

Tan Chi Fang; Jason Ray Tantular; Sandy Tantular; Michael Tantular v HM Attorney General

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2014] JRC 128

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff **and** Jurats Fisher **and** Olsen

IN THE MATTER OF THE REALISABLE PROPERTY OF ROBERT TANTULAR

Between
Tan Chi Fang
Jason Ray Tantular
Sandy Tantular
Michael Tantular
Applicants

and
HM Attorney General
Respondent

Advocate T. V. R. Hanson **for the Applicants.**

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

Advocate H. E. Ruelle **for the Trustee.**

Advocate D. R. Wilson **for the Viscount.**

Authorities

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

Proceeds of Crime (Jersey) Law 1999.

R v May [2008] 4 All ER 97 .

Re Kaplan [2009] JLR 088 .

In re Illinois District Court [\[2001\] JLR 160](#) .

Gartside v Inland Revenue Commissioners [\[1968\] AC 553](#) at 617.

Snell's Equity 32nd Edition.

Lewin on Trusts (18th Edition).

Matthews and Sowden, The Jersey Law of Trusts.

Trusts (Jersey) Law 1984.

R v Waya [\[2013\] 1 All ER 889](#) .

European Convention on Human Rights 2000.

Prest v Prest [\[2013\] 4 All ER 673](#) .

Matrimonial Causes Act 1973.

Court of Appeal [2013] 1 All ER 759.

AG -v- Smale [\[2003\] JRC 099A](#) .

Trust — application for an order that all assets acquired by the trust be released from saisie judiciaire.

Bailiff

THE

- 1 This is an application by the applicants for an order that all assets that are identifiable in the Jasmine Investment Trust ("the Trust") as being acquired by the Trust prior to a certain date should be released from a *saisie judiciaire* over the assets of the Trust which was granted ex parte by the Bailiff on 9th August, 2013, following an application by the Attorney General on behalf of the Ministry of Law and Human Rights of the Republic of Indonesia.
- 2 The application raises an important point as to whether assets of a discretionary trust fall to be considered as 'realisable property' of a person who is a discretionary beneficiary of such a trust.

The Background

- 3 It is not necessary to record the factual background in any detail. The matters relevant to the particular issue with which we are concerned can be summarised as follows.
- 4 Mr Robert Tantular ("the settlor") was the President of an Indonesian Bank called P.T. Bank Century Tbk ("Bank Century"). In September 2009 he was convicted of certain banking offences in relation to Bank Century and, following various appeals, was sentenced to nine years' imprisonment.
- 5 He has now been charged with fraud and money laundering offences in relation to his position as president of Bank Century. These new proceedings had not been concluded at the date of the hearing before us. On 4th February, 2010, in connection with those proceedings, the Central Jakarta District Court issued a restraint order in respect of the assets of the Trust. The Ministry of Law and Human Rights in due course sought the assistance of the Attorney General to obtain a *saisie judiciaire* in Jersey and, as already stated, such an order was granted on 9th August, 2013. The *saisie* was in the normal form in that it was granted in respect of the realisable property of the settlor situated in Jersey, but it was also expressed specifically to extend to the assets of the Trust.
- 6 The Trust was established by deed dated 17th June, 2004, between the settlor and ING Trust Company (Jersey) Limited as trustee. The present trustee is BOS Trust Company (Jersey) Limited. The beneficiaries were listed as the settlor, his wife (the first applicant), his three children (the second to fourth applicants) and his wife's younger sister ("the sister-in-law"). They remain the only beneficiaries although there is power to add to the class.

