

Robert Tantular v HM Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Clyde-Smith
Judgment Date:	08 April 2020
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Text

[2020] JRC 58

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner**

In the Matter of the Proceeds of Crime (Jersey) Law, 1999 as Modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations, 2008

And in the Matter of Saisies Judiciaires in Respect of the Realisable Property of Robert Tantular

Between
Robert Tantular
Representor
and

Her Majesty's Attorney General
First Respondent

and

The Viscount
Second Respondent

and

H1 Trust Company Limited
Third Respondent

and

Tan Chi Fang
Fourth Respondent

and

Jason Ray Tan
Fifth Respondent

and

Michelle Tantular
Sixth Respondent

and

Sandy Tantular
Seventh Respondent

and

Credit Suisse AG Singapore Branch
Eighth Respondent

Advocate M. L. Preston for the Representor.

Her Majesty's Solicitor General for the Attorney General.

Advocate C. F. D. Sorensen for the Viscount.

Authorities

Proceeds of Crime (Jersey) Law 1999.

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

Tantular v AG [2014] JRC 243.

Rex v Williams & Another [\[1942\] AC 541](#).

Brassard v Smith [\[1925\] AC 371](#).

Tantular v AG [\[2014\] JRC 128](#).

British South Africa Co v Companhia de Moçambique [\[1893\] AC 602](#).

King v Director of the Serious Fraud Office [\[2009\] 1 WLR 718](#).

Morrison v National Australia Bank Ltd [561 US 247](#) [2010].

Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

[Proceeds of Crime Act, 2002](#).

(*King v HM Procureur* 2011–12 GLR 285).

In the matter of the representation of Kaplan [\[2009\] JLR 88](#).

Security Interests (Jersey) Law 2012.

S D Freeman and Ors v Ansbacher Trustees (Jersey) Limited [\[2009\] JLR 1](#).

In the matter of the realisable property of Arnold Bengis [\[2018\] 1 JLR 377](#).

R v Richards [\[2008\] EWCA Crim 1841](#).

Mirchandani v Somaia and Anor [2017] EWHC 1038 (QB).

R (on the application of KBR Inc) v Director of the Serious Fraud Office [\[2019\] QB 675](#).

[Criminal Justice Act 1987](#).

Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime.

Baroque Trust Company Limited and Ors v The Viscount [\[2004\] JRC 066](#)

In The Matter of Hindelang [2004] JLR Note 17.

In re Doraville [\[2016\] \(2\) JLR 44](#).

In re Rosenlund [\[2015\] \(2\) JLR 29](#).

AG v Ljungman [2014] (2) JLR 1.

United States v Abacha [\[2015\] WLR 1917](#).

Republic of Nigeria v Doraville Properties Corporation [\[2017\] \(1\) JLR 46](#).

Macmillan v Bishopsgate Investment Trust Plc (No 3) [1995] EWCA Civ 55

Saisies Judiciaires — are the Court's powers limited to property situated in Jersey?

THE COMMISSIONER:

- 1 This case concerns a point of statutory construction, namely whether a *saisie judiciaire* imposed under Article 16(1) of the Proceeds of Crime (Jersey) Law 1999, as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations, 2008 (“the Modified Law”), is limited to property situated in Jersey, as contended by the Representor.

Background

- 2 On 9th August 2013 and 3rd September 2014, the Court granted the Attorney General two *saisies judiciaires* over the realisable property of the Representor, pursuant to Article 16(1) of the Modified Law. The application was made at the request of the Indonesian Government following the convictions in Indonesia of the Representor for fraud and money laundering offences. The two Acts of Court are in the same terms, and taking the first, it recites as follows:

