HM Attorney General v Arne Rosenlund

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Clyde-Smith
Judgment Date:	15 March 2016
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Text

[2016] JRC 62

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**

Her Majesty's Attorney General
Applicant
and
Arne Rosenlund
First Respondent
FNB International Limited
Second Respondent

Crown Advocate A. J. Belhomme **for the Attorney General**.

Advocate J. Harvey-Hills **for the First Respondent**.

Advocate A. Kistler **for the Second Respondent**.

Authorities

Royal Court Rules 2004.

Proceeds of Crime (Jersey) Law, 1999.

Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008.

AG -v- Rosenlund and FNB International Limited [2015] JRC 186.

Trant v AG [2007] JLR 231.

Royal Court (Jersey) Law, 1948.

Home Farm Developments Limited v Le Sueur [2015] JCA 242.

Tinsley v Milligan [1993] 1 AC 340.

Bennion on Statutory Interpretations 6th edition.

In the matter of the Esteem Settlement and the No 52 Trust [2000] JLR 119.

Tantular v AG [2014] (2) JLR 25.

Pothier's Traité des Donations entre vifs, Article préliminaire.

Re Rose (deceased) [1952] 2 All ER 959.

Trusts (Jersey) Law 1984.

Bankruptcy (Désastre)(Jersey) Law 1990.

R v Smith [2013] EWCA Crim 502.

In Re Esteem Settlement [2003] JLR 188.

Mezhdunarodniy Promyshlenniy Bank & Others v Pugachev [2016] EWHC 248 (Ch).

Confiscation Order — saisie judiciaire — application by the 1st and 2nd respondents to strike out amended application by the Attorney General.

IN THE MATTER OF THE PROCEEDS OF CRIME (JERSEY) LAW 1999 AS MODIFIED AND INCLUDED IN THE SECOND SCHEDULE TO THE PROCEEDS OF CRIME (ENFORCEMENT OF CONFISCATION ORDERS)(JERSEY) REGULATIONS 2008

AND IN THE MATTER OF A SIASIE JUDICIAIRE IN RESPECT OF THE REALISABLE PROPERTY OF ARNE ROSENLUND

THE COMMISSIONER:

1 The first respondent ("Mr Rosenlund") and the second respondent ("the new trustee") apply to strike out the Attorney General's amended application for a *saisie judiciaire* and this pursuant to Rule 6/13 of the Royal Court Rules 2004 (as amended) and/or the inherent jurisdiction of the Court, on the basis that the application discloses no reasonable cause of action, is scandalous, frivolous or vexatious, is likely to prejudice, embarrass or delay the fair trial of the action or is an abuse of the process of the Court.

Background

2 On 29 th May, 2012, the court of Lyngby in Denmark sentenced Mr Rosenlund to 3 years' imprisonment (suspended for 2 years) for tax fraud and ordered the confiscation of a sum corresponding to approximately £2m, together with imposing a fine. That sentence was increased on appeal to 3 $^{1}/_{2}$ years' imprisonment and the confiscation order was confirmed.

3 On 11 th January, 2014, the Attorney General received a request for assistance dated 28 th November, 2012, from the State Prosecutor for Serious Economic Crime, Copenhagen, Denmark seeking a *saisie judiciaire* in respect of the realisable property situated in Jersey of Mr Rosenlund.

4 On 4 th February, 2014, the Attorney General applied to the Court for a *saisie judiciaire* in respect of the realisable property situated in Jersey of Mr Rosenlund, to include assets held in the name of the new trustee as trustee of the Mingo Trust. That application was adjourned for a trial date to be fixed on the new trustee undertaking not to pay or apply all of or any part of the trust fund of the Mingo Trust save in respect of its reasonable remuneration and expenses and certain legal costs.

5 In the Attorney General's first skeleton argument of 23 rd January, 2015, he identified two issues for the Court:-

> (i) Does the conduct alleged and proved by the Danish prosecutor constitute 'criminal conduct' within the meaning of Article 1(1) of the Proceeds of Crime (Jersey) Law, 1999, as modified and included in the Second Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008 ("the Modified Law")?
>
> (ii) If the answer to (i) is 'yes', did the defendant make an indirect gift caught by the Modified Law (as defined in Article 1(1) and 2(9) and (10) of the Modified Law), when

the trust was transferred to new trustees in 2008.

6 Within the first issue identified by the Attorney General was the question of whether the definition of criminal conduct in the Modified Law requires that the relevant offence falls within Schedule 1 of the Modified Law at the time of the application or at the time the conduct occurred. On 13 th April, 2015, following a directions hearing, the Court ordered that the following should be taken as a preliminary issue of law, namely:-

> ***"For the purpose of Article 1(1) of the Modified Law, it is necessary to apply Jersey law to transposed overseas conduct ("the conduct") in order to decide whether the conduct "corresponds" to an offence of a category described in Schedule 1 of the Modified Law.*** In this case between the date of the conduct and the date of the application to the Royal Court the sentence for the Jersey offence which the Attorney General contends one would apply to the conduct (Article 137 of the Income Tax (Jersey) Law 1961) has changed. At the time the conduct occurred the maximum sentence was a fine; at the time of the application to the Court the sentence was greater than one year in prison. The question to be determined is whether, for the purposes of the Modified Law one applies Jersey law to the transposed conduct as that law existed at the time the conduct occurred or whether one applies Jersey law as that law exists at the time the application is made to the Royal Court."

7 By its judgment of 9 th September, 2015, (*AG -v- Rosenlund and FNB International Limited* [2015] JRC 186), the Court found in favour of the Attorney General in relation to this preliminary issue, concluding that one applies Jersey law as that law exists at the time the application is made to the Royal Court.

8 That left the Court to determine at trial whether the conduct of the defendant, as it finds it to be, does correspond to an offence specified in Schedule 1 and if so, whether Mr Rosenlund made an indirect gift caught by the Modified Law when the Mingo Trust was transferred to new trustees in 2008.

9 The final hearing is scheduled to take place on the seven days commencing 25 th May, 2016, with directions having been issued by consent on 15 th February, 2016, for the filing of evidence and skeleton arguments.

The Mingo Trust

10 We are concerned here only with the assets of the Mingo Trust; there are no other assets within the jurisdiction which are susceptible to confiscation.

11 Mr Rosenlund created the Mingo Trust (then called the Arintopema Trust) on 18 th October,

1988, with X Trust Company Limited as trustee ("the old trustee"). It is a standard discretionary settlement then governed by Jersey law, of which the discretionary beneficiaries are his wife and three children and, following a deed of addition of 21 st September, 1993, himself.