- 7 The Trust is a discretionary trust governed by Jersey law. It is in conventional form. Thus there is a power of appointment of capital and income in favour of any one or more of the beneficiaries. Subject to any such appointment, the trustee may pay or apply the capital or income to or for the benefit of any one or more of the beneficiaries as it may in its discretion think fit failing which there is a trust to accumulate the income. Finally, at the expiry of the trust period, which is 78 years (or such earlier day as the trustee may declare) the trust fund is to be held upon trust for such one or more of the beneficiaries in such shares or proportions as the trustee may determine, in default of which upon trust for the individual beneficiaries then living in equal shares.
- 8 It is said that the original assets of the Trust were first settled into a New Zealand trust on 13th March, 2003. On 17th June, 2004, all the assets of the New Zealand trust were transferred to the Trust.
- 9 It appears that the assets of the Trust are essentially as follows. The Trust owns the entire share capital of a company called Perennial Investment Holdings Limited ("Perennial"). Perennial was contributed to the Trust in 2004. Perennial owns a property in Singapore which it acquired in 2000. There is a mortgage over the Singapore property with Credit Suisse, Singapore, in the sum of approximately S\$2.4m. There is however, an equity in the property of over S\$1m.
- 10 The Trust also owns a BVI company called Jonzelle Limited which was incorporated on 19th August, 2004. In 2005 it purchased what is now the home of the settlor's family in Singapore. Again, there is a mortgage with Credit Suisse which has a balance of some S\$4.4m, leaving a substantial equity in the property. We were informed that Credit Suisse has called in the mortgages on both properties with the consequence that the family is at risk of being evicted from the family home.
- 11 Finally, there is a third company which has certain investments, cash balances and insurance policies. The company is said to have comparatively little value.
- 12 There is a letter of wishes dated 19th June, 2004, from the settlor to the original trustee. The letter recognises that the settlor's wishes are not legally binding upon the trustee and that it grants no rights to any of the potential beneficiaries. However, it expresses the hope that the trustee will take his wishes into account when exercising any discretionary powers. The letter goes on to say that, during his lifetime, the settlor would like the trustee to consider him as the principal beneficiary. After his death, he wished the trust fund to be held for his wife and children in specified shares, passing to grandchildren in default. It went on to say that, should all his children die without issue, he would wish the trust fund to be held for the sister-in-law.

The law

- 13 The Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008 (“the 2008 Regulations”) modify the Proceeds of Crime (Jersey) Law 1999 (“the 1999 Law”) as it applies to external confiscation orders i.e. confiscation orders made by courts outside Jersey. Schedule 2 of the 2008 Regulations sets out the 1999 Law in its modified form (“the modified 1999 Law”) and the relevant provisions for our purposes are as follows:–

“15 Cases in which saisies judiciaires may be made

(1) The powers conferred on the Court by Article 16 are exercisable where –

(a) proceedings have been instituted against the defendant in a country or territory outside Jersey and –

(i) the proceedings have not been concluded, and

(ii) either an external confiscation order has been made in the proceedings, or it appears to the Court that there are reasonable grounds for believing that such an order may be made in the proceedings; or

(b) it appears to the Court that proceedings are to be instituted against the defendant in a country or territory outside Jersey, and that there are reasonable grounds for believing that an external confiscation order may be made in those proceedings.

(2) Where the Court has made an order under Article 16 by virtue of paragraph (1)(b), the Court shall discharge the order if the proceedings have not been instituted within such time as the Court considers reasonable.

16 Saisies judiciaires

(1) The Court may, subject to such conditions and exceptions as may be specified in it, make an order (in this Part referred to as a saisie judiciaire) on an application made on behalf of the government of a country or territory outside Jersey.

(2) An application for a saisie judiciaire may be made ex parte to the Bailiff in chambers.

(3) A saisie judiciaire shall provide for notice to be given to any person affected by the order.

(4) Subject to paragraph (5), on the making of a saisie judiciaire –

(a) all the realisable property held by the defendant in Jersey shall vest in the Viscount;

(b) any specified person may be prohibited from dealing with any realisable property held by that person whether the property is described in the order or not;

(c) any specified person may be prohibited from dealing with any realisable property transferred to the person after the making of the order,

and the Viscount shall have the duty to take possession of and, in accordance with the Court's directions, to manage or otherwise deal with any such realisable property; and any specified person having possession of any realisable property may be required to give possession of it to the Viscount.

(5) ...” [Emphasis added]

14 Article 2 of the modified 1999 Law deals with the meaning of “***realisable property***” and the relevant provisions are as follows:–

“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; 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 Law, and

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

...

(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.”

15 Finally, in Article 1(1), dealing with interpretation, the following definition is to be found:–

““property” means all property, whether movable or immovable, or vested

or contingent, and whether situated in Jersey or elsewhere.”