“(1) that pursuant to paragraph (1) of Article 16 of the 1999 Law, as modified and included in the 2008 Regulations, a Saisie Judiciaire be granted in respect of the realisable property situate in Jersey of Robert Tantular (hereinafter referred to as “Tantular”) (whether movable or immovable, vested or contingent) which, without prejudice to the generality of the foregoing, is known to include assets held by BOS Trust Company (Jersey) Limited 3rd Floor, Forum House, Grenville Street, St Helier, [now H1 Trust Company Limited] as trustee of the Jasmine Investment Trust and its underlying companies, which, without prejudice to the generality of the foregoing, includes:-

(i) movable property including securities, investment stocks, shares (including bearer shares), promissory notes, bonds, funds or currency in whatever form held within the Jasmine Investment Trust and its underlying companies;

(ii) balances standing to the credit of accounts held in the name of the Jasmine Investment Trust and its underlying companies;

(iii) the benefit of any loans made by [H1 Trust Company Limited] as trustee of the Jasmine Investment Trust or by the directors of its underlying companies; and

(iv) immovable property held by the companies underlying the Jasmine Investment Trust;

(2) that, save to the extent envisaged by paragraph (4) below, [H1 Trust Company Limited] be prohibited from dealing with any realisable property of Tantular at present held by it or transferred to it after the making of this present Order;

(3) that thereafter, in view of the statutory duties placed upon him by paragraph (4) of Article 16 of the Modified 1999 Law, the Viscount be directed to take possession of all the realisable property situated in Jersey of Tantular and to manage or otherwise deal with the same in accordance with the Court's directions;

(4) that [H1 Trust Company Limited] be permitted to manage or otherwise deal with the assets of the Jasmine Investment Trust under the direction of the Viscount."

- 3 The Representor does not hold any property in Jersey. All that is situated in Jersey is H1 Trust Company Limited ("H1"), a Jersey incorporated and regulated trust company, in its capacity as trustee of the Jasmine Investment Trust, a discretionary trust governed by Jersey law. In that capacity H1 has a limited amount of cash, but otherwise owns the issued shares in the British Virgin Island incorporated company Jonzelle Limited ("Jonzelle"). The share register identifies the shareholders of Jonzelle as Helm Management Limited, a Jersey incorporated company, at the same address as H1. Helm Management Limited has executed a document stating that it holds the shares in Jonzelle as "... *nominee of and as trustees on trust for* H1 ... as trustee of the Jasmine Investment Trust (hereinafter called 'the owner') ...". Helm Management Limited gives a number of undertakings in the same document, including an undertaking to exercise its rights as shareholder at the direction of "*the owner*". I understand that the share certificates are at the offices of Helm Management Limited in Jersey. The directors of Jonzelle are officers of H1 and also resident in Jersey. In short H1 owns and controls Jonzelle.
- 4 The sole material asset of Jonzelle is a residential property situated in Singapore, namely 26 Cuscaden Road, #20–03 Cuscaden Residence, Singapore 249722. The Singapore property is mortgaged to the Eighth Respondent, Credit Suisse, which has taken or is in the process of taking possession with a view to its sale. It is anticipated that the net proceeds of sale of some US\$4 million will flow back up to H1.
- 5 A number of gifts have been made by the Representor to the Jasmine Investment Trust. In its judgment of 8th December 2014 (*Tantular v AG* [2014] JRC 243), the Court found that gifts totalling some US\$1.6 million were caught by the Modified Law, but I am given to understand that figure may extend to gifts of some US\$7.3 million.
- 6 Advocate Preston, for the Representor, submitted that the share certificates in relation to Jonzelle are not in themselves title to the shares but merely evidence of such title and that the physical location of the share certificates does not determine their situs for legal

purposes (*Rex v Williams & Another* [1942] AC 541). Instead, the legal situs of shares in a company is the place where the shares can be effectively dealt with – *Brassard v Smith* [1925] AC 371. The shares in Jonzelle are ordinary shares that are recorded on a register in the BVI and it was clear, he said, that they do not constitute property held in Jersey. Subject to the caveat to which I refer later, the case proceeded on the basis that it was concerned with property situated outside Jersey.