12 The creation of the Mingo Trust pre-dated the criminal conduct for which Mr Rosenlund was convicted, which conduct commenced in 1997. This is important as any gifts made by Mr Rosenlund into the Mingo Trust prior to 1997 are not caught by the Modified Law, pursuant to Article 2(9)(a), which I set out below. The Attorney General does not seek to challenge any of the gifts made by Mr Rosenlund into the Mingo Trust after 1997 on the grounds that they were *de minimis*. The Attorney General accepts that the Mingo Trust is a valid trust.

13 The sole ground upon which the Attorney General relies for seeking to extend the *saisie judiciaire* to the assets of the Mingo Trust is that on 12 th November, 2008, the old trustee appointed the new trustee (then called Firstrand Trustees Limited), a Guernsey based trust company, as trustee in its place. On 21 st November, 2008, the new trustee changed the proper law of the Mingo Trust to Guernsey law, although the assets of the trust (a portfolio of investments) remained managed from this jurisdiction; hence the application for a *saisie judiciare* here. In essence, the Attorney General argues that this change of trusteeship constitutes an indirect gift by Mr Rosenlund which is caught by the Modified Law.

Legal test

14 The test on an application to strike out is well established, and was summarised by the Court of Appeal in *Trant v AG* [2007] JLR 231 at paragraphs 22 and 23:-

> ***"22 The test on an application to strike out is well established.*** It is only where it is plain and obvious and that claim cannot succeed that recourse should be had to the court's summary jurisdiction to strike out. Particular caution is required in a developing field of law. Provided that a pleading discloses some cause of action or raises some question fit to be decided by a judge, jurats or jury, the mere fact that a case is weak is not a ground for striking it out. These propositions are vouched for by a wealth of Jersey authority embracing principles deployed by the courts of the United Kingdom, see e.g. *In re Esteem Settlement (6)* [2000 JLR at 127] ***(we note en passant that a new regime, arguably more favourable to an application to strike out, has been introduced in England and Wales by the Civil Procedure Rules)*** .
>
> ***23 On an application to strike out under sub-para.*** (a) of r.6/13(1) (that there is no reasonable cause of action) evidence is not admissible. The facts alleged in the Order of Justice must be taken as correct. However, where an application is made under sub-para. (b) (scandalous, frivolous or vexatious) or sub-para. (d) (abuse of process), or where the application to strike out is made out under the inherent jurisdiction of the court, evidence is admissible ***and may be considered by the***

court. It follows that, on this application, evidence was and is admissible."

15 No evidence was submitted on the applications under sub-paragraphs (b) and (d) or under the inherent jurisdiction of the Court, but to the extent that issues of fact might arise the parties agreed that I should sit alone, as certified by the Judicial Greffier under Article 17 of the Royal Court (Jersey) Law, 1948.

16 The Court of Appeal has recently considered the law in connection with striking out an action under Rule 6/13(1)(b) and (d) in *Home Farm Developments Limited v Le Sueur* [2015] JCA 242 where, having cited the above passage from *Trant*, the Court said this at paragraph 29:-

> ***"29 Applying these principles to the circumstances of the present case, the Appellants' Order of Justice should be struck out only if we are satisfied, based upon the conclusions which we can draw from the relevant documents and facts which are not in dispute, that any trial of the issues would be unnecessary because the claim would inevitably fail.*** In doing so, we acknowledge that in the particular circumstances of this case a distinction may be made between paragraph (1)(b), which refers to a claim or pleading which is 'scandalous, frivolous or vexatious', and paragraph (1)(d) which refers to 'abuse of process'. Whilst the former expression might, as the Deputy Bailiff referred to in Pike (at p. 37), suggest a degree of opprobrium about what has been pled, for example the making of unjustified allegations of outrageous conduct or the unreasonable inclusion of a solicitor as a defendant, we do not consider that the expression 'abuse of process' necessarily carries the same connotation. In the context of striking out, we consider that a claim or pleading may be said to be an abuse of process where, after applying the test set out in *Trant*, the conclusion can be reached that to allow the proceeding to continue would be an unnecessary waste of the court's time because at the end of any trial the result would inevitably be that the claim would fail."

17 As made clear in *Trant*, the facts alleged by the Attorney General must, for the purpose of an application under Rule 6/13(1)(a), be taken as correct. It is the Attorney General's case that on the facts of this case, the transfer of the trust assets from the old trustee to the new trustee on 12 th November, 2008, was an act of Mr Rosenlund, for which the gift provisions of the Modified Law are designed to cater.

18 In his skeleton argument of 12 th October, 2015, the Attorney General sets out those facts succinctly and it is helpful to set them out here in full:-

> *"19 As set out above, the evidence establishes to the civil standard of proof that from the beginning of the relationship the intention of Mr Rosenlund (with the knowing assistance of the trustee) was to conceal the trust and its distributions from the Danish authorities.* The primary intention was probably to hide these things from the authorities that assessed and collected tax. However, such an

intention carried with it an implicit intention to hide from the Danish investigating and prosecuting authorities. The evidence may be summarised as follows:

(a) When Mr Rosenlund first approached [the old trustee] (this skeleton argument refers to [the old trustee] for convenience to mean the bank and trustee from time to time) he made it clear that neither the trust nor any distributions made to him would be declared to the Danish tax authorities. In the same meetings he also said he was both resident and domiciled in Denmark.

(b) Throughout the life of the trust in Jersey, [the old trustee] complied with Mr Rosenlund's requests to assist him to ensure that no record of the trust appeared in Denmark. This extended to being careful about correspondence and any telephone communications.

(c) From the late 1980 until at least 2003, distributions were made to Mr Rosenlund by making large amounts of cash (sometimes amounting to £25,000) available to him at various banks outside Denmark (the principal ones being Jersey, London and Hamburg). From the settlement of the trust until September 1993 this was done notwithstanding the fact that at the time Mr Rosenlund was not a beneficiary of the trust.

(d) In 2003 Mr Rosenlund was told that [the old trustee] was no longer prepared to make distributions to him in cash. From around that date distributions were made to an account at [the old trustee] in Jersey to which debit cards were attached. Mr Rosenlund and his wife then withdrew large sums of cash using the debit card. The bank statement show that large withdrawals were made at least every few days and sometimes a number of times a day. The daily amounts ranged from around £400 to £3,000.

20 From 2003 Mr Rosenlund's intention to conceal matters from the investigating and prosecuting authorities in Denmark (as opposed simply to conceal matters from the assessing authorities) is no longer to be implied. It is proved by direct evidence:

(a) In around 2003, Mr Rosenlund sent a letter to the trustee in Jersey attaching a newspaper article which described a Swedish investigation into tax evasion which centred on the use in Sweden of credit cards attached to offshore accounts. The defendant's letter expressed serious concerns that the Danish authorities would do the same thing and said in terms that if the Danish authorities were to carry out such an investigation ‘the consequences are obvious’. The letter attached a diagram apparently drawn by Mr Rosenlund which set out the various links between his use of the debit card and the trust and examined what would be ‘visible’ at each level.

