

Baroque Trust Company v Hindelang

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	15 April 2004
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Text

[2004] JRC 66

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy** Bailiff, **and** Jurats Tibbo **and** King.

IN THE MATTER OF THE DRUG TRAFFICKING OFFENCES (DESIGNATED
COUNTRIES AND TERRITORIES) (JERSEY) REGULATIONS, 1997

AND IN THE MATTER OF A SAISIE JUDICIAIRE IN RESPECT OF THE RELISABLE
PROPERTY OF MR PAUL EDWARD HINDELANG JNR.

AND IN THE MATTER OF AN APPLICATION SEEKING REGISTRATION OF
EXTERNAL CONFISCATION ORDERS

Baroque Trust Company Limited, Abacus Financial Services Limited, Abacus (C.I.) Limited,

Abacus (Nominees) Limited and Charles Richard Blampied ("The Abacus Parties")
First Party Convened
and
The Viscount
Second Party Convened

Advocate. A.J. Belhomme, **Esq., Crown Advocate, on behalf of Attorney General.**

Advocate J.A. Clyde-Smith **for the First Party Convened.**

Advocate J.A. Campbell **for the Second Party Convened.**

Authorities

Drug Trafficking Offences (Jersey) Law, 1988.

Representation by Attorney General, on behalf of the Government of the United States of America, seeking: registration of external confiscation orders; an order that the Viscount realise realisable property encompassed by a ' *saisie judiciaire*' and then pay the amount realised into the Drug Trafficking Confiscations Fund in satisfaction of the said external confiscation order.

Bailiff

THE DEPUTY

- 1 As a result of a disclosure made by Abacus of a suspicion which it had formed, the Jersey and United States Authorities were alerted to the existence of a substantial trust and corporate structure which was the proceeds of drug trafficking.
- 2 As a result a *saisie* was obtained which took effect over the whole of the trust and corporate structure and of course the underlying assets thereof. In due course in the United States three forfeiture orders *in rem* were made, and there is now an application by the Attorney General to this Court to register those orders. Those orders refer specifically to all the assets of the various trusts; in other words they list both the shares in the various underlying companies as well as the assets of those companies.
- 3 The application is brought under the relevant provisions of the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1997. During the course of the *saisie* the Viscount has had the responsibility for managing the assets. Various assets of the companies have been realised and for the sake of administrative convenience the Viscount has very reasonably transferred the underlying assets out of the corporate

structures so that in effect all the underlying assets are now held predominantly in cash in various accounts in the Viscount's name.

- 4 The Viscount has requested today that the registration of these external confiscation orders should be confined to these assets currently in the Viscount's name. The Viscount has suggested that the *saisie* should be lifted in relation to the shares in the underlying corporate structures and these should be returned from whence they initially came, namely to the Baroque Trust Company as trustee of the various settlements in question.
- 5 Baroque is a trust company administered by Abacus which provides the directors for Baroque. It is agreed that, in order thereafter to terminate what will essentially be a dormant structure, two alternative courses could be followed. First, there could be a proper winding up of these various companies. What exactly would be required in this connection is not clear because the companies are incorporated in a variety of jurisdictions including the British Virgin Islands, Panama, Costa Rica, England and Jersey. But almost certainly it will require declarations of solvency or preparation of accounts.
- 6 The second alternative would be simply to allow the companies to be struck off for failing to pay annual fees and so forth in the relevant jurisdiction. It is known that this procedure can be followed in the British Virgin Islands and Jersey but the parties do not know whether that procedure also applies in the other three jurisdictions to which we have referred.
- 7 The Viscount accepts that, if the first alternative is followed, costs will be incurred in taking necessary steps to wind up the companies properly and that if the second course is followed there is a possible damage to reputation. Mr Campbell made the point that the Viscount would not really be happy to allow companies to be struck off for non-payment of fees whilst they were under his management. Mr Clyde-Smith made the point that Abacus took a similar view.
- 8 Mr Clyde-Smith submits on behalf of Abacus and Baroque that what is proposed is unfair. We agree with him. The United States has made orders confiscating all the assets listed in the various orders. In other words, it has confiscated the structure because the assets cannot realistically be separated from the structure. The assets which, at the moment, still belong in Law to the relevant parties are a series of companies which in turn have assets. So, for example, suppose a confiscation order in America had not been made, so that the assets had to be returned to their owners, the owners would have been entitled to expect back the corporate structure albeit that some assets in the companies might have been sold and turned into cash. Nevertheless the structure would have been returned to the owners.
- 9 In our judgment the assets to be confiscated here should reflect the assets forfeited by the external confiscation and that relates to the structure. The assets, in effect, reflect the benefits and burdens of the corporate structure. In our judgment it would not be right to allow the two governments, in effect, to cherry pick these assets and to take the attractive

