HCMP 2557/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS No 2557 OF 2010

IN THE MATTER OF THE

MUTUAL LEGAL ASSISTANCE IN

CRIMINAL MATTERS ORDINANCE CAP 525

AND

IN THE MATTER OF

RAFAT ALI RIZVI	1st Defendant
HESHAM TALAAT MOHAMED AL-WARRAQ	2nd Defendant
ROBERT TANTULAR	3rd Defendant
HARTAWAN ALUWI	4th Defendant
GALLERIA RESOURCES LTD	5th Defendant
ARLINGTON ASSETS INVESTMENT LTD	6th Defendant
BLUE HARBOUR INVESTMENT LTD	7th Defendant
CHINKARA CAPITAL MARKETS LIMITED	8th Defendant
PROPERTY BANK CENTURY TBK	9thDefendant
TEXFIELD HOLDINGS PTE LTD	10th Defendant
FIRST GLOBAL FUNDS LIMITED	11th Defendant
FIRST GULF ASIA HOLDINGS LIMITED	12th Defendant
EXPRESSIVE CONSULTANTS INC	13th Defendant
JASMIN WORLDWIDE LTD	14th Defendant
BCIC INTERNASIONAL LTD	15th Defendant
EVERICH HOLDINGS TRADING LTD	16th Defendant
METICULOUS OFFSHORE INVESTMENT INC	17th Defendant

AQUARIUS FINANCE ENTERPRISES LTD 18th Defendant

and

NOMURA INTERNATIONAL PLC 1st Intervener

ING BANK NV 2nd Intervener

WESTON INTERNATIONAL ASSET RECOVERY COMPANY LTD Intended 3rd Intervener

Before: Deputy High Court Judge J Yau in Chambers

Dates of hearing: 11–15 November 2013

Dates of Written Submissions: 18 November 2013 and 14, 15, 17 and 21 January 2014

Date of Judgment: 30 January 2014

J U D G M E N T

Background

1. The present proceedings arose as a result of the collapse of the Bank Century, a public bank in Indonesia, in 2008. The bank was taken over by the Government of the Republic of Indonesia ("the Indonesian Government") through Bank Indonesia and renamed Bank Mutiara. D1, D2, D3 and D4 are alleged to have illegally caused the collapse of the bank to enrich themselves or other people.

2. The Central Jakarta District Court issued 3 restraint orders ("the Indonesian restraint orders") in October 2009 and March and July 2010 respectively, ordering the restraint of the overseas bank accounts of the four defendants, including those in Hong Kong pending final decision of the Indonesian court regarding the confiscation of the assets by way an external confiscation order.

3. At the request of the Indonesian Government, the Secretary for Justice ("Secretary") applied to the Court of First Instance in Hong Kong for an order to restrain the bank accounts of the defendants in Hong Kong. On 15 December 2010 a restraint order ("the restraint order") was made by Reyes J pursuant to section 27, and section 7 of Schedule 2, of the Mutual Legal Assistance in Criminal Matters Ordinance, Cap 525 ("the Ordinance") which prohibited, subject to certain exceptions, the 18 defendants named in it, whose names appear in the citation, from disposing of, dealing with, or diminishing the value of "any of their property in Hong Kong" including a substantial number of identified accounts held in various banks ("the Property").

4. The restraint order, which has subsequently been extended and varied by various orders of the court, was granted on the application of the Secretary acting on behalf, and at the request, of the Indonesian Government, made on the strength of the 1st affirmation of Detective Senior Inspector Harding ("DSI Harding") of the Hong Kong Police Force. Attached to the affirmation were copies, with translations, of the three Indonesian restraint orders.

5. By the order of Judge Wright J dated 14 March 2012 receivers were appointed to administer the Property ("the Receivers").

6. D1 and D2 were tried in absentia by the District Court of Central Jakarta ("the Indonesian District Court") and were convicted of corruption and money laundering offences. In the judgment of the Jakarta Court delivered on 16 December 2010 the defendants were ordered to pay restitution of 3,115,889,000 Indonesian Rupiah (US$ 286,650,550) and

should they fail to pay their assets might be seized to satisfy the order. This is referred to as Verdict 3 in the present hearing and judgment.

7. An order was also made to confiscate the assets and money owned or controlled by D1, D2, D3 and D4 as set out in the judgment of the Indonesian District Court. This is referred to as Verdict 5E in the present hearing and judgment.

8. On 26 December 2012 the Indonesian Government made a supplementary request to the Secretary for the enforcement of Verdicts 3 and 5E, as an external confiscation order pursuant to section 27 of the Ordinance and the provisions of the bilateral Agreement for Mutual Assistance in Criminal Matters between Indonesia and HKSAR.

Applications of the Secretary

9. By a summons dated 31 January 2013 the Secretary acting on behalf of the Indonesian Government applies to register the Indonesian Confiscation Order as an external confiscation order pursuant to section 28 of the Ordinance.

10. By an amended summons dated 5 November 2013 the Secretary applies to appoint the Receivers to enforce the external confiscation order as enforcement Receivers upon the registration of the external confiscation order pursuant to section 9 of Schedule 2 of the Oridnance.

11. By a summons dated 31 October 2013 the Secretary applies to amend:

(a) the restraint order in relation to account number 90053 held by the Standard Chartered Bank (Hong Kong) Limited by substituting reference to D11 by reference to D12 and to have Schedule 1 of the order of Wright J dated 30 March 2012 amended in the same manner;

(b) the name of D15 to "BCIC INTERNASIONAL LTD".

12. As D12 is consenting and D11 is not opposing to the amendment in (a), and the amendment in (b) is for the correction of a typographical error to which nobody opposes, the Court makes an order in terms of the summons.

Positions of Parties

13. By a summons dated 13 January 2012, D1, D2 and D12 apply to discharge the restraint order against the property held in their names. They also oppose the application of the Secretary to register the external confiscation order.

14. By a summons dated 13 January 2012, D10 applies to discharge the restraint order against property held in its name. D10, however, has not taken an active part in the proceedings since then and is not represented in the hearing. According to the understanding of the Secretary, D10 will abide by the decision of the Court on the Secretary's application to register the external confiscation order.

15. By a summons dated 11 January 2012, D11 applies to discharge the restraint order against the property held in its name. It also opposes the Secretary's application to register the external confiscation order.

Positions of Other Defendants/Interveners

16. D3 has not taken an active part in the proceedings since the beginning and is not represented in the hearing. He is currently serving a sentence of imprisonment in Indonesia in relation to the offences giving rise to these proceedings.

17. D4 is wanted for prosecution by the Indonesian authorities. It together with D17 and D18 oppose the Secretary's application to register the external confiscation order. It is the contention of the Secretary that D17 and D18 are holding bank accounts in Hong Kong which are under the effective control of D4.

18. D5 to D9 are not represented in the proceedings, except to the extent the D6 was previously represented by a firm of solicitors (Hogan Lovells). It is the contention of the Secretary that they are holding bank accounts in Hong Kong which are under the effective control of D1 and/or D2.

19. The property of D7 which takes the form of a bank account was discharged from the restraint order by Wright J on 14 March 2012 on the basis that it carried a zero balance.

20. D13 to D16 are not represented in the proceedings and it is the contention of the Secretary that they are holding bank accounts in Hong Kong which are under the effective control of D3.

21. The 1st and 2nd Interveners have recently had their claims settled by consent and are no longer parties in the proceedings.

22. The Intended 3rd Intervener had its application to join the proceedings refused by Wright J. in his judgment of 14 March 2012 and it is precluded from taking part in the proceedings.

D4, D17 and D18

23. D4, D17 and D18 have not taken an active part in the proceedings until the time very near to the hearing. They have the same legal representation and oppose the application of the Secretary to register the external confiscation order. D4 filed an affirmation in this connection a few days before the hearing.

24. The Secretary asks for an adjournment in relation to the hearing of the three defendants on the ground that it and the Indonesian Government need time to consider the factual issues raised by the affirmation of D4 and to decide what further action to be taken. The three defendants oppose the application for adjournment. After hearing the submissions, the Court grants the adjournment and orders the matters to be brought up for mention on 20 January 2014 to decide how the case is to be dealt with.

25. In this connection the Court allows the application of the Secretary for the restraint order in respect of the property held in the name of D17 and D18 to continue. The Court also makes an order in terms of the summons of the three defendants dated 1 November 2013 by consent of the parties with the variation that the time limit for the Secretary to file evidence in reply to the evidence filed by the three defendants be extended to 8 January 2014 and an order that the costs of the hearing in respect of the three defendants be reserved.

26. As a result the Court will only deal with the summonses of the Secretary involving the rest of the defendants and the summonses of D1, D2 and D12 and D11 in the hearing.

10th Affirmation of DSI Harding

27. D11 files a summons dated 8 November 2013 to ask, inter alia, the court to exclude the 10th affirmation of DSI Harding on the ground that he is giving expert evidence on Indonesian law instead of deposing to facts of his own knowledge as required under O 41 r 5 of the High Court Rules. D1, D2 and D12 support D11's submission and ask the whole of the 10th affirmation of DSI Harding to be struck out. They go even further to say that all of his affirmations should in fact be excluded and D11 echoes by saying that it only challenges the 10th affirmation because the earlier affirmations were filed in relation to the application for the restraint order instead of the application for the registration of the external confiscation order under section 28 of the Ordinance.

28. The Secretary argues that O 115A r 5 allows DSI Harding to depose information that came to him as long as the source of the information is given.