(b) After this (and later expressions of concern by Mr Rosenlund at the new rules which required bank transactions to record the name of the remitter of funds) [the old trustee] continued to make distributions on demand, by the same route and obeying such rules of ‘confidentiality’ that Mr Rosenlund required.

21 The fact that the transfer of the trust was part of this course of conduct is established by the following evidence:

(a) There were meetings/telephone conversations between Mr Rosenlund and the trustees in early 2008 in which Mr Rosenlund explained that he would not co-operate with the tax investigation and/or that if he did co-operate he would not make full disclosure of the trust assets. In one conversation he asked the trustee about changing the name of the trust and was told that this would not make any difference. The Jersey trustee's note of another meeting states that Mr Rosenlund was surprised when he was told that the Danish authorities could obtain the trustee's files.

(b) The only reason the Jersey trustee retired was the defendant's request that it do so. This was discussed in a meeting between Mr Rosenlund and the Jersey trustees immediately before the request and followed by a letter actually requesting that it occur. In contrast to every time the trustee met Mr Rosenlund, the Attorney General has not found a note of this last meeting. This is suspicious. There would also seem to be no other explanation for the request to change trustees: in his request, Mr Rosenlund said he was entirely happy with the service provided by the Jersey trustee and despite changing the trustee did not change the manager of the portfolio which constituted the majority of the trust assets."

19 Notwithstanding the serious nature of these allegations, I must take them as correct, which I do, for the purpose of this strike-out exercise, but it needs to be reiterated that no challenge to the validity of the Mingo Trust is being made by the Attorney General or to the validity of the exercise of the power by the old trustee to appoint the new trustee as new trustee in its place. In his skeleton argument for the substantive proceedings, he says the fact that a trust is established for a criminal purpose cannot be used to invalidate it, and cites as authority the case of *Tinsley v Milligan* [1993] 1 AC 340.

20 However, the Attorney General argues that the fact that there is a valid trust does not prevent the statutory regime for the confiscation of assets from applying to transactions entered into by a trustee at the request of a criminal and for a purpose caught by that regime. That is particularly, although not exclusively, the case where the trustee knows or suspects what the criminal is up to. It cannot matter, he says, that the trustee has a choice whether to comply with the criminal's request. The statutory confiscation regime extends to "indirect" transactions by a criminal. Most such transactions would involve a step being taken by someone else who would have a choice whether to assist.

The Modified Law

21 As Crown Advocate Belhomme stressed repeatedly, we are dealing here with an issue of statutory construction. We start therefore with the Modified Law. Article 1 has the following relevant definitions:-

"gift caught by this Law" has the meaning given in Article 2(9) :

"making a gift" has the meaning given in Article 2(9) ;

"property" means all property, whether movable or immovable, or vested or contingent, and whether situated in Jersey or elsewhere;"

22 Article 2 defines "realisable property" in this way:-

"2 Meanings of expressions relating to realisable property

(1) In this Law, "realisable property" means –

(a) In relation to an external confiscation order in respect of specified property, the property that is specified in the order;

(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 Law, and

(iii) any property to which the defendant is beneficially entitled."

In this case, the Attorney General relies on Article 2(1)(b)(ii), namely that the trust fund of the Mingo Trust is property held by the new trustee, to whom Mr Rosenlund has indirectly made a gift caught by the Modified Law.

23 Article 2(9) and (10) relating to gift are in these terms:-

"(9) A gift (including a gift made before the commencement of the Enforcement Regulations), is caught by this Law if –

(a) it was made by the defendant at any time after the conduct to which the external confiscation order relates; and

(b) the Court considers it appropriate in all the circumstances to take the gift into account."

(10) For the purposes of this Law –

(a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a value that is significantly less than the value provided by the defendant; and

(b) in those circumstances, the preceding provisions of this Article shall

apply as if the defendant had made a gift of such share in the property as bears to the whole property the same proportion as the difference between the values referred to in sub-paragraph (a) bears to the value provided by the defendant."

The Attorney General's case in summary

24 The Attorney General's case is that whatever meaning the courts may have attributed to the word "gift" in other contexts, the Modified Law provides its own definition in Article 2(10) which is wide and not exhaustive. It begins:-

" *For the purposes of this Law* –

(a)The circumstances in which the defendant is to be treated as making a gift ***include …"***

(His underlining and emphasis added)

25 Mr Rosenlund and the new trustee concede that on the change of trusteeship, there was a transfer of the legal interest in the trust fund from the old trustee to the new trustee. Even though Mr Rosenlund, as a discretionary beneficiary, was not beneficially entitled to any part of that trust fund, the transfer that he caused is caught by Article 2(10), emphasis being placed by Crown Advocate Belhomme on the wording of that article in this way:-

"Article 2(10) of the Modified Law :

'(10) For the purposes of this Law –

(a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a value that is significantly less than the value provided by the defendant; and

(b) in those circumstances, the preceding provisions of this Article shall apply as if the defendant had made a gift of such share in the property as bears to the whole property the same proportion as the difference between the values referred to in sub-paragraph (a) bears to the value provided by the defendant' .

In that context, he emphasised this part of Article 1(1) of the Modified Law:-

"property" means all property, whether movable or immovable, or vested or contingent, and whether situated in Jersey or elsewhere."

(His underlining added)

26 Crown Advocate Belhomme argued that in order to succeed on this strike out application, the respondents would have to analyse at least the underlined parts of this definition. They would have to concentrate on the specific meaning of the word "gift" in this statute (which he repeated expressly provides its own definition).

27 A plain meaning of these underlined words, he said, would cover the transfer of the trust fund from the old to the new trustee. The definition of "gift" so construed, includes indirect transfers of property and applies to "all property" including contingent interests and encompasses part interests (shares) in property.

28 Crown Advocate Belhomme referred to the plain meaning rule of statutory interpretation as set out in s.195 of Bennion on Statutory Interpretations 6th edition:-

> ***"This section sets out the plain meaning rule, namely that where the legal meaning is plain it must be followed.*** For this purpose a meaning is 'plain' only where no relevant interpretative criterion (whether relating to material within or outside the Act or other instrument) points away from that meaning .
>
> ***In other words the plain meaning must be given, but only where there is nothing to modify, alter or qualify it."***

29 Crown Advocate Belhomme further submitted that the statutory context was of crucial importance in two ways:-

> (i) The first is the purpose that the "gifts" provision serves in preventing convicted criminals from dissipating their assets to avoid financial orders.
>
> (ii) The second is the role that "gifts" provisions play in recovering those assets. They are the only mechanisms by which the authorities can obtain assets which are held by people who are not parties to criminal proceedings. If they do not work properly, the confiscation regime would be critically undermined and convicted criminals could rely on technicalities and create transactions to avoid legitimate confiscation orders being satisfied.

