before the law nor do they infringe the appellants rights under the constitution.

34.7 Furthermore looking at the provisions of the Proceeds of Crime and Money Laundering (Prevention) Act 2001 of Saint Vincent and the Grenadines in the round, it was held applying the threefold test of **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and others** [1998] UKPC 30, that its provisions are reasonably justifiable and did neither arbitrarily nor excessively invade the enjoyment of the guaranteed rights according to the standards of Saint Vincent and the Grenadines that has proper respect for the rights and freedoms of the individual.

35. Conclusion

35.1 Confiscation is an essential element of the criminal justice process. Without it, defendants will serve their prison sentence safe in the knowledge that the proceeds of their criminality will be waiting for them once they are released.

35.2 Although this Guide does not cover the enforcement of confiscation orders, it is important to appreciate that the confiscation process does not end once the order is made. When confiscation orders begin to be

made in the Eastern Caribbean, prosecutors and courts will play a vital role in the task of enforcing them.

35.3 The primary responsibility for enforcement of confiscation order will rest with the court, as with payment of a fine. It is only the High Court (and also the Magistrates' Court in Saint Christopher and Nevis) who will have power to activate the default sentence if the defendant fails to pay the confiscation order.

35.4 The prosecutor and financial investigator will also have a continuing responsibility to support the court to enforce confiscation orders. In Grenada and Saint Vincent and the Grenadines, which are the only jurisdictions with specific legislation relating the appointment of enforcement receivers, the DPP (prosecutor in Grenada) is the only person able to apply to the court for such an appointment. Often, the successful payment of a confiscation order will depend upon the timely nature of such an application.

35.5 It is at the stage that a confiscation order is made against him that a defendant becomes truly aware of the reality of the situation and the futility of his criminal actions. There can be no better deterrent to crime than the certainty that, once convicted, an offender will be stripped of all the benefit that was obtained or sought and, in some cases, will be left penniless.

ANNEX A – PRECEDENT RESTRAINT ORDER

**DISOBEDIENCE TO THIS ORDER IS A CONTEMPT OF COURT WHICH IS
PUNISHABLE BY A FINE OR IMPRISONMENT OR BOTH**

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

CLAIM NO.

IN THE MATTER OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

And

[DEFENDANT]

Defendant

And

IN THE MATTER OF THE PROCEEDS OF CRIME [MONEY LAUNDERING
(PREVENTION)] ACT

RESTRAINT ORDER PROHIBITING DISPOSAL OF ASSETS

BEFORE THE HONOURABLE JUSTICE

(IN CHAMBERS)

DATED the

ENTERED the

TO: (1) Mr/Mrs (the Defendant)

(2) Mrs X (wife of the Defendant)

(3) [AB LIMITED] (a company controlled by the Defendant)

(4) [NAME OF OTHER RESTRAINED PARTY]

PENAL NOTICE

If you the Defendant, Mrs X, AB LIMITED [or NAME OF RESTRAINED PARTY] disobey this Order you may be held to be in contempt of court and may be imprisoned or fined, or both.

IMPORTANT: NOTICE TO THE DEFENDANT, MRS X, AND AB LIMITED [and/or NAME OF RESTRAINED PARTY]

This order prohibits you the Defendant, from dealing with your assets. It prohibits Mrs X from dealing with the assets identified in paragraph [INSERT NO.] of this Order. It prohibits AB LIMITED from dealing with the assets identified in paragraph [INSERT NO.] of this Order. [REPEAT FOR ANY OTHER RESTRAINED PARTY]

The order is subject to the exceptions contained in the order. You should read it all carefully.

You are advised to consult a solicitor as soon as possible.

You have a right to ask this court to vary or discharge this order, see paragraph [INSERT NO.] below. If you wish to do this you must serve on the Director of Public Prosecutions and all other affected parties a copy of the application and any witness statement in support at [APPROPRIATE NOTICE PERIOD] working days before the date fixed for the hearing.

THE ORDER

1. This is a Restraint Order made against Mr/Mrs (‘‘the Defendant’’), Mrs X and AB LIMITED [and/or NAME OF RESTRAINED PARTY] on by His/Her Honour Judge on the application of the Director of Public Prosecutions. The Judge read the affidavit of Officer attached to this order and accepted the undertakings set out in Schedule B at the end of this order.

2. This order was made without notice to the Defendant, Mrs X, AB LIMITED, [and/or NAME OF RESTRAINED PARTY]. The Defendant, Mrs X, AB LIMITED, [and/or NAME OF RESTRAINED PARTY] have a right to apply to the court to vary or discharge the order - see paragraph [NUMBER]

below.