The Modified Law

- 7 The 2008 Regulations were made under Article 28A and Article 38 of the Proceeds of Crime (Jersey) Law 1999 (“the 1999 Law”), which Articles are concerned with the recognition and enforcement of foreign confiscation orders. By the 2008 Regulations, the 1999 Law is modified in the manner set out in the Schedule. The law as modified is reproduced after the Schedule for illustrative purposes only. Counsel confirmed that no issue arose in the Court relying upon the Modified Law as illustrated.

The Modified Law

- 8 I now set out the key provisions which stand to be construed, starting with the operative provision of Article 16, so far as is relevant:

“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 by or on behalf of the Attorney General on behalf of the government of a country or territory outside Jersey .

(2) ...

(3) ...

(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) Any property vesting in the Viscount pursuant to paragraph (4)(a) shall so vest subject to all hypothecs and security interests with which such property was burdened prior to the vesting."

9 "Realisable property" is defined in Article 2:

"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 .

(2) However, property is not realisable property if –

(a) A confiscation order;

(b) An order under Article 9 of the Proceeds of Crime (Cash Seizure) (Jersey) Law 2008; or

(c) An order under Article 27 of the Terrorism (Jersey) Law 2002

,

is in force in respect of the property."

10 There then follow provisions relating to the circumstances in which gifts are caught by the Modified Law and how the value of property and of gifts is to be determined. In this case, we are not concerned with Article 2(1)(b)(i), namely property held by the Representor, or

with Article 2(1)(b)(iii), namely property to which he is beneficially entitled. In its judgment of 10th June 2014, (*Tantular v AG* [\[2014\] JRC 128](#)) the Court held that as a beneficiary of the Jasmine Investment Trust, a discretionary trust, the Representor was not beneficially entitled to the trust assets for the purposes of Article 2(1)(b)(iii) of the Modified Law. We are concerned, therefore, with Article 2(1)(b)(ii), namely gifts made by the Representor to the Jasmine Investment Trust, which the Court has found are caught by the Modified Law.

11 The word “**property**” is defined in Article 1:

“1 Interpretation

In this Law, unless the context otherwise requires –

...

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

12 On the face of it, where Article 2(1)(b)(ii) refers to “**any property held by a person to whom the defendant has made a gift**” it is a reference to property defined as being “**situated in Jersey or elsewhere**”. It is this definition of “**property**” with which the case is principally concerned.

13 Turning to the registration of external confiscation orders, Article 39 provides:

“39 Registration of external confiscation orders

(1) On the application of the Attorney General, the Court may register an external confiscation order if –

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

(b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that the person received notice of the proceedings in sufficient time to enable the person to defend them; and

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

14 Finally, Article 17 deals with the realisation of property:

“17 Realisation of property

(1) Where –

(a) An external confiscation order has been registered under Article 39, and

(b) The Court has made a saisie judiciaire ,

the Court may, on an application made by or on behalf of the Attorney General, empower the Viscount to realise, in such manner as it may direct, any realisable property vested in the Viscount or in the Viscount's possession pursuant to a saisie judiciaire, under Article 16."

The Representer's case in summary

15 Advocate Preston referred first to Jersey's international obligations under the following treaties, which have been extended to Jersey:

(i) The United Nations' 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UK Treaty Series No 26 (1992)) often referred to as the "Vienna Convention", which was extended to and came into force in Jersey on 7th July 2019.

(ii) The Council of Europe's 1999 Criminal Law Convention on Corruption (European Treaty Series – No 173) – often referred to as the "Corruption Convention" which was extended to and came into force in Jersey on 1st October 2013.

(iii) The Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (European Treaty Series – No 141), often referred to as the "Strasbourg Convention", which was extended to and came into force in Jersey on 1st May 2015.