This application

- 16 The applicants do not suggest that the conditions set out in Article 15 of the modified 1999 Law for the grant of a *saisie judiciaire* are not satisfied. Thus proceedings against the settlor have been instituted in Indonesia for offences of fraud and money laundering, those proceedings have not been concluded, and there are reasonable grounds for believing that an external confiscation order may be made in those proceedings.
- 17 What Advocate Hanson focussed on, on behalf of the applicants, was that most of the assets of the Trust — and in particular the two properties in Singapore — do not constitute **“realisable property”** and cannot therefore properly be made the subject of a *saisie judiciaire* because, under the terms of Article 16(4), a *saisie judiciaire* can only be applied to realisable property. He contended that these assets were contributed to the Trust before any alleged criminal conduct began and, therefore, were not gifts caught by the modified 1999 Law (see Article 2(9) quoted above). He further contended that the fact that the settlor was a beneficiary of the Trust did not of itself mean that all the assets of the Trust were realisable property. In this respect he submitted that a beneficiary of a discretionary trust was not ‘beneficially entitled’ to the property subject to the trust.
- 18 In his ex parte application to the Bailiff and in his submissions before us, Crown Advocate Belhomme asserted that the assets of the Trust are realisable property on two grounds:—
- “It is alleged that the settlor made certain gifts to the Trust after the date of commencement of his alleged criminal conduct. The assets of the Trust are therefore realisable property under Article 2(1)(b)(ii) to the extent of such gifts.
- More generally, as the settlor is a beneficiary of the Trust, he is therefore ‘beneficially entitled’ to the assets of the Trust so that all the trust assets are realisable property as falling within Article 2(1)(b)(iii) of the modified 1999 Law.”
- 19 As to (i), the Court gave directions at the conclusion of the hearing for the obtaining of further information concerning the extent of gifts into the Trust and maintained the *saisie judiciaire* over all the trust assets pending the outcome of such further investigations regardless of its decision in relation to (ii). Having heard argument, the Court reserved its decision in relation to (ii) and this judgment contains our decision on that aspect.

The Attorney General's submissions

- 20 Crown Advocate Belhomme's submissions were simple. He began by referring to *Re Kaplan* [2009] JLR 088 where Bailhache, Bailiff made it clear that, when interpreting the 1999 Law, the Court should adopt a purposive approach. Thus at paragraph 18 of his

judgment the Bailiff quoted with approval from a passage from an earlier case of *In re Illinois District Court* [\[2001\] JLR 160](#) at para 10 as follows:–

“It is true that this is not directly in point, but the passage does nonetheless serve to emphasize (a) that the whole purpose of the legislation is to curb the menace of drug trafficking; and (b) that in furtherance of that end it is undesirable for the court to adopt a restrictive view.”

The Bailiff then went on at paragraph 19 of *Kaplan* as follows:–

“... We agree that the court should try to give effect to the purpose of the legislation. A passage from Maxwell on the Interpretation of Statutes, 12th ed., at 201 (1969), cited by Mr Belhomme in Batalla-Esquivel, seems equally relevant in this case:

“Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act, which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results.”

Clearly, the words of the statute must be given their proper meaning.

Nonetheless, the language employed should, having regard to the purposes of the 1999 Law, be construed in such a way as to accommodate the widely different procedures in other jurisdictions designed to penalize the concealing or laundering of the proceeds of serious crime. ...”

- 21 Crown Advocate Belhomme then turned to the definition of **“property”** in Article 1(1) of the modified 1999 Law, namely **“all property, whether movable or immovable, or vested or contingent and whether situated in Jersey or elsewhere”** [emphasis added].
- 22 He went on to refer to Article 2(1)(d) of the modified 1999 Law, which includes in the definition of realisable property “any property to which the defendant is beneficially entitled”. He submitted that, adopting the purposive construction envisaged in *Re Kaplan*, a combination of these two provisions was wide enough to encompass the contingent beneficial interest of a beneficiary of a discretionary trust and that the settlor had a contingent beneficial entitlement to the entirety of the assets of the Trust.
- 23 In support, he pointed to two examples (one on 24th February, 2009, and one on 22nd August, 2011,) where a *saisie judiciaire* had been granted in respect of the assets of a trust of which the offender was a discretionary beneficiary. However, these were uncontested ex parte applications. Furthermore, all that was available to this Court was the Act of the court in each of those cases, which did not of course explain the background. We cannot therefore draw any assistance from these two examples.