30 He referred in this respect to the English Court of Appeal decision in *R v Richards* where Toulson LJ said this at paragraph 21:-

> ***"21 The underlying purpose of the tainted gift provisions of the [Proceeds of Crime Act (2002)] is plain.*** No self-respecting organised criminal would expect to be caught with high-value property in his own name readily identifiable, particularly since the enactment of legislation which is designed to strip such criminals of their profits. As a matter of standard practice he is likely to have taken steps to transfer high-value assets to nominee companies, offshore trusts or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed or he has served any

sentence of imprisonment which he may have had the misfortune to have imposed upon him. Parliament has sought to address that mischief in various ways, including the tainted gift provisions presently under consideration."

31 The rules of statutory interpretation pointed strongly, he said, to the Attorney General's position being correct but even if that were not the case, this application fell plainly within the category of case identified by Birt, Deputy Bailiff, in the case of *In the matter of the Esteem Settlement and the No 52 Trust* [2000] JLR 119 at page 127 (cited with approval by the Court of Appeal in *Trant*) where he said this at paragraph 127:-

> ***"It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out*** .
>
> …
>
> ***This is particularly so in an uncertain and developing field of law.*** This has been the subject of comment in a number of cases recently. An example is to be found in the judgment of Chadwick, LJ in *Farah v British Airways (5)*, ***in the Court of Appeal of England***.
>
> ***'The question raised on this appeal is whether the court can be certain at this preliminary stage in the action that – whatever, within the reasonable bounds of the claimant's pleaded case, the actual circumstances in which the incorrect and inaccurate information was provided might be held to be after a trial – the question of law raised in the action would be answered in the negative*** .
>
> ***As Lord Browne-Wilkinson observed in*** *Barrat v L B Islington* [1999] 3 WLR 83, ***unless it is possible to give a certain and affirmative answer to the question whether the claim would be bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial.*** Lord Browne-Wilkindon went on to point out that in an area of the law which was uncertain and emphasized the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (perhaps wrongly) to be true on the hearing of the application to strike out. There are observations to the like effect in Lord Browne-Wilkinson's speech in *X (minors) v Bedfordshire County Council* [1995] 2 AC at 741 ***and in the judgment of Bingham MR in*** *E (a minor) v Dorset County Council* ***at 694 in the same report.***'"

I note that the uncertain and developing field of law with which the Court was concerned in that case was lifting the veil of a trust so as to enable creditors of a settlor to have recourse to assets in a trust which was otherwise valid.

32 He concluded that there were very strong reasons for the Court not to make a decision with such potentially far reaching effects by using the summary procedure of strike-out, where the argument turns in part on interpretation of the statute. If the respondents' arguments

were correct, important types of transactions would not be caught by the Modified Law.

The respondents' case in summary

33 The respondents' case was that it was simply not possible for a change of trustees in relation to a validly created trust to constitute an indirect gift by one member of the discretionary class of beneficiaries for the purposes of the Modified Law. The Attorney General had equated “gift” with “transfer” and ridden roughshod over basic rules of trust and property law. An indirect gift must amount to a gift, which requires the transfer of the beneficial entitlement to assets from the donor, indirectly, to the donee. Mr Rosenlund had no beneficial entitlement in the trust fund to gift, whether directly or indirectly, to the new trustee.

Discussion

34 The starting point is the decision in *Tantular v AG* [2014] (2) JLR 25, where the applicants sought an order releasing trust assets from a *saisie judiciaire*. The Attorney General argued that the settlor, who had been charged with fraud and money laundering offences and who was a beneficiary of the trust, was ***“beneficially entitled”,*** as a beneficiary, to the assets of the trust, so that all of the trust assets were realisable under Article 2(1)(b)(iii) of the Modified Law. That argument was rejected by the Court. Quoting from the judgment of Birt, Bailiff, paragraphs 24–26:-

> ***“24 In our judgment, a discretionary beneficiary (whether technically a beneficiary of a discretionary trust or an object of a discretionary power of appointment) is not ‘beneficially entitled’ to the property which is the subject of the trust or power of appointment*** .
>
> ***25 One begins by noting that there is no special definition of ‘beneficially entitled’ in the modified 1999 Law.*** It follows that the legislature must have intended such expression to have its ordinary meaning and this to be ascertained by applying ordinary principles of property or trust law – see *R v May (5)* [2008] 1 AC 1028, ***at para. 48, per Lord Bingham of Cornhill: ‘The exercise of the jurisdiction to make confiscation orders’ involves no departure from familiar rules governing entitlement and ownership’; and see also Mitchell, Taylor & Talbot, Confiscation & the Proceeds of Crime, at para.*** III.037: ‘Whether a particular piece of property is realisable property is a question of civil property law.’
>
> ***26 For the purposes of this judgment, it is not necessary to draw a distinction between a beneficiary under a discretionary trust (in the strict sense) and the discretionary object of a power of appointment.*** We therefore propose for the sake of brevity to refer to a beneficiary of a discretionary trust to cover both categories. In our judgment, it is clear and abundantly well-established law that a beneficiary of a discretionary trust has no ‘entitlement’ to any of the trust property. His sole right is to

be considered as a potential recipient of benefit by the trustee and he also has a right to have his interest protected by a court of equity (see *Lord Wilberforce in Gartside v Inland Rev. Commrs.*(2) [1968] AC at 617."

35 Applying fundamental principles of trust law, the judgment continues at paragraphs 30–33:-

> ***"30 In our judgment, it is incompatible with fundamental principles of trust law to assert that a discretionary beneficiary of a trust is 'beneficially entitled' to all – or indeed any – of the assets of the trust.*** The true position is that he has no right to any of those assets unless or until the trustees decide in their discretion to make an appointment to him and he then becomes ***beneficially entitled only to such assets as are appointed to him.*** As Lord Reid said in *Gartside (2)* [1968] AC at 607:
>
> ***'But a right to require trustees to consider whether they will pay you something does not enable you to claim anything.*** If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered; you get it only because the trustees have decided to give it to you.'
>
> ***31 Crown Advocate Belhomme argued that because 'contingent property' was included in the definition of property, this covered the position of a discretionary beneficiary because his interest was contingent upon the exercise of the trustee's discretion in his favour.*** He further argued that art. 10(10) of the Trusts (Jersey) Law 1984 declared the interest of a beneficiary of a trust to be movable property. But, even if a discretionary beneficiary's interest can be described as 'contingent property', it is only the interest which could conceivably be so described, not the underlying property of the trust. Thus, all that could be made the subject of a saisie judiciaire would be a discretionary beneficiary's interest under the trust, which would mean his right to be considered for appointment by the trustee. That is completely different from the suggestion that he is beneficially entitled to all or any part of the trust property .
>
> ***32 In our judgment, consideration of well-established principles of trust law is determinative of the outcome in this case.*** Nevertheless, it is instructive to consider some of the possible consequences if the argument put forward on behalf of the Attorney General is correct .
>
> ***33 Crown Advocate Belhomme conceded (correctly) that there is no difference as a matter of law between the position of one discretionary beneficiary and another.*** The fact that one may be the settlor does not make his legal position different, nor does anything said in the letter of wishes."