29. After considering the submissions and the contents of 10th affirmation the Court is of the view that those parts containing the opinion and legal arguments of DSI Harding is not admissible and on this basis paragraphs 29 to 47 of the affirmation are excluded. The Court also holds that the rest of the affirmations of DSI Harding are admissible in evidence in general but agrees that should parties in the course of hearing raise any challenge in respect of any specific part of them the issue can be revisited.

The Legal Principles

30. In order to enforce the external confiscation order, it must first be registered pursuant to section 28 of the Ordinance and thereafter it can be enforced under section 27 of the Ordinance. These are what the Secretary is applying for.

31. According to section 28(1) of the Ordinance the court will only register an external confiscation order if:

(a) it is satisfied at the time of registration the order is in force and not subject to appeal;

(b) it is satisfied where persons against whom or in relation to whose property the order is made does not appear in the proceedings, that he received notice of the proceedings in accordance with the law of the place outside Hong Kong concerned, in sufficient time to enable him to defend them; and

(c) it is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice.

32. The Secretary contends that all the three criteria are fulfilled. There is no dispute about the first criterion that the order is in force and not subject to appeal. There are, however, arguments as to the other two criteria.

33. The main challenge of the defendants who are represented in the hearing is against the proceedings in Indonesia and the Indonesian District Court in respect of its jurisdiction in trying D1 and D2 in absentia, as well as the legality and enforceability of the external confiscation order made by it and other related matters. As the issues relate directly to D1

and D2 and are the determining factors in the application of the Secretary the Court will deal with their contentions first.

34. D1 and D2 have the same legal representation as D12. They contend that the Indonesian District Court had no jurisdiction over D1 and D2 because they had not been arrested and brought before the Indonesian District Court and were tried in their absentia without notice of the proceedings being served on them in compliance with Indonesian law. D1, D2 and D12 also argue that the judgment of the Indonesian District Court is not enforceable in Hong Kong.

35. The Court is of the view that the issues raised by D1, D2 and D12 have to be dealt with in two stages. First, the Court will have to consider whether the Indonesian District Court in the present case has the jurisdiction to try D1 and D2 in absentia in accordance with the Indonesian law. Only when it is concluded that it has such jurisdiction will the Court need to go on to the second stage of considering whether its judgment is enforceable in Hong Kong, because failing such a conclusion the judgment will certainly not satisfy the requirements of section 28(1)(b) and no doubt not be recognised and enforceable in Hong Kong.

36. The jurisdiction requirement is expressly included in the agreement between Hong Kong and Indonesia in the Mutual Legal Assistance in Criminal Matters (Indonesia) Order, Cap 525Z. Article 1(2) provides:

> "For the purpose of this Agreement, criminal matters mean investigations, prosecutions or proceedings relating to any offence which at the time of the request for assistance, falls within the jurisdiction of the competent authority of the Requesting Party."

37. It is not in dispute that D1 and D2 had never been arrested and brought before any of the courts in Indonesia. No notice had been physically given to them of the proceedings and they were not in Indonesia when the proceedings took place. The trial proceeded and judgment given in their absence. The question therefore is whether under such circumstances the Indonesian District Court had the jurisdiction to try D1 and D2 in absentia.

38. Ms Desy Meutia Firdaus, Section Head of Special Crimes at the District Attorney's Office of Central Jakarta, set out in her affirmation how the summonses of the various hearings in the proceedings in Indonesia were served on D1 and D2. The methods used included:

(a) Sending the summonses through the National Central Bureau of the Indonesian Interpol and the Interpol offices at Riyadh, Nassau and Singapore to the addresses of D1 and D2 there;

(b) Sending the summons through the Indonesian Ambassadors in Saudi Arabia, Singapore and Cuba to the addresses of D1 and D2 there;

(c) Sending the summonses to D1 and D2 through President Director of Bank Mutiara of which D1 and D2 were shareholders; and

(d) Advertising the summonses in an Indonesian language and an English language newspaper in Indonesia.

39. It is also deposed by Ms Firdaus that although D1 and D2 did not attend the hearings, D1 had instructed law firms to be present in the hearings and taking notes, a fact which the 2 defendants do not dispute in their affirmations. According to the affirmation of Mr H Mohammad Amari, Expert Staff of the Attorney General's Office of Indonesia, in

June 2010 an Indonesian lawyer and two persons claiming to be the financial consultants of D1 and D2 made approaches to him regarding the proceedings. The 2 defendants also did not dispute that they knew of the proceedings.

40. In the affirmation of Professor Lindsey of the Law School of Melbourne University, it is said that according to the Code of Criminal Procedure ("KUHAP"), Corruption Eradication Law and Money Laundering Law of Indonesia D1 and D2 had been validly summonsed.

41. Dr Butt of Sydney University Law School in his affirmations expresses a contrary view that the methods used to send the summonses to D1 and D2 did not comply with the provisions of KUHAP. He adds that as it is apparent from the affirmation of Ms Firdaus that the Indonesian Attorney General's Office was aware of D1 and D2 being represented by lawyers from Kingsley and Naple in London, the summons could have been validly served by sending them to the legal representatives.

42. The expertise of both Professor Lindsey and Dr Butt is not in dispute. Even though they express opposite opinions in the issue, the Court is of the view what is important is that the issue had been decided on by the Indonesian District Court. In the interlocutory judgment of the Indonesian District Court the panel of judges concluded that D1 and D2 had been legally and properly summonsed.

43. The panel of judges did so after considering the methods of serving the summonses and the relevant Indonesian law. The Court does not see how it can fault their findings. It must be borne in mind that the Court does not act as an appellate court and the present hearing is not a second trial. As stated in paragraph 11.048 of *Mitchell Taylor & Talbot*

on Confiscation and the Proceeds of Crime the court will not conduct a review of the facts and law found by the foreign court when determining the issue of interests of justice.

44. If the defendants are of the view that the Indonesian District Court was wrong, as stated in *Re Secretary of State for the Home Department Exp Mohammed Sani Abacha* [2001] EWHC Admin 787, it should be raised with and considered by the courts or authorities in the countries concerned. The proper course of action is for the defendants to lodge an appeal to the higher courts in Indonesia. The Court is not in a position and has no resources and capability to retry the issue in terms of evidence or knowledge of the Indonesian law and is, indeed, not competent to do so.

45. The inevitable conclusion of the Court is that D1 and D2 had been validly and properly summonsed and given notice of the proceedings in accordance the Indonesian law and the Indonesian District Court had jurisdiction to try them in absentia. The requirements under section 28(1)(b) are therefore satisfied.

46. The Court then needs to consider the second point raised by D1, D2 and D12, namely the judgment of the Indonesian District Court not being enforceable in Hong Kong. This has to do more with section 28(1)(c) and section 27 of the Ordinance. In terms of section 28(1)(c) if the judgment of the Indonesian District Court is not enforceable in Hong Kong the inevitable result must be that the Court should refuse to register the external confiscation order because enforcing it would be contrary to the interests of justice.

47. In this connection D1, D2 and D12 cite the case of *In re S-L* [1996] QB 272 to illustrate their point that it is generally assumed internationally that a court has no jurisdiction over a defendant unless he has been arrested and brought before the court. They argue that it is a fundamental requirement for the recognition or enforcement of a foreign judgment in Hong Kong at common law that the foreign court should have had jurisdiction according to the Hong Kong rules of the conflict of law.

48. D1, D2 and D12 further cite in support Dicey and Morris on *The Conflicts of Laws* which set out the common law principles in relation to the circumstances under which the court of a foreign country has jurisdiction to give a judgment *in personam* capable of enforcement in the UK, which D1, D2 and D12 say are applicable to Hong Kong. D1, D2 and D12 contend that as D1 and D2 had never been arrested and brought before the courts in Indonesia, the trial of them in absentia was in breach of these common law principles.

49. D1, D2 and D12 also rely on the authorities of *Government of India v Taylor* [1955] AC 491, *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, *Tasarruf Mevduatti Sigorti Fonu v Demirel* [2006] EWHC 3354 (Ch) and *Islamic Republic of Iran v Barakat Galleries Ltd* [2009] QB 22 to convince the Court that under such circumstances the external confiscation order is not enforceable in Hong Kong.

50. There are ample authorities such as *R v Abraham* (1895) VLR 343, *R v Jones* [1972] 2 All ER 731 and *HKSAR v Ng Chi Yuen* [1998] 3 HKC 526 saying that when a defendant who has been arrested, charged and taken to court chooses to absent himself voluntarily afterwards, the court having regard to the overall fairness of the proceedings has a

discretion to conduct the trial in his absence. There, however, appears to have no authority on whether a defendant who has not been arrested, charged and taken before a court in Hong Kong can be tried in absentia if he fails to attend court. There are also no statutory provisions to enable this to be done.

51. Article 11 of the Bills of Rights Ordinance, Cap 383 provides, inter alia, that an accused person is entitled to be informed promptly and in detail in a language which he understands the nature and cause of the charge against him and to be tried in his presence. Taking all these into consideration it would appear that the way D1 and D2 were tried in absentia in the Indonesian District Court is not a practice recognised in Hong Kong.

52. The question to ask is whether the external confiscation order of the Indonesian District Court would as a result rendered unenforceable in Hong Kong. D1, D2 and D12 submit that according to the common law principles as set out in Dicey and Morris on *The Conflicts of Laws* it is not enough that the foreign court is invested with jurisdiction according to its own law, it must also have jurisdiction according to Hong Kong conflict of law rules.

53. In the Australian case of *O'Connors v Adamas* [2013] FCAFC 14 cited by D1, D2 and D12, it was said that in a request for extradition of a person convicted and sentenced in absentia in the requesting country, one of the factors the court of the requested country had to consider was whether the person could have been convicted and sentenced in the same manner according to the law of the requested country.