16 The obligations of the contracting parties to these three Conventions, including Jersey, made it clear, he said, that territorial limits are to be observed by the parties. In particular, they are clear that Jersey is obliged, and only obliged, to enforce foreign confiscation orders made in respect of property which is "**situated**" in Jersey. Indeed, he said, one can go further and state that it would be against the scheme of the Conventions for requested states to seek to enforce confiscation orders made by requesting states by attempting enforcement action in a third state.

17 Advocate Preston then referred to other laws which he said, although not binding on Jersey, demonstrate how the international order had been established and effected by other sovereign states. In particular, he referred to [Regulation \(EU\) 2018/1805](#) of the European Parliament and the Council of 14th November 2018 on the mutual recognition of freezing orders and confiscation orders (the "EU Confiscation Regulation") which will enter into force on 19th December 2020, which although not binding on Jersey, lay out a scheme for mutual recognition of both "*freezing orders*" (Chapter 2) and "*confiscation orders*"

(Chapter 3). In relation to both the EU Confiscation Regulation requires, and only requires, that states enforce other states orders in relation to property which is “located” in a requested state: (Article 4(4) and (5) and Article 13(3) (regarding freezing orders) and Article 14(4) and (5) and Article 22(3) (regarding confiscation enforcement). The EU Confiscation Regulation explicitly deals with the fact that a requesting state will need to issue requests for freezing and confiscation orders to more than one state where items of property are located in more than one state (Articles 5(2)(a), 5(3), 15(2)(a) and 15(3)) or where the freezing or confiscation of a specific item of property covered by the order would require “*action in more than one state*” (Articles 5(2)(b) and 15(2)(b)).

- 18 This is consistent, he said, with the longstanding principles of conflict of laws that the courts have no jurisdiction to determine the title, or right to possession, of any immovable property outside the jurisdiction where the effect of the judgment would be to alter the right to possession, or other proprietary rights in the property (*British South Africa Co v Companhia de Moçambique* [1893] AC 602). A further conflict of laws principle applies in respect of both immovable and movable property, namely that it cannot be expropriated by an act of state unless it is physically located in the jurisdiction of the state seeking to expropriate the property in question.
- 19 It was a canon of construction, he said, that legislation is presumed not to be extra-territorial in reach, unless a clear contrary indication is expressed in the legislation. In the House of Lords decision of *King v Director of the Serious Fraud Office* [2009] 1 WLR 718, Lord Phillips (with whom all the other Law Lords agreed) applied what he called the “ **well-established canon of construction that requires clear language if an Act is to be given extra-territorial effect.**” I consider this case in more detail below. The supreme Court of the United States in *Morrison v National Australia Bank Ltd* 561 US 247 [2010] affirmed the “**longstanding**” principle of American law that legislation of Congress is purely domestic in its territorial application unless a contrary intent appears, which must be clearly expressed.
- 20 In two cases involving the same individual, the English and Guernsey Courts have declined to restrain assets outside their respective jurisdictions. In the first case, *King v Director of Serious Fraud Office*, the House of Lords considered whether the United Kingdom's Proceeds of Crime Legislation had extra-territorial effect in its response to a request from foreign states for assistance in England and Wales. In particular, it considered whether a restraint order could be issued by a Court pursuant to secondary legislation, namely the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (“the POCA Order”) made under the Proceeds of Crime Act, 2002 (“POCA”) for the purpose of providing assistance to a foreign state's request for assistance from the United Kingdom which purported to restrain assets outside England and Wales. The House held that:
 - (i) POCA and the POCA Order made under it did not allow the Court to seek to provide assistance to a foreign state by restraining property outside of England and Wales. This was despite the fact that the relevant definition of “**property**” in POCA includes the words that “**Property is all property wherever situated**”.

(ii) Whether property bore the extended meaning "... '**wherever situated' must depend ... on the context in which the word is used**" and in the case of the [POCA](#) Order, it expressly or by implication referred to property in England and Wales and not property outside the jurisdiction (paragraph 37).