36 Relevant to the Attorney General's submissions in relation to the importance of the statutory context of the Modified Law, is this passage of the judgment at paragraphs 40–42:-

> ***"40 Although it was not referred to by counsel, some support by analogy***

for the decision we have reached may be obtained from the decision of the Supreme Court in *Prest v Petrodel Resources Ltd* ***(4).*** That case concerned the provisions of s.24(1)(a) of the Matrimonial Causes Act 1973 , ***which enables a court, on granting a decree of divorce, to order that a party to the marriage should transfer to the other party any specified property, being property to which the first mentioned party 'is entitled, either in possession or reversion'.*** The judge at first instance found that the husband in that case was in complete control of certain companies and ordered the transfer of certain UK-situated real properties owned by the companies to the wife on the ground that in reality, because of his complete control of the companies, the husband was beneficially entitled to the properties.

41 That approach was roundly condemned by a majority of the Court of Appeal, and that decision was upheld by the Supreme Court. As Lord Sumption said [2013] 2 AC 415, at para. 37 – 'an entitlement' is a legal right in respect of the property in question.' The court held that the husband was not beneficially entitled to the properties; on the contrary, they belonged to the companies which were therefore beneficially entitled to them. The fact that it might be thought desirable for the Family Division of the High Court to have a wide power to achieve justice between divorcing parties did not entitle the court to depart from settled principles of property law. Lord Sumption said this (ibid, at para. 40) :

'I do not doubt that the construction of section 24(1)(a) of the [1973] Act is informed by its purpose and its social context, as well as by its language. Nor do I doubt that the object is to achieve a proper division of the assets of the marriage. But it does not follow that the courts will stop at nothing in their pursuit of that end, and there are a number of principled reasons for declining to give the section the effect that the judge gave it. In the first place, it is axiomatic that general words in a statute are not to be read in a way which 'would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness' .

42 In our judgment, the arguments put forward on behalf of the Attorney General in this case would require the court to over throw fundamental principles of the law relating to trusts and there is no indication whatsoever, let alone irresistible clearness, that this was the intention of the legislature. In this connection we would repeat the observation of Lord Bingham in *R v May* ***(5) that the exercise of the jurisdiction to make confiscation orders involves no departure from familiar rules governing entitlement and ownership."***

37 Crown Advocate Belhomme did not seek to argue that *Tantular* was wrongly decided in any way and therefore two propositions can be drawn from that case which are of direct relevance to the case before me:-

(i) Mr Rosenlund, as a discretionary beneficiary (and settlor) of the Mingo Trust, was not (and is not) beneficially entitled to the trust assets.

(ii) The exercise of the jurisdiction to make confiscation orders under the Modified Law can involve no departure from the familiar rules governing entitlement and ownership, unless the statutory provisions so provide ***"with irresistible clearness".***

38 I agree with Advocate Harvey-Hills that there is no special definition of ***"gift"*** under the Modified Law. It is to be given its ordinary meaning (as were the words ***"beneficially entitled"*** in *Tantular*) by applying the familiar rules governing entitlement and ownership. Article 2(10) extends that ordinary meaning to include transfers at an undervalue, because, as Advocate Kistler pointed out, such transfers (not being gratuitous) would not ordinarily constitute gifts. Article 2(10)(b) then goes on to stipulate the share in the property transferred at an undervalue which is to constitute a gift for the purposes of the Modified Law.

39 Gift is defined in the Oxford dictionary as "a transfer of property in a thing, voluntarily and without valuable consideration." This is consistent with *Pothier's* definition contained in his Traité des Donations entre vifs, Article préliminaire:-

"40 La donation entre-vifs est une convention par laquelle une personne, par libéralité, se dessaisit irrévocablement de quelque chose au profit d'une autre personne qui l'accepte .

41 D'ailleurs, la parfaite libéralité qui fait que le donateur préfère le donataire à lui-même pour la chose donnée est (comme nous l'avons dit) le caractère des donations entre-vifs ; or, c'est une suite de cette préférence que le donateur se dépouille au profit de son donataire. Ce dépouillement est donc de la nature des donations entre-vifs."

40 *Pothier* makes it quite clear that a gift requires the donor to have the power and freedom to divest himself entirely and irrevocably of the item and to do so for the benefit of the donee. If the benefit is not passed to the donee, the gift is simply not effective.

41 Advocate Harvey-Hills referred to the leading English case on gifts, *Re Rose (deceased)* [1952] 2 All ER 959, which concerned the transfer of shares from a husband to a wife, with the second block of shares to be held on trust. The transfers and settlement were executed prior to 10 th April. 1943, but the transfer of the shares was not registered until 13 th June, 1943, which had rendered the shares liable to estate duty. The principal question for the court was whether the donor had made an effective gift of the shares, notwithstanding that the legal title in the shares had not been transferred. Roxburgh J said at Page 962H:-

""Gift" seems to me to involve transfer without consideration of a beneficial interest. "Gift of property" seems to me to involve transfer of the

> whole beneficial interest, as distinct from a gift of an interest in property. There must be an intention to give. But equity requires more than that, and if the giver has not done all that it requires, the gift is "imperfect". Now equity might have adopted the principle that, while it will perfect an equitable title acquired for value, it will never perfect an equitable title acquired without consideration. In that case, no gift unaccompanied by the legal title would be an effective gift, but, once it has been to be conceded that a gift can be effective before the legal title is transferred, I can see no reason why equity should not enforce the effective gift and enforce it in its entirety."

42 Roxburgh J then went on to find that if the donor had done everything in his power to transfer the shares, the gift would be regarded as effective, notwithstanding that legal title had not been transferred, because the share transfer had not been registered (Page 963).

43 It is implicit that you can only make a gift of something which you own or to which you are entitled and the Attorney General does not argue that Mr Rosenlund was beneficially entitled to the trust fund of the Mingo Trust. The relevant transfer, he says, is the transfer by the old to the new trustee, in which both legal and (he argues) beneficial interests in the trust assets passed.