54. The Secretary argues in reply that the common law rules do not apply in the scheme of registration and enforcement of the external confiscation order under the Ordinance, citing the case of *Re Law Kin Man* [1994] 2 HKC 118 in support. This case was about the registration and enforcement of an external confiscation order for the recovery of the proceeds of drug trafficking under sections 29 and 28 respectively of the Drug Trafficking (Recovery of Proceeds) Ordinance ("DTRPO"), Cap 405.

55. Section 29(1) of DTRPO read as follows at that time:

> "29 Registration of external confiscation orders
>
> (1) On an application made by or on behalf of the government of a designated county, the High Court may register an external confiscation order made there if:
>
> (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
>
> (b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
>
> (c) it is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice."

56. The facts of the case were that Mr Law was a drug trafficker who at the request of the United States authorities was arrested in Hong Kong and extradited to the United States where he pleaded guilty to a dangerous drug offence. The United States authorities sought forfeiture of Mr Law's bank accounts and real property situated in Hong Kong by civil proceedings of an *in rem* nature, claiming that all the property were proceeds of drug trafficking and the real property had been used for trafficking.

57. A judge of the United States District Court ordered the bank accounts and real property, including two bank accounts and a house owned by a company set up by Mr Law, to be forfeited. The orders were subsequently registered under section 29 of DTRPO by an order of a Hong Kong High Court judge. The company later applied to discharge the order of registration on the ground that Hong Kong courts had no jurisdiction to register a forfeiture order of the United States that purported to be in rem as well as extra-territorial in effect and which was made without jurisdiction on the part of the United States Court.

58. It was held, inter alia, that the legislature did not intend the new procedure under sections 28 and 29 of the DTRPO to be approached by reference to common law principles. The Secretary submits that the ruling is applicable to the interpretation of sections 27 and 28 of the Ordinance. D1, D2 and D12 on the other hand argues in substance that the case is not material to the present case in the sense that it was about the jurisdiction of Hong Kong courts to register a foreign in rem order under the DTRPO and that the decision of the case is more consistent with their contentions that the jurisdiction under the Ordinance is entirely in personam.

59. Although Barnett J in delivering the judgment of the case did say that one of the issues was whether the DTRPO had changed the common law relating to foreign judgments in rem and enlarged the jurisdiction of the Hong Kong courts, the Court is of the view that his analysis of the DTRPO is applicable to the interpretation of the Ordinance. His Lordship said:

> "The Ordinance (*DTRPO*) was, as I have said, enacted to meet a growing and serious problem. Although, in its domestic operation, it is initially restricted in ambit to an order in

> personam and hedged with safeguards, it was nonetheless a revolutionary approach. The convicted drug trafficker is to be required to disgorge the benefits of his trafficking whenever the trafficking took place, whenever the benefits were obtained and wherever the property representing those benefits might be situated. Thus, a wide ranging enquiry is contemplated and one which will operate retrospectively. At the same time, the legislature wished to facilitate enforcement of foreign orders aimed at the proceeds of drug trafficking so that the drug trafficker would have as little room as possible for using Hong Kong as a haven for his benefits. Absent words restricting foreign orders to those of like nature to orders available in Hong Kong, it is implicit or inherent in s 28 that orders of a different or wider nature are contemplated.
>
> ……. it can be seen from the provisions I set out earlier that, first, an ECO *(external confiscation order)* can arise independent of criminal proceedings: see s 2(11); and second, that such an order can embrace property that is in rem as well as in personam: see s 2(12) and ss 3 and 7. That conforms with the wider meaning of s 28 of the Ordinance.
>
> I am quite satisfied that it was the intention of the legislature to introduce a 'fundamentally new principle' as Widgery J put it. The legislature did not intend that the new procedure should be approached by reference to common law principles. Had it so intended, doubtless it would have made provision similar to that contained in s 6 of the FJO (*Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 319*) which, as I have already mentioned, in its English counterpart has been found not to have introduced a new procedure.
>
> The legislature plainly had in mind and introduced the new and simple procedure set out in s 29. Provided the judge hearing the application is satisfied that the order sought to be registered is one which is aimed at the proceeds of drug trafficking; that where the order is against a person, that person had notice; and that generally registration is in the interests of justice, the order should be registered. There is no warrant, in my view, for the proposition that the judge has to embark upon a consideration of common law principles and the conflict of laws before registering an ECO." (Italics in brackets added)

60. A similar conclusion was arrived at in the case of *Re F* (unreported 15 November 1996) cited by the Secretary in which the English High Court considered a similar enactment of UK. Although the judgment was described as a draft judgment it was to be handed down to

the legal representatives of the parties who could communicate the substance of it to their clients not more than 1 hour before the giving of the judgment. This shows that it was unlikely that the court would change let aside reverse its decision.

61. Section 29(1)(b) of the DTRPO was amended in 1995 which was about a year after the decision in *Re Law Kin Man* by adding two new phrases while section 29(1)(a) and 29(1)(c) remained unchanged. The new section 29(1)(b) with the 2 new phrases underlined reads as follows:

> "(b) it is satisfied, where the person against whom, or in relation to whose property, the order is made does not appear in the proceedings, that he received notice of the proceedings, in accordance with the law of the designated country, in sufficient time to enable him to defend them; and"

62. As a result of the amendment it has become unequivocal that section 29 of DTRPO applies to both orders in rem and in personam and that the law to look at to determine if the foreign court has jurisdiction to try a defendant in absentia is the law of the place outside Hong Kong. It is important to note that the amendment does not stipulate that the property concerned has to be situated in Hong Kong and that the mode of serving of the notice of the proceedings in the foreign country has to conform with Hong Kong practice. The absence of such stipulations in the wake of the decision of *Re Law Kin Man* must show that the legislature was in recognition of the decision of the case.

63. The Ordinance was enacted in 1997 and its section 28(1) is an exact copy of the amended section 29(1) of the DTPRO. The Court is of the conclusion that sections 27 and 28 of the Ordinance, like their counterparts in DTRPO, introduce a new and simple regime and it is not the intention of the legislature that the registration and enforcement of an

external confiscation order pursuant to them, be it an order in rem or in personam, should be approached by reference to common law. The external confiscation order in the present case is no doubt enforceable in Hong Kong.

64. Moreover, in the present case D1 and D2 were actually aware of the institution of proceedings and had instructed lawyer to be present and taking notes. The Court is of the view that D1 and D2 have suffered no unfairness, prejudice or injustice and the issue of the enforceability of the external confiscation order does not cause the Court to consider that the criterion in section 28(1)(c) is not satisfied.

65. D1, D2 and D12 also raise other grounds which they consider would render registration of the external confiscation order contrary to the interests of justice.

Dual Criminality

66. D1, D2 and D12 contend that the dual criminality test is not satisfied as the conduct for which D1 and D2 were convicted on the primary charge discloses no offence known in Hong Kong. In this connection they say that the offence of corruption with which D1 and D2 were ultimately charged and convicted bears no relation to corruption known to Hong Kong law and the acts of the two defendants amounted to nothing more than a breach of contract. They also refer to a part of the judgment of the Indonesian District Court which spelt out that there was no criminal intent on the part of the defendants and criminal intent was not required.

67. It is a requirement under section 5(1)(g) of the Ordinance that the test of dual criminality has to be satisfied. The Court, however, does not agree with D1, D2 and D12 that it has not been so satisfied. As can be seen from the indictment (Bundle B3 page 1175) and the judgment of the Indonesian District Court (Bundle B1 pages 229 and 553), apart from the offence of money laundering which will be dealt with later, the allegations of the other offence against the two defendants are that D1 and D2 through D12, with D3, Hermanus Hasan Muslim and Laurenece Kusuma, between the year 2001 until the year 2008, committed or participating in committing unlawfully any act aiming at making them or another person or a certain corporation rich that may harm the State finance or State economy. Details of the illegal acts, the enrichment with the amounts and the law contravened were set out in the indictment. No matter the offence was called corruption or any other names in the indictment the allegations against the defendants are clearly offence of fraud/theft in the context of Hong Kong law.

68. In the judgment of the Indonesian District Court, the elements of the offence (Bundle B1 page 499) and acts of the two defendants were set out and analysed and the Indonesian District Court came to the conclusion that they did the illegal acts to enrich themselves or D12. The illegal acts including the defendants causing the bank to trade non-performing or delinquent commercial papers which had no market value and were not actively traded on a stock exchange, resulting in huge losses to the bank while enriching themselves or D12. The Indonesian District Court also found this to be in contravention of the banking law.

69. From the elements of the offence and the finding of the Indonesian District Court there was obviously criminal intent in the

offence and there was such intent on the part of D1 and D2 to enrich themselves or others by illegal means, causing losses to the bank. The Indonesian District Court convicted them of corruption which is offence of fraud/theft in Hong Kong.

70. As regards the offence of money laundering, the Indonesian District Court set out its elements in the judgment (Bundle B1 page 553):

> "1) Every person;
>
> 2) Intentionally exchanging or other acts toward the property known or reasonably suspected of being proceeds of crime in the currency or other commercial papers.
>
> 3) Aiming at hiding or obscuring the origin of assets known to be or allegedly to be the proceeds of corruption.
>
> 4) Element of person committing, having someone to commit taking part therein."

71. It can be seen that criminal intent is clearly one of the elements of money laundering in Indonesia. After considering these elements and the evidence of the witnesses the Indonesian District Court convicted D1 and D2 of the offence.