Discussion

- 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 is to be ascertained by applying ordinary principles of property or trust law (see *R v May* [2008] 4 All ER 97 per Lord Bingham at para 48 "The exercise of [the jurisdiction to make confiscation orders] involves no departure from familiar rules governing entitlement and ownership"; and see also Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime at 3.037 "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 Revenue Commissioners* [1968] AC 553 at 617).
- 27 A convenient description of the position is to be found in Snell's Equity 32nd Edition, 647 as follows:—

"22–004 (a) The trustee's duty. In a discretionary trust, the beneficiaries have no right to any defined part of the income or capital of the trust fund. The settlor defines a class of beneficiaries and gives the trustee a power to select which of them should receive appointments from the fund and what the amount should be. The discretionary trust differs from a power of appointment in that the trustee must exercise his power of selection. He must generally distribute the income as and when it becomes available. If he does not make the distribution at the due time, the power is not extinguished so that he can distribute later. He had no power to bind himself for the future.

22–005 (b) Nature of the beneficiary's interests. The beneficiary's only right is to be considered for the exercise of the trustee's discretion and to compel due administration of the trustee's duties. He has no more than a hope that the discretion will be exercised in his favour. Except for any money that the trustee has already appointed to him, he therefore has no interest that his creditors or assigns could claim against. His interest is not alienable to another person.

But the beneficiary's interest is nonetheless proprietary in character since

it gives him a stronger equitable title to the trust property than any third party with no entitlement to it at all. He would have a sufficient interest to trace and recover any money that the trustee transferred in breach of trust. But his only right would be to compel the third party to reinstate the misapplied money to the trust fund. He could not require the third party to pay the money directly to him since that would give the beneficiary a stronger right against the third party than he had against the trustee himself.” [Emphasis added]

28 To similar effect is Lewin on Trusts (18th Edition) at page 7 as follows:–

“1–06 A trust is not a mere obligation. It may confer on a beneficiary the equitable ownership of a trust asset or a partial equitable interest in the asset. Even if he has neither, a beneficiary can enforce the trust against anyone to whom a trust asset may come, except a bona fide purchaser for value without notice, so he has a proprietary right or interest in a broader sense of the term. Though some remedies sought by beneficiaries do not turn upon the existence of a proprietary interest (and certainly not a proprietary interest in the narrow sense of a transmissible interest), the proprietary nature, in the wide sense, of a beneficiary's rights, is at the heart of the proprietary remedy which can be asserted against trustees and others into whose hands trust property can be followed or traced.

1–07 A beneficiary can be said to be the equitable owner of a trust asset if the asset is sufficiently ascertained and he is the only beneficiary interested. ...

1–08 The beneficiary has no equitable proprietary interest in the narrower sense, and of course no equitable ownership, if either his rights or the assets in which they are to be enjoyed are not sufficiently ascertained. For instance, a discretionary beneficiary, who is merely a member of a class to whom the trustees have a discretion to apply trust capital or income, has no interest in the narrow sense. He has a mere right to require the trustees to consider from time to time how to exercise their power, but this prevails against the trustees, and against a third party other than a bona fide purchaser, and so is a proprietary interest in a broader sense. ...” [Emphasis added]

29 Matthews and Sowden, The Jersey Law of Trusts at 12.13 states:–

“A discretionary trust may be of income, or of an interest in income, of capital or an interest in capital, or any combination of these. The important thing is that someone (usually the trustees) has power to decide how the benefits available should be distributed. As already stated at para 9.14 above, unless and until the discretion is exercised in favour of a particular person, that person, although a “beneficiary” within the meaning of TJL Art 1(1), has no individual right to call for any part of the distributable assets. ...”

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* 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 Article 10(10) of the Trusts (Jersey) Law 1984 declared the interest of a beneficiary of a trust to be moveable property. But, even if a discretionary beneficiary's interest can be described as ‘**contingent property**’, it is only that 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. Thus the reference in the letter of wishes to the settlor as ‘principal beneficiary’ does not alter the legal position. Even if it is more likely (as a result of the letter of wishes) that the trustee would appoint assets to the settlor than, say, to the sister-in-law, this still does not mean that the settlor is entitled to any such assets. He will only become entitled to them if and when the trustee, in its discretion, appoints them to him.

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. Thus, if a grandfather set up a discretionary trust for his children and grandchildren and if, many years later, one of his ten grandchildren committed a crime such that a confiscation order could be made against that grandchild, the entire trust fund could be made the subject of a *saisie* and in due course

confiscated, to the prejudice of all the children and other grandchildren of the grandfather. By analogy, in this case, the entire trust fund could be taken if the sister-in-law had committed a crime which rendered her liable to an external confiscation order notwithstanding that she had never contributed anything to the trust and that in reality the likelihood of her benefiting was extremely remote.