(iii) There was obvious force in the following proposition:-

"Mr Perry submitted that there was good reason why the scope of the Order should be restricted to property within the jurisdiction. If a country wishes assistance from other countries in preserving or recovering property that is related to criminal activity, it makes sense for its request to each of those other countries to be restricted to the provision of assistance in relation to property located within its own jurisdiction. If each country were requested to take steps to procure the preservation or recovery of property on a worldwide basis, this would lead to a confusing and possibly conflicting overlap of international requests for assistance. Not only would such multiplication of activity be confusing, it would involve significant multiplication of effort and expense". (paragraph 31)

21 In the second case of (*King v HM Procureur* 2011–12 GLR 285) the Guernsey Royal Court applied and followed *King v Director of the Serious Fraud Office*, determining that the Guernsey authorities had no right to seek to restrain property outside Guernsey in support of a foreign state's request for assistance.

22 Advocate Preston accepted that Jersey had not adopted the same approach. In the case of *In the matter of the representation of Kaplan* [2009] JLR 88, the Court held that Jersey law was different from English law and that the Modified Law did allow this Court to, using Advocate Preston's words, "*exercise exorbitant jurisdiction over assets located abroad in a third country when giving assistance to a state requesting assistance from Jersey.*"

23 Advocate Preston submitted that the decision in *Kaplan* was right in part and wrong in part in its approach to the ambit of Article 16 of the Modified Law. The Court considered the scope of Article 16 in the light of the definitions of property in Article 1(1) and realisable property in Article 2(1) at paragraphs 30–32 and said this:

"32 It is clear from these definitions that "realisable property" embraces property held outside the Island. It is also clear that art 16(4) vests in the Viscount, following a saisie judiciaire, only realisable property held by **the defendant in Jersey**. Mr Dessain for the Viscount contended, and we agree, that the effect of art. 16 is to empower the Viscount to require any specified person to repatriate to Jersey any realisable property situated outside the jurisdiction. In practice any specified person would no doubt be in the jurisdiction of this court."

- 24 Advocate Preston submitted that the Court was correct to conclude that under Article 16(4)(a) only realisable property held by a defendant in Jersey vests in the Viscount, since that it is the clear meaning of that provision, but he said the Court was wrong to conclude that the same territorial limitation did not apply equally to Article 16(4)(b) and (c) and was thus wrong to conclude that the Viscount was empowered to require any person to repatriate to Jersey property situated outside Jersey.
- 25 Given the points of general principle and the case law on extra-territoriality referred to earlier, he submitted that the clearest words would be required to give such extra-territorial power to the Court, and they are missing. That the court caveated its conclusion with the opinion that any person so required by the Viscount “ **would no doubt be in the jurisdiction of this court**” does indicate a degree of unease in the court about its own conclusion, but does not answer the objection to extra-territorial application arising from general principles, case law and international treaties. The better view, he submitted, is that Article 16(4) does no more than recognise and give effect to the need to divest the defendant of legal title to his realisable assets in Jersey, whilst pragmatically and cost-effectively enabling third parties situated in Jersey – such as trustees and nominees – to continue to retain realisable property which is situated in Jersey, but do so at the Viscount's direction. This, he said, on a proper construction and in light of general principles, is the safer interpretation.
- 26 After judgment had been reserved, the Court in *In re Kaplan* was referred to the decision of the House of Lords in [King v Serious Fraud Office](#) which did not cause it to alter its decision, the Court noting that the statutory provisions in England were different from those applicable under the Modified Law, but nonetheless it found some of the observations in the House of Lords judgment were interesting and relevant to the exercise of the Court's discretion, causing the Court to conclude at paragraph 72:
- “...as a matter of policy, it seems to us that this Court should be slow to assume the functions of the world's policeman.** There may be occasions when it is appropriate for the Viscount to seek repatriation of realisable property outside Jersey, pursuant to the wide powers granted by a saisie judiciaire. Generally speaking, in the context of applications by foreign countries to enforce an external confiscation order, it seems to us, for all the **reasons given by Lord Phillips, that assistance should be confined to realisable property within the jurisdiction.**”
- 27 In so far as the Court concluded that the English statutory provisions were different from those in Jersey, Advocate Preston argued that it erred if it concluded that the Modified Law had, as a consequence, an extra-territorial reach which was absent from the English provisions. He said that the Court had erred in not concluding that what it appears to have couched as a brake on extra-territorial application on discretion grounds were and are expressions of the general principles to be given effect in the proper statutory construction of the Modified Law, applicable to every case before the Court. In the alternative, however, and if that submission was wrong, the argument from policy indicated that the *saisies*