72. It is true that in the part of the judgment of the Indonesian District Court referred to by D1, D2 and D12 it was mentioned that regardless of mens rea the defendants had committed the unlawful acts to enrich themselves or D12. A closer look at the judgment reveals that what the Indonesian District Court meant was that the defendant had actively done the illegal acts to cause looses to the bank to enrich themselves or D12. This clearly amounted to criminal intent. As for the passive act of failing to fulfil commitment to settle difficulty in liquidity of Bank Century as suggested by Bank Indonesia Supervisor, the Indonesian District Court deemed it illegal regardless of *mens rea*. This does not

affect the finding by the Indonesian District Court of the illegal acts of the defendant in, using the legal terminology of Hong Kong, "defrauding" the bank and money laundering.

73. D1, D2 and D12 cite the case of *Director of Assets Recovery Agency v Vitrosu* [2009] 1 WLR 2808, to support their contention that it is for the Secretary to prove on the balance of probability that the requirement of dual criminality is satisfied. The Secretary argues that whether the dual criminality test is satisfied is a matter for the Secretary, not the Court.

74. While the Court agrees that the present hearing is not a second trial it does not agree that the finding of the Secretary is not open to challenge. In the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1977] AC 1014, the English House of Lords pointed out at page 1047 that "if a judgment require, before it can be made, the existence of some facts, then, although the evaluation of the facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge".

75. The Court is of the view that this principle applies to the present case. The Court, of course, has already come to the conclusion that the dual criminality test is satisfied. There is nothing to fault the exercise of judgment of the Secretary.

76. The argument of D1, D2 and D12 that dual criminality test is not satisfied fails.

77. D1, D2 and D12 also make other criticisms of the judgment of the Indonesian District Court including failing to set out precisely how the amount of restitution ordered was made up and discrepancy in the figures and making mistake about D1 and D2 being majority or controlling shareholders of Bank Century. As stated above this is not a second trial of the Indonesian proceedings and the Court is not in a position and has no resources and capability to do so in terms of evidence or knowledge of the Indonesian law and is not competent to do so. The proper course of action is for the defendants to lodge an appeal to the higher courts in Indonesia. Moreover, as rightly pointed out by the Secretary these are minor technical points and would not invalidate the judgment of the Indonesian District Court.

External Confiscation Order Not as Defined

78. D1, D2 and D12 contend that the external confiscation order the Secretary is seeking to register is not an external confiscation order as defined in the Ordinance on the ground that it was penal in nature. D1, D2 and D12 base their argument on the "fatwa" of the Indonesian Supreme Court which clarified Verdicts 3 and 5E of the judgment of the Indonesian District Court and set out how the orders of the Indonesian District Court could be enforced according to Indonesian law.

79. External Confiscation Order is defined in section 2 of the Ordinance as an order, made under the law of a place outside Hong Kong, for the purpose of:

> "(a) recovering (including forfeiting and confiscating)-

> (i) payments or other rewards received in connection with an external serious offence or their value;
>
> (ii) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
>
> (iii) property used or intended to be used in connection with an external serious offence or the value of such property; or
>
> (b) depriving a person of a pecuniary advantage obtained in connection with an external serious offence,
>
> and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property."

80. Although it was stated in the "fatwa" that Verdicts 3 and 5E are different and both had to be executed, the Court does not see how this can result in the external confiscation order being penal in nature when the Indonesian Supreme Court was only clarifying the verdicts in accordance with the Indonesian law, saying that they were of different legal basis.

81. In any event, contrary to the contention of the Secretary, the Court is of the view that the "fatwa" is not part of the external confiscation order. Although it is a judgment of the Supreme Court there is no evidence of how it has come into being and whether parties had been given notice to attend and make representations in the hearing in which the judgment was given.

Political Character

82. D1, D2 and D12 submit that the proceedings against D1 and D2 are political in nature and the Court should refuse to register the external confiscation order under section 5(1)(b) of the Ordinance. They say that D1 has explained in his 5th affirmation his view of why the

proceedings are political in character. In the affirmation, D1 referred to some news article of Indonesian newspapers about the investigation by the Indonesian Corruption Eradication Commission into the bailout of Bank Century. He does not say specifically that he consides the proceedings to be political in nature apart from saying that the "alleged corruption in relation to the investigation into Bank Century's affairs and bailout which was the catalyst for the case against D2 and him serves to underline the unreliable nature of the criminal process in Indonesia".

83. D1, D2 and D12 also rely on some other news articles and a letter dated 15 November 2018 from the lawyers of D1, D2 and D12 to the Secretary. In the letter (which should be dated 16 November 2019), the lawyers said that the allegation against D1 was political in nature without giving any reasons. They, however, pointed out that there was an investigation into the corruption of Indonesian officials in the Bank Century affair and this supported their contention that D1 was being fed out of a potentially and apparently corrupt Indonesian investigation. This is obviously the opinion of the lawyers. Both the opinion of the lawyers and the news articles do not support the allegations that the proceedings against D1 and D2 are politically motivated.

84. After the hearing D1, D2 and D12 write to the Court on 14 January 2014 saying that according to a news article, the Supreme Audit Agency ("BPK") of Indonesia has completed the audit report regarding the collapse of Bank Century, finding that there were irregularities in the bailout of the bank by Bank Indonesia, causing losses to Indonesia. D1, D2 and D12 ask for the audit report to be disclosed.

85. The Secretary replies that the issue is of no relevancy to the matter under determination because the audit report deals with the bailout of Bank Century as distinct from whether D1 and D2 had committed the criminal acts against Bank Century for which they were convicted of the offences of corruption and money laundering by the Indonesian District Court. The Secretary adds that they do not have the audit report in their possession.

86. D11 makes no submission in the matter.

87. The Court accepts the submission of the Secretary. As pointed out by the Secretary, the news article quoted the vice president of Indonesia, Mr Yusuf Kalla, who was the acting president when Bank Century was collapsing, as saying that the bank had been robbed by its owners and that it was not necessary to salvage it. Although D1, D2 and D12 sarcastically say in its reply that D1 and D2 had not been convicted of robbery they should know very well that what the vice president meant was that Bank Century collapsed because of unlawful acts of its owners.

88. More importantly, this clearly shows that the cause of the collapse of the bank and its bailing out are different matters. The Court is of the view that the audit report is irrelevant to the whether the collapse of Bank Century was caused by the illegal acts of D1, D2, D3 and D4 and whether their prosecution in the Indonesian District Court was political in nature. The Court rejects the application of D1, D2 and D12 for the disclosure of the audit report.

89. The Indonesian authorities have denied the allegations of D1, D2 and D12 and the judgment of the Indonesian District Court also does not show any hint of the prosecution of D1, D2 and D3 and the intended

prosecution of D4 to be politically motivated. The Court does not consider the bare allegations of D1, D2 and D12 to be a sufficient ground to refuse to register the external confiscation order.

Death Penalty

90. D1 in his 3rd affirmation dated 6 June 2012 says that D2 and he could face death penalty for the offences they had been convicted and that the Indonesian authorities had omitted this in their request for the assistance of Hong Kong to freeze their assets. D1, D2 and D12 rely on this as a ground that the restraint order against them should be discharged. However, according to the Supplementary Request of the Indonesian authorities dated 26 December 2012 the maximum penalty for the offences of corruption and money laundering, apart from fines, are respectively life imprisonment and 15 years imprisonment, not death penalty. In any event D1 and D2 have only been each sentenced to 15 years imprisonment.

91. This obviously is not a valid ground for the Court to discharge the restraint order against D1, D2 and D12.

Material Non-Disclosure

92. D1, D2 and D12 further ask the Court to discharge the restraint order against them for the reason that the Secretary has failed to disclose a number of material documents when making the ex parte application for the restraint order. Such documents include:

(a) Letters of the lawyers of D1, D2 and D12 dated 8 March, 10 August and 18 August of 2010 written to the Secretary and the Joint Financial Intelligence Unit ("JFIU") presenting their cases;

(b) Reply of the Secretary dated 24 August 2010;

(c) Letters of the lawyers of D1, D2 and D12 dated 15 November and 14 December of 2010 to the Secretary asking the latter to keep them informed of the steps taken by the Indonesian authorities regarding their assets;

(d) The Letters of Request of the Indonesian authorities.

93. D1, D2 and D12 argue that due to such material non-disclosure the restraint order should not have been granted in the first place. The matter in fact had been dealt with by Wright J in his judgment dated 14 March 2012 who ordered that the letters of request needed not to be disclosed. It is not in dispute that the first and third letters of request had eventually been disclosed and the second one is also disclosed at the present hearing.

94. After studying these letters of request and correspondence, the Court is of the view they do not support D1, D2 and D12's contention and there is no cause to discharge the restraint order against D1, D2 and D12. The Court also concludes that such non-disclosure would not render it contrary to interests of justice to enforce the external confiscation order.

95. Even when all the conditions of section 28 of the Ordinance are satisfied the Court has a discretion as to whether to register the external confiscation order. There are, however, cases saying that the normal course is for the court to do so.

96. In the case of *Government of USA v Montgomery (No 2)* [2003] 1 WLR 1916 which dealt with the registration of a confiscation order made in a United States court against a defendant living in England under section 97 of the Criminal Justice Act 1988, which is

similar to section 28 of the Ordinance, it was said:

> "The only issue that remains is whether it would be contrary to the interests of justice to enforce the order since, as was accepted before Stanley Burnton J, where the court has a discretion as to whether to do so, the normal course is for our courts to register an external confiscation order that satisfies the conditions of section 97. This is for reasons of comity and because the order is by definition aimed at recovering money or other property obtained as a result of or in connection with crime. It is usually in the interests of justice that the courts in different jurisdictions should assist each other in the fight against crime."