35 Another example raised by the Court in argument was the contrast between a fixed trust and a discretionary trust. Let us assume a traditional settlement where the assets are settled upon A for life with the reversion in equal shares to his children B and C. Let us assume further that B commits a crime and is liable to have a confiscation order made against him. It is accepted by all parties that in those circumstances the *saisie* and any resulting confiscation order could only be made in respect of B's 50% reversionary interest. Yet, on the Attorney General's argument, where an offender has no right to any of the trust assets but merely a right to be considered for benefit at the discretion of the trustee, the whole of the trust fund can be taken.

36 In *R v Waya* [\[2013\] 1 All ER 889](#) the Supreme Court considered whether in some circumstances the making of a confiscation order could amount to a breach of Article 1 of the First Protocol of the [European Convention on Human Rights 2000](#) 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 way 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 emphasised that Article 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 Article 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 Article 1 of Protocol 1.

38 Crown Advocate Belhomme responded by referring to Article 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 Article 39 (1) (c) 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.
- 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 Prest* [2013] 4 All ER 673. That case concerned the provisions of section 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 [2013] 1 All ER 759, and that decision was upheld by the Supreme Court. As Lord Sumption said (at para 37) an “entitlement is a legal right in respect to 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 at para 40:—
- “I do not doubt that the construction of s24 (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 overthrow 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* that the exercise of the jurisdiction to make confiscation orders involves no departure from familiar rules governing entitlement and ownership.

Conclusion

- 43 We hold therefore that a beneficiary of a discretionary trust is not **'beneficially entitled'** for the purposes of Article 2(1)(b)(iii) of the modified 1999 Law to any of the assets of that trust. It follows that the Court may not grant a saisie judiciaire over the assets of a discretionary trust merely on the ground that the offender (or suspected offender) is a beneficiary of such a trust.
- 44 However, that is not to say that a saisie may never be made against the assets of a discretionary trust. It will often be the case that there is evidence that the offender has contributed assets to the trust after the date upon which the alleged criminal conduct began. In those circumstances the trust assets are realisable property under Article 2 (1)(b)(ii) to the extent of any such gifts. It is not necessary that there be evidence that such gifts were the proceeds of the criminal conduct. That is to misunderstand the framework of the legislation which does not require there to be any link between the proceeds of crime and the realisable property. As Lord Walker and Sir Anthony Hughes said in *Waya* in relation to the equivalent legislation in England and Wales at para 27:—

“Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.”

This is equally the position in Jersey. Thus in *re Smale* [\[2003\] JRC 099A](#), the Court said at paragraph 5:—

“The whole regime of confiscation orders under the Drug Trafficking Offences (Jersey) Law 1988 does not depend on establishing any link between specific assets and the proceeds of drug trafficking. Under that regime, the Court is not concerned with whether a particular asset was bought with drug trafficking proceeds or with entirely clean money. The Court is concerned only with establishing two things; on the one hand what is the benefit which the defendant has received from drug trafficking; and on the other, what are his realisable assets.”

The fact that that observation was made in the context of drug trafficking whereas we are here dealing with the proceeds of other criminal conduct makes no difference to the validity of the observation.

- 45 It follows that, if on an application for a saisie judiciaire in support of an anticipated

application to register an external confiscation order, there is evidence of gifts to a trust after the date upon which the criminal conduct in question began, it may well be appropriate to grant a *saisie judiciaire* in respect of the trust. In deciding whether to do so at that stage and, if so, the extent of the trust property to be covered by such a *saisie*, the Bailiff may have regard to the important policy objectives of the legislation in seeking to remove from offenders the benefit of criminal conduct but must at the same time have regard to the need for any order to be proportionate.

- 46 In the present case, there is evidence of gifts by the settlor to the Trust after the commencement of the alleged criminal conduct. Accordingly, at the conclusion of the hearing the Court maintained the *saisie* whilst directing that further investigations be carried out as to the extent and timing of any such gifts. In this respect the Court ordered the trustee of the Trust to provide information about gifts to the Trust. The application of the applicants therefore stands adjourned, but the Attorney General is, in our judgment, not entitled to maintain the *saisie* on the ground that all the assets of the Trust are realisable property by virtue of the settlor's position as a beneficiary of the Trust.