44 *Rose* was concerned, as Crown Advocate Belhomme said, with the question of whether the donor had divested himself of the whole of his interest in shares to the donee for the purpose of tax legislation, where all that remained to be done was for the company itself to register the transfer. It was held that where the donor had done all that was in his power to effect the gift, there had been a gift for the purposes of that legislation. The beneficial interest had passed and therefore the fact that the legal interest had not been transferred was irrelevant. That question, said Crown Advocate Belhomme, did not arise in this case. The relevant transaction in this case is the transfer by the old trustee to the new trustee and there can be no doubt that the whole of the old trustee's interest in the trust property, both legal and beneficial, had passed to the new trustee. *Rose*, he said, did not address the question of whether one can have a gift where a transferor holds property subject to other rights and transfers that property so that the transferee takes the property subject to similar rights.

45 The gift here, said Crown Advocate Belhomme, was this transfer between the old and the new trustee. The new trustee had to accept that it had obtained something of value to it as the result of the transfer. The trust industry, he said, is based on the fact that administering a trust produces profits for the trust company. The new trustee also obtained a limited beneficial interest in the trust itself in relation to its right to charge remuneration and its right to indemnity. No value was provided to the old trustee in exchange for these benefits and it follows that the transfer between the old and new trustees was, therefore, a gift.

46 The respondents countered that there was no conceivable way a transfer of assets from the old to the new trustee could be described as a gift for the following reasons:-

(i) A change in the trusteeship effectively changed the legal title to the trust property but importantly, it does not alter the beneficial ownership of the property which remains the same, i.e. with the beneficiaries as a whole.

(ii) A trustee who retires is bound by the terms of the trust deed and by Article 34(1) of the Trusts (Jersey) Law 1984 ("the Trusts Law") to transfer the trust assets to the new trustee. There is no question of the transfer being voluntary.

47 Crown Advocate Belhomme argued that the fact that the old trustee exercised the power to appoint the new trustee was irrelevant. It was also irrelevant that the old trustee was the only person who could have actually carried out that transaction. The Attorney General's case is that when exercising that power, the old trustee was acting to assist Mr Rosenlund in avoiding Danish tax issues with knowledge of what he was up to. It therefore became an instrument in Mr Rosenlund's plan. The fact that the retiring trustee could have said no is irrelevant. The indirect gift provisions are not confined to circumstances of duress by the defendant. They must apply to situations where the defendant merely requests the help of another person who is free to refuse to cooperate. Any other decision would, he said, emasculate the provisions.

48 Accepting, however, as I do for the purposes of this exercise, that the old trustee was complicit in Mr Rosenlund's intentions to conceal the trust assets from the Danish authorities and had retired and appointed a new trustee in Guernsey at his request, it comes down to whether, on these facts, the resulting transfer of the trust assets from the old to the new trustee comes within the definition of an indirect gift by Mr Rosenlund to the new trustee for the purposes of the Modified Law.

Decision

49 The provisions of the Modified Law with which we are concerned relate to the enforcement of external confiscation orders by way of the imposition of a *saisie judiciaire* over the realisable property of a defendant in Jersey.

50 A defendant's realisable property is defined under Article 2(1)(b) as meaning (i) property held by him or (iii) to which he is beneficially entitled, neither of which apply here. Mr Rosenlund does not hold property in Jersey and there is no property in Jersey to which he is beneficially entitled. We are concerned with (ii) namely property held by a person (the new trustee) to whom Mr Rosenlund has indirectly made a gift "caught by" the Modified Law.

51 In this case, the gift claimed by the Attorney General is not a gift of property to which Mr Rosenlund was beneficially entitled or which was held by him. It is the transfer of the assets of the Mingo Trust made at Mr Rosenlund's request by the old trustee to the new trustee on

12 th November, 2008, and in the context of the factual matrix set out by the Attorney General which are to be accepted for the purposes of this exercise.

52 Whether such a transfer is "caught by" the Modified Law comes down to the proper interpretation to be placed upon the relevant provisions, in particular Articles 2(9) and (10), applying firstly the appropriate rules of statutory interpretation and taking into account the statutory context and secondly, the familiar rules governing entitlement and ownership, save to the extent that the wording of the Modified Law makes its contrary intention irresistibly clear.

53 I can see no prospect of the Attorney General succeeding in persuading the Court to his interpretation of the Modified Law, which in my view is not supported by the language used, let alone irresistibly clear.

54 As I said earlier, the word gift is not given any special meaning and therefore has to be given its ordinary meaning, save that under Article 2(10) that ordinary meaning has been extended to include transfers at an undervalue, which would not otherwise ordinarily be considered to constitute gifts. Crown Advocate Belhomme has taken that extension and placed emphasis on the words set out in paragraph 25 above and uses that emphasised wording to justify extending the definition of gift to the transfer of trust assets to which Mr Rosenlund has no beneficial entitlement.

55 There are three reasons why, in my view, that emphasised wording simply cannot bear the weight he seeks to place upon it:-

> ***"Position of outgoing trustee***
>
> ***Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control."***

That obligation to surrender the trust property is subject to the right of the retiring trustee under Article 34(2) to be provided with reasonable security for liabilities it has incurred as trustee.

(i) The property transferred, the trust assets, is property to which Mr Rosenlund has no beneficial entitlement – it was not and is not his property to give, directly or indirectly and whether at full value or at an undervalue.

(ii) There is no element of gift in the transfer of the trust assets as between the old and the new trustee. That transfer takes place pursuant to an obligation on the part of the old trustee both under the terms of the trust deed and under the provisions of Article 34(1) of the Trusts Law which provides as follows: -

(iii) The emphasised words have to be considered within their context, which is that

they form part of a provision which, under Article 2(10)(a), extends the ordinary meaning of gift to transfers by the defendant at a significant undervalue and which, under Article 2(10)(b), stipulates the share in the property transferred at an undervalue which is to constitute a gift by the defendant for the purposes of the Modified Law. The interpretation placed upon the emphasised words by Crown Advocate Belhomme in my view ignores that context.

56 Crown Advocate Belhomme argued that it was common for a change of trustees to take place without any consideration moving from the new trustees to the old ones and if Jersey law were not to recognise such a transaction as constituting a valid gift, the consequences for the finance industry would be significant. In fact, he said, the proposition only had to be stated for its lack of inherent merit to be seen. I can only disagree.

57 The concept of a gift, something made voluntarily from your own assets, can have no application to such a transfer. Subject to its right to be provided with reasonable security, it is not within the power of a trustee, who has retired, to decide whether or not to transfer the trust assets to the new trustee—it is obliged to do so.