97. The Court has considered the contentions for the discharge of the restraint order together with all other grounds advanced by D1, D2 and D12 to decide whether, when they are taken individually or as a whole, would render it contrary to the interests of justice to enforce the external confiscation order. In light of the above analysis, the Court is of the view that D1 and D2 had suffered no unfairnerss, prejudice or injustice in the proceedings in Indonesia and considers that there is no justification to exercise the discretion not to register the external confiscation order against D1, D2 and D12. The Court will come back to this issue when the Court deals with the assets of individual defendants.

Enforcement

98. As this hearing is *inter parte* and parties have made full submissions in respect of both the issues of registration and enforcement of the external confiscation order, the Court can go on directly to the enforcement of the external confiscation order.

Realisable Property

99. The enforcement of an external confiscation order is governed by section 27 and Schedule 2 of the Ordinance and only realisable

property can be confiscated. The main bone of contention is the meaning of realisable property. The term is defined in section 5 of Schedule 2 of the Ordinance as:

> ‘(1) In this Schedule, “realisable property” (可變現財產) means, subject to subsection (2)-
> (a) in relation to an external confiscation order-
> (i) made in respect of specified property, the property which is specified in the order;
> i) which may be made as the result of proceedings which have been, or are to be, instituted in a place outside Hong Kong, the property which may be specified in the order; and
> (b) in any other case-
> (i) any property held by the defendant;
> (ii) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Schedule; and
> (iii) any property that is subject to the effective control of the defendant.
>
> (2) Property is not realisable property if-
> (a) an order under section 102 or 103 of the Criminal Procedure Ordinance (Cap 221); or
> (b) an order under section 38F or 56 of the Dangerous Drugs Ordinance (Cap 134), is in force in respect of the property.’

100. The Secretary contends that the definition should be given a purposive construction in its interpretation in the sense that in a case where an external confiscation order has been made, realisable property includes not only property specified in the external confiscation order but also the property specified in section 5(1)(b). In support the Secretary

argues that Schedule 2 of the Ordinance is described in its title as relating to enforcement of external confiscation order.

101. The Secretary also draws an analogy with the provisions of confiscation in DTPRO and the Organised and Serious Crimes Ordinance, Cap 455 ("OSCO"), saying that the definition of realisable property in the OSCO includes also those property set out in section 5(1)(b) of Schedule 2 of the Ordinance. The case of *Secretary v Male Ye Zhiqiang* CACV 195/2012 is cited to illustrate the point that the court has the power under OSCO to impose a restraint order in respect of realisable property which included, among other things, any property held or subject to the effective control by the defendant.

102. The Court agrees with the Secretary that under section 2 of the Ordinance the definition of external confiscation order is very broad and can be in rem or in personam. However, when it comes to the enforcement of the external confiscation order, according to section 27 and Schedule 2 of the Ordinance, only property that falls within the definition of realisable property can be confiscated. The Court must point out that in the interpretation of the definition of realisable property, no matter what kind of approach is adopted, be it purposive or other types of construction, it cannot be done in such a way as to depart from the clear and unequivocal wordings used in it.

103. The definition is drafted in such a way that a clear distinction is drawn between the case of an external confiscation order and other cases. The Secretary is clearly wrong in saying that Schedule 2 applies only to enforcement of external confiscation order. It places too much emphasis on the title given to the Schedule which is misleading.

Schedule 2, as can be seen from its contents, does not only apply to external confiscation order. For example, under section 7 of the Schedule the court may make a restraint order to prohibit any person from dealing with any realisable property. This must be one of the cases other than external confiscation order envisaged by the legislature that falls within section 5(1)(b). There is also section 8 of the Schedule which empowers the court to make a charging order on realisable property. Although it is not as straight forward as section 7 it is also one of the cases other than external confiscation order to which section 5(1)(b) applies.

104. The interpretation of the definition of realisable property as proposed by the Secretary, in the view of the Court, does not make sense and is not logical. In aid of its contention the Secretary makes reference to the confiscation provisions in DTRPO and OSCO. These provisions, however, not only offer no assistance but are actually adverse to the submission of the Secretary.

105. There are two definitions of realisable property in DTPRO. The first one is in section 7 which deals with domestic confiscation orders. It reads:

> "(1) In this Ordinance, "realisable property" (可現變財產) means, subject to subsection (2)-
>
> (a) any property held by the defendant;
>
> (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Ordinance; and
>
> (c) any property that is subject to the effective control of the defendant.
>
> (2) Property is not realisable property if-
>
> (a) an order under section 102 or 103 of the Criminal Procedure Ordinance (Cap 221); or
>
> (b) an order under section 38F or 56 of the Dangerous Drugs Ordinance (Cap 134)

is in force in respect of the property."

106. The definition of realisable property in section 12 of OSCO is exactly the same with only one variation in that there are three instead of two instances when property is not regarded as realisable property. This difference is irrelevant to the present case. OSCO also deals only with domestic confiscation orders.

107. The second definition of realisable property in DTPRO is in Schedule 2 of its subsidiary legislation, the Drug Trafficking (Recovery of Proceeds) (Designated Countries and Territories) Order ("the Order"), which applies to enforcement of external confiscation order instead of domestic confiscation orders. The definition is exactly the same as that in the Ordinance. Again Schedule 2 in the Order, like its counterpart in the Ordinance, also empowers the court to make restraint orders and charging orders. This in the view of the Court explains why they are drafted exactly the same.

108. If the intention of the legislature is to include, among other things, any property held or subject to the effective control by the defendant as realisable property in the case of an external confiscation order, the legislature could have done it by simply drafting the definition in the same way as the first definition of realisable property in DTPRO and that in OSCO, instead of drawing a distinction between the case of an external confiscation order and other cases.

109. Such distinction must show that the intention of the legislature is to treat external confiscation order and other cases differently. This, in the view of the Court, makes sense. Take restraint order as an example. One of the purposes of making a restraint order in respect of

realisable property under Schedule 2 of the Ordinance is to prohibit any person to deal with the property, in order to preserve the property to satisfy any external confiscation order which may subsequently be made. As final adjudication has not yet been made in the foreign country it is only fair that property connected with the defendant should be restrained, thus section 5(1)(b) of the Schedule.

110. After adjudication in the proceedings has been made, be the proceedings a criminal charge or civil claim against the defendant or only for the purpose of making a confiscation order, the foreign country or court will surely have come to the conclusion of what property are to be confiscated and will issue the external confiscation order accordingly. The enforcement of the confiscation order should therefore be carried out against the property specified in the external confiscation order instead of the property restrained, thus section 5(1)(a).

111. Any attempt to enforce confiscation of more than the property specified in the external confiscation order, no matter they are property under section 5(1)(b) or otherwise, is not registering and enforcing the external confiscation order. This is consistent with the principle stated above that the Hong Kong court is not to retry the case, and indeed, the Secretary or the Hong Kong court should not decide for the foreign country what to confiscate.

112. The whole scheme in the Ordinance is for the registration and enforcement of an external confiscation order of a foreign country by Hong Kong court. The Court is therefore enforcing the terms of the external confiscation order. An external confiscation order is defined in the Ordinance and has to be an order made under the law of a place

outside Hong Kong. The simple logic is that the court cannot go beyond the external confiscation order to enforce confiscation of property not specified in it, because in doing so the court is not enforcing an external confiscation order as defined in the Ordinance.

113. According to the Secretary 3 international agreements are applicable to the present application. They are:

(a) Mutual Legal Assistance in Criminal Matters (Indonesia) Order, Cap 525Z, incorporating the agreement between Hong Kong and Indonesia;

(b) Mutual Legal Assistance in Criminal Matters (Corruption) Order, Cap 525W incorporating the United Nations Convention Against Corruption; and

(c) Mutual Legal Assistance in Criminal Matters (Transnational Organised Crime) Order, Cap 525X incorporating the United Nations Convention Against Transnational Organised Crime.

114. In the order in Cap 525Z it is provided that the country requested to give assistance should, to the extent of its law permits, give effect to the confiscation order made by the court of the requesting party. In the orders in Cap 525W and 525X it is stipulated to the effect that the requested country should, within its domestic legal system, enforce the confiscation ordered by, or pursuant to the request of, the requesting country. The three orders also make provisions for the requested country to trace and identify the proceeds of crime but they stipulate that it is the requesting country which should make the order of confiscation. All these provisions serve to support the conclusion that Hong Kong court should enforce the confiscation according the terms of the external confiscation order and not go beyond it.

115. The conclusion of the Court is that for the enforcement of Verdicts 3 and 5E of the Indonesian District Court the meaning of realisable property is as defined in section 5(1)(a). The Court therefore can only enforce the confiscation of the property specified in the verdicts.

116. In the judgment of the Indonesian District Court it is mentioned that since D1 and D2 "had been proven to be guilty of committing acts of corruption and sentenced to pay restitution, then the money and assets of both defendants controlled directly or by the other party in favour of both defendants or the respective defendant are forfeited for the State to pay indemnity." This part of the judgment is not repeated in Verdicts 3 and 5E which the Secretary seeks to enforce as an external confiscation order. As such the Secretary cannot rely on it to argue that that even if section 5(1)(b) does not apply, the external confiscation order has included the confiscation of property under the control the defendants.

117. However, even if included, there will still be argument of whether it fulfils the requirement of "property specified" in section 5(1)(a). This is of course not an issue that need to be determined in the present case.

118. After dealing with the legal principles in general the Court now comes to the assets of individual defendants.

Accounts in the names of D5 and D12

119. In respect of D1, D2 and D12 the Secretary asks to enforce the confiscation of the following bank accounts which D1, D2 and D12 oppose and ask for the restraint order against the accounts be discharged:

(a) account number 379276 with the EFG Bank Hong Kong held in the name of D5;

(b) account number 379179 with the EFG Bank and accounts number 447-007273-2, 447-0-661244-5 and 90053 with the Standard Chartered Bank (Hong Kong) Limited held in the name of D12.