3. There will be a further hearing of this matter on [INSERT DATE OR LEAVE BLANK FOR DATE] (“the return date”) when the Prosecutor will apply for the continuation of this order. The Defendant, Mrs X, AB LIMITED, [and/or NAME OF RESTRAINED PARTY] and any other person affected by this order are entitled to appear and to object to the continuation of this order or to ask for it to be varied.

DISPOSAL OF OR DEALING WITH ASSETS

4. The Defendant must not:-

- (1) remove from [] any of his assets which are in [] [up to the value of \$ amount. - NOT NECESSARY TO INSERT VALUE IF BENEFIT WILL EXCEED REALISABLE ASSETS]; or

- (2) in any way dispose of, deal with or diminish the value of any of his assets, whether they are in or outside [] [up to the value of \$ amount. - NOT NECESSARY TO INSERT VALUE IF BENEFIT WILL EXCEED REALISABLE ASSETS];

5. This prohibition includes the following assets in particular:-

- (a) the property known as _____ or sale money after payment of any mortgages if it has been sold;
- (b) the assets of a company called AB LIMITED (company number xxxxx), registered address xxxxx;
- (c) the shares held by the Defendant in the company called AB LIMITED (company number xxxxx), registered address xxxxx;
- (d) any money in the account numbered [ACCOUNT NUMBER & SORT CODE] at [NAME AND ADDRESS OF BANK] held in the name of [NAME(S) IN WHICH ACCOUNT HELD e.g name of defendant, third party or AB LIMITED].
- (e) a vehicle [CAR/ MOTOR BIKE MAKE/MODEL, REGISTRATION NUMBER & WHOSE NAME REGISTERED IN].
- (f) jewellery namely [DETAILS] presently in the possession of the [NAME] Police Service.
- (g) cash of £ [AMOUNT] currently in the possession of the [NAME] Police Service.

6. MRS X must not:-

(1) remove from [] or

(2) in any way dispose of or deal with or diminish the value of the following assets -

(a) [LIST ASSETS]

7. AB LIMITED (a company in the Control of the Defendant) must not:-

(1) remove from [] or

(2) in any way dispose of or deal with or diminish the value of the following assets -

(a) The assets of the company called AB LIMITED (Company number xxxxx) registered address xxxxxxxxxxxx;

(b) [LIST SPECIFIC ASSETS OF AB LIMITED SEEKING TO RESTRAIN]

EXCEPTIONS TO THIS ORDER

8. (1) This order does not prohibit the Defendant, on the proviso that he is not in prison, from spending up to \$[AMOUNT] EC a week towards his ordinary living and business expenses, up to the date of the making of any confiscation order. But before spending any money the Defendant must tell the Director of Public Prosecutions where the money is to come from.
- (2) This order does not prohibit MRS X, on the proviso that she is not in prison, from spending up to \$[AMOUNT] EC a week towards her ordinary living expenses, up to the date of the making of any confiscation order. But before spending any money MRS X must tell the Director of Public Prosecutions where the money is to come from.
- (3) This order does not prohibit the Defendant from paying for the reasonable expenses incurred in defending the criminal charge and any proceedings relating to this restraint order or confiscation proceedings. Such costs must be first agreed with the Director of Public Prosecutions.
- (4) The Defendant [and MRS X] may agree with the Director of Public Prosecutions that the above spending limits be varied or that this Order be varied in any other respect, but any such agreement must be in writing.

(5) This order does not prevent:-

- (a) any person from paying any money in satisfaction of the whole or part of any confiscation order which may be made against the Defendant.

VARIATION OR DISCHARGE OF THIS ORDER

- 9. Anyone affected by this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Director of Public Prosecutions and the Defendant, Mrs X, AB LIMITED, [and/or NAME OF RESTRAINED PARTY] giving two working days notice together with a witness statement in support of the application.

EFFECT OF THIS ORDER

- 10. A person who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

11. A person who is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

PARTIES OTHER THAN THE DEFENDANT

Effect of this order

12. It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned or fined. He is also at risk of prosecution for a money laundering offence.

Set off by banks

13. This order does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the Defendant before it was notified of this order.

Withdrawals by the Defendant

14. No bank need enquire as to the application or proposed application of any money withdrawn by the Defendant if the withdrawal appears to be permitted by this order.

Existing Charges

15. This order does not prevent any financial institution from enforcing or taking any other steps to enforce an existing charge it has in respect of a property or properties so secured.