ones but insist on the less attractive assets, such as the shares, being returned in this case to innocent parties such as Baroque or Abacus who, it is accepted, have been entirely co-operative throughout these proceedings.

- 10 Furthermore, as Mr Clyde Smith pointed out, the shares themselves are the proceeds of drug trafficking as found by the American courts and one is therefore asking Abacus or Baroque to continue to deal with the proceeds of drug trafficking.
- 11 Furthermore the relationship between Baroque and Abacus, and the beneficiaries is extremely poor because all these proceedings have come about because of the initial disclosure very properly made by Abacus.
- 12 The approach we prefer is that which is envisaged by the Law. Article 9(4) of the Drug Trafficking Offences (Jersey) Law, 1988 as amended by the 1997 regulations, provides that, following the making of a *saisie*, the Viscount will take possession of and, in accordance with the Court's directions, manage or otherwise deal with the realisable property. That has happened here in that certain assets have been realised because they have needed to be and the property has generally been managed. Article 10 deals with realisation of property and provides that where an external confiscation order has been registered, the Court may empower the Viscount to realise any realisable property and, of course, the proceeds of realisation are then, under Article 11, paid into the Drug Trafficking Confiscation Fund.
- 13 In our judgment the Law clearly envisages that it is at this stage that the Viscount will realise the assets and it will be the net assets as realised which will be paid into the Confiscation Fund. Where there is a corporate structure, it seems to us that the process of realisation naturally includes the process of winding up the corporate structure so that one is left with net assets.
- 14 So for these reasons we accept the submission made on behalf of Baroque and Abacus, that the proposal as initially put forward to us would not be the right order to make and would not, in this case, match the order made in the United States, although we are not to be taken as saying that the order which the Jersey Court makes can never vary from the external confiscation order made in the other jurisdiction; but we certainly do not agree that the variation proposed in this case is the right variation to make.
- 15 In our judgment the orders made in this case should be registered generally and the Viscount should be authorised to realise the various assets, and included in that realisation process will be the winding up of the corporate structure. Whether he chooses to do that by a full winding up process or by allowing companies to be struck off will be ultimately a matter for his judgment. We accept the risk of danger to reputation, but where matters are clearly explained to another jurisdiction, it may be that there will be no such damage but this will be a matter for the Viscount in due course.

- 16 Now, Mr Belhomme, as envisaged we think the right course therefore is to adjourn this application. We indicate that we will be agreeing to register these external orders. We are satisfied that the various conditions have been met but we think counsel should go away and come up with an agreed draft order for our consideration which will reflect what we have said.
- 17 As I understand it, there was no issue between the parties other than this matter that we have had to decide this morning; so everything else in this draft order you had agreed and so, no doubt, when you bring back the order, it will be reflected again.
- 18 My understanding is that 4.2 and 4.3 are still going to stay as they are; in other words those are assets which were not forfeited and are going to go back to Mr Batalla, so that that is not altered by what we have decided today. Similarly, if there were other assets which were going to be taken out of the order because they are assets where further enquiries are proceeding, the Court's position is that the assets, at the moment, are vested in the Viscount. Of course, whom he chooses to allow to administer them and act as directors is entirely a matter for the Viscount. Who he wants to continue to act as directors pending the realisation is a matter for him and, indeed, if directors have to organise the winding up of some of the companies, he will no doubt presumably ask the directors to do it.
- 19 We are not making any order today; so we have not registered the confiscation order. We are still as we were. We will only make the order when you have all agreed it. The formal order today is that for reasons we have stated in this judgment, this application is adjourned and the *saisie* therefore continues and then, hopefully, when you are all ready, we can just come back at 9:45 one morning to agree it.