120. According to the information of the banks, D1 is the sole signatory of account numbers 379276 and is the beneficial owner of the assets in the account. As regards the rest of the accounts either D1 or D2 can sign to operate them. D2 is the sole director and sole shareholder of D12.

121. According to the 1st affirmation of D1, he and D2 are the beneficial owners of D12. D1 is claiming ownership of account number 379276 and D12 is claiming ownership of the accounts held in its name.

122. These accounts are specified in Verdict 5E of the external confiscation order and are realisable property. They no doubt belong to or under the control of D1 and D2. It is the view of the Court that registration and enforcement of the confiscation of them will not be contrary to the interests of justice and the Court so orders. The Court consequently dismisses the application of D1, D2 and D12 for the discharge of the restraint order against these accounts.

Account in the name of Vantage Corporation Limited

123. The Secretary asks for the confiscation of bank account number 379190 with the EFG Bank Hong Kong Branch held in the name of Vantage Corporation Limited which the Secretary says is beneficially

owned by D1. D1 however disclaims any interest in the account. As this account is not specified in the external confiscation order the Court is of the view that it is not realisable property and confiscation cannot be enforced. The restraint order against it is discharged.

Accounts in the name of D6

124. Nine accounts with the 2nd Intervener held in the name of D6 which the Secretary says are D1 entity are subject to the restraint order. With the exception of account number 0370006824, the rest of the accounts are specified in the external confiscation order. However, all the assets of D6 have been subsumed under the security of the 2nd Intervener and there are no assets to confiscate. No registration of the external confiscation order relating to them is necessary and the restraint order against them is discharged.

Account in the name of D7

125. Similarly, account number 712090702963 with the 2nd Intervener held in the name of D7, which the Secretary says is a D1 vehicle, has no more money left in the account and no confiscation is required. The restraint order against it has in fact been discharged by Wright J.

Accounts in the name of D8

126. Accounts number 447-0072727-5 and 0101753667 with the Standard Chartered Bank (Hong Kong) Limited held in the name of D8 are subject to the restraint order. Neither D1, D2 nor D8 have claimed any interest in the accounts. According to the information of the bank either D1 or Kim Tong Buhm can sign to operate the accounts. D1 is one of the directors of D8. D8 is wholly owned by Chinkara International

Management (Cayman) Limited in which D2 owns 19% while D1, through Chinkara Global Ventures Limited, a company wholly owned by him, owns 38% of its shares and voting rights. No doubt, as pointed out by the Secretary, D8 is a vehicle of D1 and D2.

127. Account number 0101753667 is specified in the external confiscation order but account number 447-0072727-5 is not. D1, D2 and D8 have not claimed any interest in the accounts and D8 is unrepresented and not present in the present hearing. This is not difficult to understand because account number 0101753667 has a balance of less than HK$18,000. The Court orders the external confiscation order in respect of this account be registered and enforced and the restraint order of the other account be discharged.

Account in the name of D9

128. Account number 447-094-1817-8 with the Standard Chartered Bank (Hong Kong) Limited held in the name of D9 is not specified in the external confiscation order but is restrained, originally in the names of D1 and D2, but on being informed by the bank that the account actually referred to D9, the restraint order was varied by consent. D1 is the President Commissioner of D9 but he has denied relationship with the account. D9 has now been taken over by the Indonesian Government and according to the Secretary there is no issue of confiscation. As the account is not specified in the external confiscation order the Court makes no order for its confiscation but orders the restraint order against it be discharged.

Accounts in the name of D10

129. Accounts number 447-0664845-7 and 447-0664859-8 with the Standard Chartered Bank (Hong Kong) Limited are held in the name of D10. According to the information of the bank, D1 is the sole account signatory and is the beneficial owner of D10. However, neither D1 nor D10 have made any claim of the accounts, although D10 has applied to discharge the restraint order against the property held in its name. The Secretary is asking for the accounts to be confiscated. As the accounts are not specified in the external confiscation order the Court declines to do so and orders the restraint order in relation to them be discharged.

Accounts in the name of D11

130. There are 15 accounts with the Chartered Bank (Hong Kong) Limited ("SCBHK") held in the name of D11 listed in the restraint order. According to the information provided to the bank, D1 and Kim Tong Buhm, by a board resolution of D11, were appointed signatories of the accounts with the bank in July 2003 and either one of them could sign to operate the accounts.

131. D1 was one of the four directors of D11 and in March 2005 D2 informed the bank about the change of name of D11 in the capacity of a director of D11. In a statutory declaration made by Kim Tong Buhm, a director of D11, in August 2003, D11 was wholly owned by D12. D2 and Chinkara Global Ventures Limited each owned 40% of the shares and voting rights of D12 and Chinkara Global Ventures Limited was wholly owned by D1. It follows that D1 and D2 together held 80% of the shares and voting rights of D11. The rest of the 20% of shares and voting rights were held by Kim Tong Buhm through the Glacier Ventures Limited

which was 100% owned by him. In the Certificate of Incumbency dated 2 May 2007 and the Secretary's Certificate of November 2008 of D12 submitted to the SCBHK by D12 in opening bank accounts, D2 was described as D12's sole shareholder and sole director, being first appointed as a director in September 2004.

132. D11, being wholly owned by D12, is obviously under the control of D1 and D2 and is, as rightly suggested by the Secretary, a vehicle used by the 2 defendants.

133. These 15 SCBHK accounts with the exception of account number 96332 are specified in the external confiscation order. All of them are no doubt under the control of D1 and D2.

134. The Indonesian District Court in convicting D1 and D2 of the offences of corruption and money laundering held that they had committed the offences jointly to enrich themselves or D12. It can be seen that the external confiscation order is not made arbitrarily but is a considered decision of the Indonesian District Court. The Indonesian District Court had taken into consideration of the ownership and control of the accounts and the benefits of the offences to D12 before making the confiscation order.

135. D11 asks the restraint order over the property held in its name to be discharged and opposes the application of the Secretary to register and enforce the external confiscation order in relation to these accounts. D11 says that the judgment of the Indonesian District Court is against D1 and D2 but it purports to make an order against D1 and D2 confiscating D11's SCBHK accounts from them. D11 contends that it is not a judgment of any kind against it and the court cannot register the external

confiscation order under section 28 of the Ordinance because it purports to confiscate property not belonging to D1 and D2 against whom the order is made, citing the case of *Regina v Walker* [2012] 1 WLR 173 in support.

136. All these boil down to the issue of whether the requirements of sections 27 and 28 are satisfied.

137. The Secretary invites the Court to disregard the evidence filed by Mr Liegey and the Intended 3rd Intervener in its entity as an abuse of process of the court. Mr Liegey and the Intended 3rd Intervener took over D11 by means of Mr Liegey purchasing from D12 the shares of First Capital Management Ltd which controls D11. As stated above D12 is a vehicle of D1 and D2. This transaction took place on 2 November 2011 after the restraint order has been made and has been held by Wright J to be in breach of the restraint order. That is also the reason for Wright J to refuse joining the Intended 3rd Intervener as a party in these proceedings.

138. The Court does not recognise this transaction because it is clearly in breach of the restraint order and is an abuse of the judicial process. The Court will not give effect to the transfer of the shares and will the case as if the transfer has never taken place. The Court, however, will not go so far as to ignore the evidence of Mr Liegey in its totality, but the Court will only consider those part of his evidence which is not inconsistent with the ruling of Wright J.

139. D11 submits that the jurisdiction of the court under section 28 is of a civil character. The Court has no quarrel about this and is of the view that this is indeed the nature of the jurisdiction of the Court's forfeiture jurisdiction under the Ordinance.

140. D11 further points out that the Secretary has the onus to prove that the Indonesian District Court has the jurisdiction to make the external confiscation order against the assets of D11, that such assets are liable to forfeiture under the Ordinance and that the court should register the external confiscation order. The case of *Wong Hon Sun v HKSAR* (2009) HKCFAR 877 is cited in support. This case deals with forfeiture of "article liable to forfeiture" under the Import and Export Ordinance, Cap 60 ("IEO").

141. The concept of "article liable to forfeiture", which means that the article is the subject of a contravention of the IEO, is not employed in the Ordinance and the case of *Wong Hon Sun* holds that in forfeiture proceedings under the IEO, it is a level playing field in the sense that each side has the burden of establishing any assertion, whether affirmative or negative, that it makes but the other side disputes. Despite citing this case it is obvious that D11 is not advocating for the "level playing field" theory. For the purpose of the present hearing the Court is of the view that the onus is on the Secretary to prove on a balance of probability that the requirements of sections 28 and 29 of the Ordinance are satisfied.

142. D11 argues that the application of the Secretary, being one to register the judgment of the Indonesian District Court as an external confiscation order for the purpose of confiscating its SCBHK assets, cannot meet the requirements of section 28(1)(b) or (c). D11 says that it has never been controlled by D1 and D2 who have ceased to be the signatories of its accounts since 30 June 2009, some 18 months before the restraint order was made in Hong Kong on 15 December 2010.

143. While this is true it is not the whole picture. It must be pointed out that during the time of the offences, which according to the indictment and the judgment of the Indonesian District Court was between 2001 to 2008, D1 and D2 were the signatories of the accounts. Apart from the change in signatories of the SCBHK accounts, according to the 5th affirmation of Mr Liegey, D1 and D2 also resigned as directors of D11 on 30 June 2009. Despite all these changes, D11 has remained to be controlled by D12.