Assets located outside [JURISDICTION]

16. Nothing in this order shall, in respect of assets located outside [], prevent any third party from complying with-

- (1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract to which it is a party; and

- (2) any orders of the courts of that country or state, provided that

reasonable notice of any application for such an order is given to the Director of Public Prosecutions;

UNDERTAKINGS

17. The Director of Public Prosecutions gives to the court the undertakings set out in Schedule B to this order.

DURATION OF THE ORDER

18. This order will remain in force for [state time within your legislation] unless it is extended by the Court upon application of the Director of Public Prosecutions.

COSTS

19. The costs of this order are reserved.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to the Eastern

Caribbean Supreme Court [ADDRESS] quoting the case number. The office is open between [] Monday to Friday. The telephone number is [TELEPHONE NUMBER].

ADDRESS OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR SERVICE AND ANY COMMUNICATION IN RESPECT OF THESE PROCEEDINGS

All communications to the Director of Public Prosecutions about this order should be sent to [ADDRESS]. Telephone number [TELEPHONE NUMBER] quoting the Defendant's name.

ANNEX B – PRECEDENT TIMETABLE

A FAILURE TO ADDRESS AN ALLEGATION IN A STATEMENT OF INFORMATION MAY LEAD TO THE COURT TREATING SUCH A FAILURE AS AN ACCEPTANCE OF THE MATTERS SET OUT THEREIN. A FAILURE TO COMPLY WITH THIS ORDER WITHOUT REASONABLE EXCUSE MAY LEAD THE COURT TO DRAW SUCH INFERENCES AS IT CONSIDERS APPROPRIATE.

IN THE HIGH COURT

SITTING IN _____

R V _____

DIRECTIONS IN RELATION TO CONFISCATION

UPON HEARING [COUNSEL] on behalf of the Crown

AND UPON HEARING [COUNSEL] on behalf of the Defendant

AND UPON the request of the Crown that confiscation proceedings be instituted and upon the Court proceeding pursuant to section _____ of the Proceeds of Crime [Money Laundering (Prevention)] Act [_____]

-

IT IS ORDERED THAT:

1. The confiscation hearing shall be heard on [], time estimate 5 days.

2. By []pm on [], the Crown shall serve upon the Defendant and the Court a Prosecutor's Statement in this matter, including any evidence and exhibits upon which it seeks to rely in a paginated bundle. Said statement shall include:

- i. The amount alleged to be the Defendant's benefit from his criminal conduct;
- ii. Any information relevant to the making or otherwise of the required assumptions;
- iii. Any other information the Crown considers relevant to the issue of benefit;
- iv. Any information the Crown considers relevant to the issue of the available amount; whether hidden assets are being alleged, the basis for that belief; and the amount the Crown has identified as realisable (if any).

3. By []pm on [] the Defendant shall serve on the Crown and the Court a response to the Prosecutor's Statement, in a witness statement bearing a statement of truth. Said statement shall include

any evidence and exhibits upon which he seeks to rely in a paginated bundle and:

- i. Indicate the extent to which he accepts each allegation in the Prosecutor's Statement;
- ii. Where he does not accept an allegation, give particulars of any matters he proposes to rely upon;
- iii. Give details of any available assets to meet any confiscation order that may be made, and if assets identified by the Crown are not available, give an explanation for the same.

4. By []pm on [] the Crown shall serve on the Defendant and the Court a reply (if any) to the Defendant's statement. Said reply shall include a supplementary statement of information and any further evidence and exhibits upon which it seeks to rely in a paginated bundle.

5. By []pm on [] the Defendant shall serve on the Crown and the Court any further statement or evidence upon which he seeks to rely (if any), including any further evidence and exhibits in a paginated bundle.

6. By []pm on [] the Defendant and the Crown shall exchange witness requirements, and notify the Court accordingly.

7. By []pm on [] the Defendant and the Crown shall serve any skeleton arguments upon which they seek to rely, upon each other and the Court, together with authorities. Said skeleton arguments shall also indicate the main areas of dispute and/or agreement between the parties, and shall include any admissions that may be made.

8. By []pm on [] the Defendant and the Crown shall serve any reply to the skeleton arguments served, upon each other and the Court, together with any authorities upon which they seek to rely.

9. By no later than [] pm on [] the Defendant and the Crown shall notify the court list office if there has been any change to the time estimate in this matter.

10. Permission to apply.

11. Costs reserved.

By the Court

This [] th day of []

ANNEX C - PRECEDENT NOTICE OF INTENTION TO APPLY FOR CONFISCATION

Form [Number] : Notice of Intention To Apply for Confiscation

[Part [Number]]

The Eastern Caribbean Supreme Court

In the High Court of Justice

[Country]

Claim No.