58 A trustee has certain rights in relation to the trust property, such as the right to remuneration (in the case of a professional trustee) and the right to be reimbursed for expenses and liabilities reasonably incurred in connection with the trust (Article 26 of the Trusts Law), but subject to such rights, the extent of a trustee's interest in the trust estate is summarised in Article 54 of the Trusts Law, which provides that, save in circumstances where a trustee is also a beneficiary of the same trust:-

> ***"(1) […]***
>
> ***(a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and***
>
> ***(b) such property shall not be deemed to form part of the trustee's assets."***

59 Pursuant to Article 54(4) of the Trusts Law:-

> ***"when a trustee becomes insolvent or upon distraint, execution or any similar process of law being made, taken or used against any of the trustee's property, the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or herself has a claim against the trust or has a beneficial interest in the trust."***

60 It is clear, for example, that a confiscation order made against a trustee, which would equate to a distraint under Article 54(5), would not extend to assets it holds as trustee of a trust. In addition, upon a declaration *en désastre* being made in respect of a debtor, all of the debtor's property shall vest in the Viscount with the exception of "property held by the

debtor in trust for any other person" (see Article 8 of the Bankruptcy (Désastre)(Jersey) Law 1990).

61 Upon retiring as trustee of the Mingo Trust, the old trustee was not able, therefore, to give away the assets of the Mingo Trust—it was, as I have said and subject to its right to be provided with security, obliged to transfer them to the new trustee, its only interest being in the proper performance of the trust. The beneficial interests in the trust assets remain exactly the same before as well as after the transfer.

62 I appreciate fully the importance of this legislation preventing convicted criminals from dissipating their assets to avoid financial orders and recovering such assets, but extending the definition of gift to include transfers of property to which the defendant has no beneficial entitlement would be a case of the Court stopping at nothing in pursuit of those ends and departing from the familiar rules governing entitlement and ownership. In order to conform with such rules Crown Advocate Belhomme would have to argue that because one of the beneficiaries of a valid discretionary trust, against whom a confiscation order has been made, persuades the trustee to retire in favour of a new trustee in another jurisdiction, for the purpose of avoiding the possible consequences of that order, the trusts upon which the assets are held are varied so as to deprive the other (innocent) beneficiaries of their rights to be considered for benefit. It is a similar argument to that put in *Tantular*, the consequences of which Birt, Bailiff, considered at paragraphs 34–37:-

> ***"34 He further accepted that the consequence of his argument is that the entire trust fund can be made subject to a saisie and in due course confiscated under a confiscation order if any of the discretionary beneficiaries commits a crime in circumstances where an external confiscation order could be made against that beneficiary*** .
>
> ….
>
> ***36 In*** *R v Waya* ***(6), the Supreme Court considered whether in some circumstances the making of a confiscation order could amount to a breach of art. 1 of the First Protocol of the European Convention on Human Rights, which provides*** :
>
> ***'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.*** No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law .
>
> ***The preceding provisions shall not, however, in any impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'***
>
> ***The Supreme Court emphasized that art. 1 requires a balance to be struck and imports the requirement that there must be a reasonable relationship***

of proportionality between the means employed by the State in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. It went on to hold that the mandatory provision of the relevant English statute (which required the court to make a confiscation order) had to be read down so as to provide that the court should not make a confiscation order which would be disproportionate and therefore in breach of art. 1 .

37 In our judgment, to make a confiscation order in respect of the whole of a trust fund merely on the ground that the offender is a discretionary beneficiary would be disproportionate in that it would remove any possibility of the other (innocent) beneficiaries benefiting from the trust assets. It would therefore amount to a breach of art. 1 of Protocol 1."

63 Crown Advocate Belhomme responded to this by pointing to the provisions of Article 2(9)(b) of the Modified Law, which allows the Court not to take into account a gift caught by the law, if it considers it appropriate to do so. Thus, Article 2(10) having ***"caught"*** the transfer of the entirety of the trust assets from the old trustee to the new trustee, the Court would have a discretion not to take that ***"gift"*** into account, having considered all the circumstances.

64 Crown Advocate Belhomme made a similar argument in *Tantular*, to which the Court gave this response at paragraphs 38 – 39:-

"38 Crown Advocate Belhomme responded by referring to Art. 39(1)(c) of the modified 1999 Law, which provides that the court may register an external confiscation order if "it is of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice". He submitted that the provision could be used to avoid the making of a disproportionate order. Thus, the court might refuse to enforce an external confiscation order where the only ground relied upon was that the person against whom the external confiscation order had been made was a beneficiary of a discretionary trust if it considered on the particular facts of the case that such an order would be disproportionate .

39 We accept that art. 39(1) does give the court an ability to refuse to register an external confiscation order, but it is fairly limited and does not seem to us to provide a convincing response to some of the potential consequences of the interpretation contended for by Crown Advocate Belhomme."

65 The difficulty lies in extending the definition of a gift to transfers of assets in which Mr Rosenlund has no beneficial entitlement in the first place, cutting across the familiar rules governing entitlement and ownership and it is of little assistance as an aid to interpretation that the Court then has the power not to take that gift into account.

66 Crown Advocate Belhomme described the gift provisions of the Modified Law as being draconian, to be construed strictly against a defendant, citing the English Court of Appeal decision in *R v Smith* [2013] EWCA Crim 502, where the defendant had given away some of her money to members of her family which she said was irrecoverable. The appeal addressed the question of when ***"tainted gifts"*** within the meaning of section 9(1)(b) of the Proceeds of Crime Act 2002 should be regarded as having no value. It was held that the valuation of tainted gifts was governed by a specific statutory regime which did not link their value to the ability to recover them, even though it contemplated the situation where the recipient of the gift had parted with it. The point of including assets which a defendant had given away when assessing the available amount was to prevent him from dissipating his assets by doing so, and it would therefore defeat the object of including tainted gifts in section 9(1) if they were to be treated as of no value if they could not be recovered.

67 It may be right to describe that statutory regime (and ours) as draconian, but I could find no reference in the judgement in *R v Smith* to those statutory provisions having to be strictly construed against a defendant. The evidence upon which the Attorney General relies shows that Mr Rosenlund's request to transfer the Mingo Trust to Guernsey was for the purpose of avoiding the confiscation order and, said Crown Advocate Belhomme, if his purpose had succeeded, assets would have been deliberately hidden from the Danish authorities. However, that assumes that these assets were Mr Rosenlund's to hide. In the case of *R v Smith* there was no question that the assets the defendant gave away were hers to give.