144. In his 1st affirmation D1 says that D12 is beneficially owned by him and D2. D1 and D2 through D12 hold 80% of D11's shares with voting rights. According to the affidavit of Ms Marie Rosy Priscilla Pattoo, a Mauritius barrister, filed on behalf of the Secretary, D1 and D2 have the entitlement to appoint the directors and management of D11. D1 and D2 have thus all along been in control of D11. All these bank accounts clearly beneficially belong to or are under the control of D1 and D2.

145. It should also be pointed out that the Indonesian District Court also comes to a similar finding after considering the evidence in the trial. In its judgment delivered on 15 December 2010, these accounts are described as "account under the control or authorization of D1 and D2". As stated repeatedly in this judgment the Court is not retrying the case and is not going to make a finding of its own to substitute that of the Indonesian District Court.

146. D11 points out that the external confiscation order against it was made by the Indonesian District Court in breach of natural justice because it was not made a party to the proceedings, no notice had been given to it regarding the trial of D1 and D2 in which the external

confiscation order was made and it was not permitted to be heard in its own defence before the external confiscation order was made.

147. As already found by the Court sufficient notice had been given to D1 and D2 in respect of their trial in which the external confiscation order was made. Judging from the finding of the Indonesian District Court and the evidence filed in the present hearing it is of no doubt that D11, as rightly pointed out by the Secretary, is actually a vehicle of D1 and D2. As such the Indonesian District Court has the jurisdiction to make the external confiscation order against the SCBHK accounts in the name of D11.

148. The analysis in relation to section 28(1)(b) above applies. Giving notice to D1 and D2 is tantamount to giving notice to D11 and there is no question of natural justice being breach. The requirement under section 28(1)(b) is satisfied.

149. D11 points out that the Court cannot register an external confiscation order under section 28 of the Ordinance if doing so would breach the constitutional property rights protected by Article 105 of the Basic Law. As pointed out above the external confiscation order is not an arbitrary but a considered decision of the Indonesian District Court to confiscate the property which it found, on the strength of the evidence in the trial, to be under the control or authorisation D1 and D2 who were convicted of the offences of corruption and money laundering in the trial. It is the view of the Court that registering and enforcing the external confiscation order under such circumstances is certainly not in contravention of Article 105 of the Basic Law.

150. D11 says that under section 28 of the Ordinance the Court can only register an external confiscation order in respect of assets which are located in Hong Kong. Apart from relying on the provisions of the Ordinance in general D11 also cites in support of the case of *Serious Organised Crime Agency v Perry (No 1 & 2)* [2012] 3 WLR 379. In this case the English Supreme Court considered the interpretation of a legislation relating to the civil recovery of proceeds of crime and the principles of international law and held that the court in England and Wales could only make a freezing order of such property if they were situated in UK. The legislation concerned is different from the Ordinance and in respect of this issue 2 of the law lords were dissenting.

151. An obvious setback of the argument of D11 is that all these accounts are in fact situated in Hong Kong. Wright J has convincingly dealt with this issue:

> "11. Notwithstanding that submission it seemed to me that the clear construction to be applied to the order granted by Reyes J is that it was designed to have effect over all the amounts reflected as credits in the Hong Kong accounts, referred to in the order, irrespective of where the underlying assets may be located geographically.
>
> 12. If that were not so, then the credit amounts reflected in the Hong Kong accounts would be nothing more than worthless book entries: it seemed to me that it could not be argued sensibly that, in those circumstances, the court would have made a restraining order in the terms it did. I was satisfied that the intention was that the Restraining Order would extend to the assets reflected as credit entries in the Hong Kong Accounts irrespective of where those assets were physically to be found.
>
> 13. Further, if the restraint order were not to extend to the underlying assets wherever they may be located, the whole purpose of the proceedings and the making of the restraint order would be frustrated. Such a result would have serious consequences for restraint procedures in matters of this nature and impinge upon agreements of mutual legal assistance concluded between the Hong Kong Special Administrative Region and other territories.

> 14. It was submitted on behalf of the 2nd Intervener that its construction of the terms of the restraint order was "reinforced" by the retention of phrase "in Hong Kong" subsequent to the amendment of 14 March 2012.
>
> 15. Although the Receivers expressed some uncertainty as to whether it was intended that that phrase would remain in the order post-amendment, I regarded that uncertainty as misplaced. The initial proceedings requested by the Indonesian Government indicated that there were believed to be numerous assets in which it was interested spread widely over the world, in respect of some of which proceedings had been instituted in other jurisdictions. The phrase was retained to reinforce the fact that it was the Hong Kong accounts with which the order was concerned, not accounts in other jurisdictions.
>
> 16. In the circumstances I was satisfied that it was clear that the Restraint Order related to, and thus the appointment of the Receivers was defined by reference to, all assets credited to or otherwise external confiscation ordered as held in the Hong Kong Accounts regardless of where the assets underlying the credit amounts shown in those accounts may physically be located."

152. D11 contends that section 28 of the Ordinance can only be invoked proportionately in order to fulfil the purpose of the Ordinance, which inter alia is to facilitate the enforcement in Hong Kong of justly imposed external confiscation order made against duly tried and convicted criminal wrongdoers in order to confiscate their property where their property has been proven to have been received by them as a reward for their wrong doing, ie the proceeds of crime. D11 relies on the case of *R v Waya* [2012] 3 WLR 1188 and *R v Gangar* [2013] 1 WLR 147.

153. *Waya* concerns the confiscation order under the Proceeds of Crimes Act 2002 in the UK which is a different regime from the Ordinance and the protection of a person's right to peaceful enjoyment of his possessions under Article 1 of the First Protocol to the Convention for the Protection of Human Rights which Hong Kong has no equivalent legislation.

154. *Gangar* deals with confiscation order under the Criminal Justice Act 1988 and holds that for the purpose of assessing what realisable property is available for a confiscation order where two defendants are co-owners of an available asset, the most one defendant can realise is his beneficial interest in the asset and it is wrong to treat the total of the jointly held asset as available to each defendant, resulting in the asset being counted twice. The meaning of realisable property in the Criminal Justice Act 1988 is similar to section 5(1)(b) of Schedule 2 of the Ordinance instead of section 5(1)(a) which is in issue in the present case.

155. The most important distinction between the present case and these two cases is that, as stated above, the accounts are under the control of D1 and D2 and D11 is only a vehicle of the two defendants. The question of proportionality therefore does not arise.

156. In the affidavit of Mr Bishwarnath Bachun, an Executive Director of Mauritius International Trust Company and Company Secretary and Fund Administrator of D11, filed on behalf of D11, it is said that D11 is as an open ended umbrella investment company fund structured as a protected cell company. As allowed by Mauritius law D11 while retaining its single legal entity has also created 9 protected cells where the assets and liabilities of each cell ("cellular assets and liabilities") are legally separated from those of any other cells and from the general assets and liabilities of the company itself ("non-cellular assets and liabilities"), thus protecting each cell from the liabilities of the other cells.

157. The affidavit goes on to say that the shares in D11 are divided into management shares which form part of the non-cellular assets of the company and participating redeemable preference shares which are

attached to the various cells and are issued to investors such that they represent the economic ownership interest in the assets of the cells. Mr Bachun deposes that under Mauritius law the cellular assets belong to the holders of the participating redeemable preference shares and should not be confiscated because they are not proceeds of crime and are not held by D1 or D2.

158. The Secretary in reply files the affidavit of Ms Marie Rosy Priscilla Plattoo, a Mauritian barrister, saying that a registered cellular shareholder has no proprietary interest in the assets of the relevant cell, in the assets of the other cells or in the non-cellular assets, which are all owned the company itself. She elaborates that according to Mauritius law and the constitution documents of D11, holders of participating redeemable preference shares of D11 have no proprietary interests in the assets of the relevant cell, in the assets of the other cells or in the non-cellular assets, which are all owned by D11 in its own right.

159. D11 further files an affidavit of Mr Michel Angelo Iu King Chee, a Mauritius barrister, who does not dispute the correctness of the opinion of Ms Platoo but stresses that she has presented an incomplete picture of the Mauritius law. The affidavit, however, adds nothing new apart from describing how stringent protected cell companies are governed under Mauritius law and disagreeing that D1 and D2 have exercised control or effective control of D11.

160. D11 does not directly pursue the point raised in the affidavit of Mr Bachun in its skeleton argument and submission in court. The Court accepts the opinion of Ms Platoo that holders of participating redeemable preference shares of D11 have no proprietary interests in the

assets of the relevant cell, in the assets of the other cells or in the non-cellular assets, which are all owned by D11 in its own right. The Court rejects the opinion of Mr Michel Angelo Iu King Chee and is of the view that, as analysed above, D1 and D2 are in control of D11 and use D11 as their vehicle. As such, despite D11 being a protected cell company under Mauritius law, the Indonesian District Court has the jurisdiction to make the external confiscation order against the SCBHK accounts and it would not for this reason be contrary to the interests of justice to enforce the order. The external confiscation order can therefore be registered and enforced in Hong Kong.

161. The Court has considered all the grounds advanced by D11 to decide if they, when taken individually or cumulatively, would render registering and enforcing the external confiscation order contrary to the interests of justice. By virtue of the above analysis the Court is of the conclusion D11 has suffered no unfairness, prejudice or injustice and it would not be contrary to the interests of justice to register and enforce the order. The Court therefore orders that the SCBHK accounts, with the exception of account number 96332 which is not specified in the external confiscation order, be registered and enforced. The Court also orders the restraint order in respect of this excepted account be discharged.