Between

The Director of Public Prosecutions

Applicant

and

[Defendant]

Defendant

NOTICE OF INTENTION TO APPLY FOR CONFISCATION

The Applicant, The Director of Public Prosecutions notifies the Court that they intend to apply for an order that:

1. The Defendant pay to the State of [Country] the full amount of the benefit derived from his/her criminal conduct; or
2. If the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount that the Court assesses to be the full benefit from the Defendant's criminal conduct, the Court shall certify, in accordance with section [section] of the [relevant Act] that the confiscation order shall be the lesser amount.
3. Take further notice that the application will be made on the following grounds:
 - i. That the Defendant was arrested and charged with [charge] on the [date].
 - ii. That the Defendant was convicted of [offence(s)] by a duly constituted jury on [date].
 - iii. That [offences(s)] is/are [scheduled offence(s)/ criminal conduct/serious offence(s)] according to Section [section]/Schedule [schedule] to the [relevant Act].
 - iv. That there are reasonable grounds to believe that the Defendant has benefited from the proceeds of the said scheduled offence(s)/criminal conduct/ serious offence(s). [Set out grounds]

- v. That pursuant to section [section] of the [relevant Act] the Director of Public Prosecutions shall not apply for a confiscation order after the relevant application period [choose appropriate]. The relevant application period is defined under section [section] of the [relevant Act] as being [choose appropriate]
 - (a) a period of 12 months after the day the person is convicted of the offence.
 - (b) a period of 12 months after the day the person is charged with the offence and is found guilty but is discharged without conviction.
 - (c) A period of 12 months after the day a Court, with a person’s consent, takes the scheduled offence, of which they have not been found guilty, into account in sentencing him or her for another offence.

- vi. That the relevant period in this case is between the [dates] and as such the Director of Public Prosecutions is notifying the Court that they intend to apply for confiscation within that period.

Dated this day of 2012

.....

[NAME]

Director of Public
Prosecutions

STATUTE

Antigua and Barbuda

Proceeds of Crime Act 1993

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| Section 3 | 2.2 (R),7.2 (C) |
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| Section 4(6) | 7.1.3(R), 27.6 (C) |
| Section 4(7) | 26.1 (C) |
| Section 4(12)(a) | 7.2.2 (R) |
| Section 4(12)(b) | 7.2.3 (R) |
| Section 4(14) | 7.2.1 (R) |
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| Section 5(4) | 31.1 (C) |
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| Section 70 | 16.2 (R) |
| Proceeds of Crime (Amendment) Act 2008 | |
| Section 2(b) | 7.1.5 (R) |
| Proceeds of Crime (Amendment of Schedule) Order 2009 | |
| | 5.3 (R) |

Barbados

Magistrates' Courts Act 1996, Cap 27

Section 65 7.3.1, 3.2.2 (C)

Proceeds of Crime Act Cap 143

Section 3 2.1 (R), 7.1.4(R), 7.2 (C)

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Section 4(7) 26.1 (C)

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| Section 19(1) | 25.2.1 (C) |
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| Section 20(2) | 15.1 (C) |
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| Section 22 | 31.3 (C) |
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| Section 37(1) | 15.9 (R) |
| Section 38(a) | 13.14 (R) |
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| Section 38(c) | 13.14 (R) |
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| Section 70 | 16.2 (R) |
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Dominica

Criminal Law and Procedure Act, Chap 12:01

Sections 18-23 3.2.2 (C)

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Magistrates' Code of Procedure Act, Chap 4:20

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| Section 70 | 21.5 (C) |
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| Proceeds of Crime (Amendment) Act 2010 | 5.3 (R) |

Grenada

Proceeds of Crime Act 2012 (No.6)

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| Section 46 | 16.2 (R) |
| Section 47 | 21.3 (C) |

Saint Christopher and Nevis

Criminal Procedure (Committal for Sentence) Act, Cap 21 3.2.2 (C)

Magistrates' Code of Procedure Act, Cap 46

Section 59 3.2.2 (C)

Proceeds of Crime Act 2000 No.16

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| Section 59 | | 3.12.109 |

Proceeds of Crime (Amendment) (No.2) Act 2008

Section 3 2.3 (R), 5.5 (R), 2.2 (C)

Saint Lucia

Criminal Procedure Rules 2007

Part 6 12.2 (C)

Proceeds of Crime Act Cap 3.04

Section 2 2.2 (R), 7.1.4(R),7.2 (C)

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