68 Central to the Attorney General's case is the control exercised by the respondent over the old trustee, and it is that element of control which he says makes the transfer by the old trustee to the new trustee an indirect gift by Mr Rosenlund which is caught by the Modified Law, but the Attorney General falls short of alleging a sham. This is a half-way house which has no place under settled principles of trust law. Quoting from the judgment of Birt, Deputy Bailiff in *In Re Esteem Settlement* [2003] JLR 188 at paragraph 110: -

> ***"110 Ultimately, in relation to trusts, it seems to us that the court's task if quite a simple one.*** It must first ascertain the trusts upon which the trustees hold the assets. In the case of a sham the court will find that the trustees in truth hold the assets as bare trustees for the settlor; in the case of a voidable transfer of an asset to the trustees, the asset will not have been held upon the terms of the relevant trust. In each of these cases there is no question of, or need for, piercing the veil. In each case the assets are held by the trustees on bare trust for the settlor and are therefore available to his creditors. But once it is accepted that the assets are held upon the trusts set out in the trust deed, the court's duty is to enforce those trusts subject only to the exceptions contained in para. (2) of art. 10 of the 1984 Law. In other words, either the assets, either the assets are held upon the terms of the trust deed or they are not. We think that the plaintiffs confused the position when they referred repeatedly during the course of their submissions to the fact that the legal position should be disregarded because the assets were "in truth" or "in substance" the assets of the settlor and should

> therefore be available to his creditors. That is true if there is a sham, the trust is invalid through application of donner et retenir ne vaut or certain assets purportedly gifted to the trust have not in fact been so validly gifted. But if that is not the case and if, as the plaintiffs accept for the purposes of these arguments, there is a valid trust, the assets are held upon the terms of those trusts. If the settlor then changes his mind and asks the trustees to ignore the terms of the trust and deal with the trust assets in accordance with his directions, for the trustees to do so would be a breach of trust. The nature of the obligations created by the trust cannot be affected by a subsequent change of mind by the settlor even if acquiesced in wrongly by the trustees. Such misconduct by the trustees and/or the settlor cannot change the provisions of the trust and cannot somehow transfer the beneficial interest in the trust assets to the settlor. As Mr Clyde-Smith put it, in the case of a trust there is no halfway house between sham and validity."

69 This is a valid trust. Acting in accordance with Mr Rosenlund's directions may constitute a breach of trust, but it would not vary the trusts and provisions upon which the trust assets are held or alter the beneficial interests of the trust and somehow transfer the same to Mr Rosenlund. The Attorney General does not dispute the validity of the exercise by the old trustee of the power to appoint the new trustee; indeed, he relies upon it. If that were held to be invalid, then of course there would have been no "gift" by the old trustee to the new trustee of the trust assets.

70 On the issue of control, Crown Advocate Belhomme placed some reliance on the very recent case of *Mezhdunarodniy Promyshlenniy Bank & Others v Pugachev* [2016] EWHC 248 (Ch). This concerned an application to discharge a world-wide freezing order over trustees of a number of trusts imposed at the instance of a Russian bank, seeking to enforce a judgment it had obtained against Mr Pugachev for some £800M, who had "made off with or caused a loss of, a lot of the Bank's assets". The order had been made under what is known as the *Chabra* jurisdiction, that is to say, orders against a person who is not a defendant in the action to restrain dissipation of assets where the real defendant is said to have a sufficient interest in those assets to justify the making of the order, whether on the basis of some sort of proprietary interest or at least control.

71 On the particular facts of that case, which Mann J found all pointed to *de facto* control being exercised by Mr Pugachev, the continuation of the world-wide freezing order was held to be justified. In the context of the Mingo Trust, I have assumed, for the purposes of the application, that Mr Rosenlund did exercise *de facto* control over the old trustee to the extent alleged by the Attorney General, but I am not dealing here with the freezing of the trust assets pending final hearing. The decision in *Pugachev* is of no assistance in deciding whether a change of trustee of a valid trust, at the request of a beneficiary who is the subject of a confiscation order, comes within the definition of an indirect gift by him to the new trustee at an undervalue for the purposes of Article 2(10) of the Modified Law.

72 Crown Advocate Belhomme gave a number of examples of how the purposes of the

Modified Law would be undermined if the Attorney General's interpretation of these provisions was not accepted. It would mean, he said, that a person in prison on remand could make a gift by persuading a friend visiting him in prison to deal with property to the detriment of the authorities. It would also mean that a person who gave property to an associate and later asked the associate to transfer the property on to another would not be caught by the Modified Law. These, he said, would be absurd results.

73 The gifts in both examples would be caught, in my view, if the person in prison had gifted his property to a friend or had subsequently asked that friend to transfer that property to another. In the case with which I am dealing, the property was held by a trust created before Mr Rosenlund's criminal conduct took place and he was not beneficially entitled to it, whatever influence he may have had over the trustee. He had nothing to give directly or indirectly.

74 In the quotation from the case of *Richards* to which Crown Advocate Belhomme drew my attention and as set out in paragraph 30 above, the Court of Appeal's reference to the standard practice of criminals of transferring high value assets to a nominee companies, offshore trusts or trusted associates who could be looked upon to harbour those assets until he sees the danger has passed, was premised upon those assets being the criminal's assets in the first place. In that case, the defendant, whilst he was on the run, had transferred 5 properties which he owned to the appellant, a friend. The appellant was convicted of money laundering and the case was concerned with whether the value of that tainted gift could be sought from both the defendant under the confiscation order against him and the appellant under the confiscation order against him. Logically the Court of Appeal found it could only be claimed once under the confiscation order made against the defendant, the appellant being a mere nominee, whose legal title was of no value.

75 In conclusion, it is plain and obvious to me that the Attorney General's argument cannot succeed. The assets of the Mingo Trust were gifted into that trust before the criminal conduct of Mr Rosenlund commenced (gifts which pursuant to Article 2(9)(a) are not caught by the Modified Law) and the validity of the trust is not challenged by the Attorney General. On 11 th November, 2008, (the day before the old trustee retired) Mr Rosenlund had no beneficial entitlement in those assets to gift, whether directly or indirectly, and if an application for a *saisie judiciare* had been made on that date, it would not have caught those assets, as Crown Advocate Belhomme concedes. At that point the assets of the Mingo Trust were outside the confiscatory regime. The fact that on the next day the old trustee retired and appointed a new trustee in its place (transferring the trust assets to that new trustee) cannot bring the trust assets into the confiscatory regime.

76 To attempt to use Article 2(10), which extends the ordinary meaning of “gift” to include transfers by the defendant at an undervalue, to catch a transfer of assets to which Mr Rosenlund has no beneficial entitlement and which are outside the confiscatory regime, is to place upon Article 2(10) an interpretation which it simply cannot bear and to ride roughshod over the familiar rules governing entitlement and ownership. For such a transfer

to be caught would require wording which is irresistibly clear. There is no such wording.

77 I conclude that to allow the proceedings to continue would be an unnecessary waste of the Court's time and the parties' costs because at the end of any trial, the result would inevitably be that the argument would fail. Though I am not dealing here with the development of our customary law, I accept Crown Advocate Belhomme's submission that interpretation of the Modified Law by the courts is a developing field and I have therefore been cautious in my approach.

78 The respondents therefore succeed in their application and I will order accordingly.