Accounts in the name of D12

162. Account number 379179 with the EFG Bank Hong Kong held in the name of D12 is not specified in the external confiscation order. The Court must therefore reject the application of the Secretary for the confiscation of this account and orders the restraint order against the account be discharged.

163. Accounts number 447-007273-2, 447-0-661244-5 and 90053 with the Standard Chartered Bank (Hong Kong) Limited held in the name of D12 are all specified in the external confiscation order and are realisable property. Account number 90053 was originally mistakenly restrained in the name of D11 which has now been substituted by D12 by order of the Court.

164. In March 2005 D1 and D2 were appointed signatories of account number 447-007-2723-2 and either one of them could sign to operate the account, while D1 was appointed the sole signatory of account number 447-0-661244-5. In a statutory declaration of the company secretary of D12 dated 13 August 2003 it was stated that D1 and Kim Tong Kuhm were directors of D12 and that D2 and Chinkara Global Ventures Limited, which was wholly owned by D1, each held 40% of the shares of D12 while the Glacier Ventures Limited which was wholly owned by Kim Tong Buhm held the remaining 20%. D12 was described as beneficially owned by D1 and D2 and Kim Tong Kuhm in the same percentage as the shares held by themselves or through their companies.

165. In the Certificate of Incumbency dated 2 May 2007 and the Secretary's Certificate of November 2008 of D12, D2 was described as D12's sole shareholder and sole director, being first appointed as a director in September 2004.

166. All this information shows clearly that D12 was, as contended by the Secretary, a vehicle of D1 and D2. As such there are ample grounds for the Indonesian District Court to order confiscation of these 3 accounts. The Court is of the view it would not be contrary to the interests of justice to register the external confiscation order in respect of these

accounts, and therefore allows the application of the Secretary to have the external confiscation order in relation to these accounts registered and enforced.

Account in the name of D13

167. Account number 217100 with the UBS AG Bank held in the name of D13 was specified in the external confiscation order. According to the documents submitted to the bank, the signatories of the account are First Directorships Limited and Second Directorships Limited while D3 is the beneficial owner of the assets deposited into the account. D3 is also empowered to operate the account by a power of attorney dated 8 May 2003.

168. The Secretary asks for its confiscation and no defendants have made any claim of the account. D3 was served with the amended restraint order and the notice of the present hearing in September 2013. He and D13 are not represented and do not appear in the present hearing. D3 had been prosecuted for and convicted of the offences of embezzlement and fraud in Indonesia which give rise to the present hearing. He is now serving a sentence of 9 years imprisonment in Indonesia.

169. The account is specified in the external confiscation order and is realisable property. In view of the control and the interests of D3 in the account the Court is of the view that enforcement of the confiscation of the account will not be contrary to the interests of justice. The Court therefore orders the external confiscation order in relation to this account be registered and enforced.

Accounts in the name of D14

170. Accounts number 207626, 281925, 20783 and 312661 with the UBS AG Bank are held in the name of D14. According to the documents submitted to the bank, D3 and Tan Chi-fang were named the signatories of the accounts in April 2003 and they can sign singly to operate the account. They are the beneficial owners of the assets deposited into the accounts. The Secretary asks for its confiscation and no defendants have made any claim of the account.

171. D3 and D14 are not represented and do not appear in the present hearing. As pointed out above D3 is serving 9 years imprisonment for embezzlement and fraud offence which give rise to the present hearing and was served the amended restraint order and the notice of the present hearing in September 2013. The accounts are specified in the external confiscation order.

172. According to the judgment of the Indonesian District Court Tan Chi Fang is the wife of D3. In view of the control and the interests of D3 in the accounts, the Court is of the view that enforcement of the confiscation of the accounts would not be contrary to interests of justice. The Court therefore orders the external confiscation order in relation to these accounts be registered and enforced.

Account in the name of D15

173. Account number 207991 with the UBS AG Bank is held in the name of D15. According to the documents submitted to the bank, D3 was named the sole signatory in April 2003 and he is also the beneficial owner of the assets deposited into the account. The Secretary asks for its

confiscation and no defendants have made any claim of the account. D3 and D15 are not represented and do not appear in the present hearing.

174. The account is specified in the external confiscation order. In view of the control and the interests of D3 in the account the Court is of the view that enforcement of the confiscation of the account will not be contrary to interests of justice. The Court therefore orders the external confiscation order in relation to this account be registered and enforced.

Account in the name of D16

175. Account number 207623 with the UBS AG Bank is held in the name of D16. According to the documents submitted to the bank, D3 was named the sole signatory in April 2003 and he is also the beneficial owner of the assets deposited into the account. The Secretary asks for its confiscation and no defendants have made any claim of the account. D3 and D15 are not represented and do not appear in the present hearing.

176. The account is specified in the external confiscation order. In view of the control and the interests of D3 in the account the Court is of the view that enforcement of the confiscation of the account will not be contrary to interests of justice. The Court therefore orders the external confiscation order in relation to this account be registered and enforced.

Absence of D3 in Trial of D1 and D2

177. One issue that has caused some concern of the Court is that the external confiscation order was made in the trial of D1 and D2 in absentia which did not involve D3. D3 was not present in that trial. The question is whether under such circumstances section 28(1)(b) and (c) of

the Ordinance are fulfilled. The Court has considered this question before coming to conclusion stated above.

178. Section 28(1)(b) requires that D3 received notice of the trial in sufficient time for him to defend in accordance with the Indonesian law. D3 himself was prosecuted and convicted, in proceedings separated from those of D1 and D2, of offences of embezzlement and fraud which give rise to the present hearing. After the Indonesian District Court delivered the judgment on 16 December 2010 he filed an objection to the order of confiscating his assets to the Indonesian District Court in February 2011. In a judgment dated 26 April 2011 the Indonesian District Court refused his objection.

179. D3 then petitioned for a cassation of the confiscation order to the Indonesian Supreme Court and one of his grounds was that the Indonesian District Court erred in law in confiscating his property when he was not a defendant in the trial of D1 and D2 and the property did not belong to D1 and D2. The Supreme Court, in a judgment delivered on 15 December 2011, dismissed D3's petition saying that the judgment of the Indonesian District Court was not in contravention of any law or legislation. D3 has not filed any further appeals or applications.

180. It is not in dispute that no notice was given to D3 about the trial of D1 and D2 and he was not present. The Indonesian Supreme Court was clearly of the view that the making of the confiscation order against the property of D3 in his absence was not in contravention of the Indonesian law. As pointed out above it is not for this Court to go behind the judgments of the Indonesian courts to adjudicate again the matters they have decided.

181. The question to ask is whether the requirements under section 28(1)(b) of the Ordinance relating to a defendant receiving notice and being given sufficient time to enable him to defend are fulfilled. Judging from the ruling of the Indonesian Supreme Court there was legal basis under Indonesian law for the courts in Indonesia to make a confiscation order of the property of a person even if the person was not a defendant in the proceedings, had not been given notice of the proceedings and had not been convicted in the proceedings.

182. That was the situation of D3. Moreover, he does not come clean hand. He has been convicted of embezzlement and fraud offences and in the judgment of the Indonesian District Court in the trial of D1 and D2, D3 is described as acting in concert with D1 and D2, particularly in causing the bank to trade non-performing or delinquent commercial papers, resulting in huge losses to the bank while enriching themselves or D12.

183. It follows that D3 was acting in concert with D1 and D2 in the illegal deeds or some of such deeds which gave rise to the external confiscation order. D3 in his own trial must have had ample opportunity to defend himself of such allegations. Although he was not present in the trial of D1 and D2 he must have had advanced defences in his own trial against the allegations which are similar to those giving rise to the external confiscation order in the trial of D1 and D2.

184. The fact that D3 filed an objection to the external confiscation order with the Indonesian District Court and then petitioned for cassation to the Indonesian Supreme Court must show that he had notice of the order and the avenues to challenge the order and had made use of them. It is the view of the Court that the requirements of section 28(1)(b) are fulfilled.

185. The Court still has to consider whether enforcement of the order would be contrary to the interests of justice under section 28(1)(c). Although the Indonesian law did not require notice to be given to him regarding the trial of D1 and D2 in which the external confiscation order was made, the absence of D3 in the trial may render enforcement of the order contrary to interests of justice.

186. As stated above D3 had been convicted of offences of embezzlement and fraud giving rise to the present proceedings. Although he was not present in the trial of D1 and D2, he had ample opportunity to defend himself of the allegations giving rise to the external confiscation order made in the trial of D1 and D2. He also filed an objection with the Indonesian District Court and then petitioned for cassation to the Indonesian Supreme Court in respect of the order. Under such circumstances the Court is of the view that D3 has suffered no unfairness, prejudice or injustice and it would not be contrary to the interests of justice in enforcing the order. The Court orders the order be registered and enforced.

Appointment of Enforcement Revivers

187. For the purpose of enforcing the external confiscation order in accordance with this judgment the Court makes an order in terms of the summons of the Secretary that the Receiver be appointed the enforcement receiver under section 9 of Schedule 2 of the Ordinance.

Costs

188. The Court makes an order nisi that the costs of this hearing be to the Secretary to be taxed if not agreed. In the absence of any application from the parties within 21 days from the handing down of this

judgment the order nisi shall stand as final.

(Joseph Yau)
Deputy High Court Judge

Mr Wayne Walsh, Deputy Law Officer, and Ms Susanna Sit, DPGC, for the Secretary for Justice

Mr Roger Beresford instructed by Messrs Reed Smith Richards Butler for the 1st, 2nd and 12th Defendants

Mr Peter Duncan, SC instructed by Messrs Haldanes for D4, D17 and D18

Mr Barrie Barlow, SC instructed by Messrs Hogan Lovells for D11