judiciaires in this case should not have the extra-territorial reach for which the Solicitor General contended. Moreover it was not apparent from the judgment in *In re Kaplan* that the Court considered the points of general principle on extra-territoriality and sovereignty. If the decision in *In re Kaplan* was in fact *obiter* then it ought not to afford any precedent and, if not, for the reasons he had put forward the extra-territorial aspect of the decision was wrong in law and should not be followed.

28 In the light of Jersey's international obligations, the wider international norms, the laws of the United Kingdom and of Guernsey and the canon of construction that raises the presumption against extra-territorial application of legislation, it was clear, said Advocate Preston, from the language of the Modified Law itself that it did not permit a *saisie judiciaire* over or enforcement against property outside Jersey or to put it in its obverse form, it is not clear that it does, and this for the following reasons:

(i) Although the definition of “**property**” in Article 1 includes property situated elsewhere than in Jersey, that geographically wide definition is conditioned/limited by the words “**unless the context otherwise requires**”. This is important in that in order to consider the context of the Court's powers, it is necessary to consider the purpose of the Modified Law in the light of the above.

(ii) There are two further points to make about the ‘**elsewhere**’ part of the definition of “**property**”, which can be characterised as the wider part of this definition:-

(a) The wider definition is present in Article 1 for a distinct other purpose, namely to enable the property to be taken into account when deciding whether property outside Jersey was gifted to a person who now holds property in Jersey, in accordance with the provisions of Article 2 dealing with gifts caught by the Modified Law. The wider definition is required in the Modified Law to catch within its grasp property which is held in Jersey by a donee who has received from a defendant property outside Jersey.

(b) It cannot be right that the wider definition is to be taken to grant extra-territorial powers of enforcement to the Court. If extra-territorial enforcement was envisaged by the Jersey legislature that would have been made clear in the powers actually granted to the Jersey Court. If the Court did not accept these points then the most compelling other reason for the drafting of Article 1 in the form as exists is that the possible application of the words “**or elsewhere**” are simply a drafting anomaly, being left in this form from the same wider definition in the 1999 Law. He acknowledged that under the 1999 Law, the Court has the power to make an *in personam* confiscation order on the basis that the person convicted by the Jersey Court has property outside Jersey which may be available to satisfy the domestic confiscation order made by the Jersey Court, but he said that does not involve the exercise of any extra-territorial jurisdiction by the Court over property overseas as the Court is merely making a domestic confiscation order against a defendant convicted by the Jersey Courts on the basis of its assessment of his or her wealth.

(iii) Article 39 of the Modified Law stipulates that the Royal Court may only register an external confiscation order if “**enforcing the order in Jersey would not be contrary to the interests of justice**”. Clearly no power is given to the Court to register any foreign orders other than for the purpose of enforcement within Jersey.

(iv) Article 2(2) of the Modified Law refers to various forms of Jersey court orders which may be in force in respect of property, the result of which is to exclude that property from being realisable property, and notably it makes no mention of any foreign equivalents, which it would have done had it been intended that property outside Jersey could be the subject of a *saisie judiciaire* and enforcement action under the Modified Law.

(v) Articles 16 and 17 of the Modified Law distinguish between property which is to be (Article 16) and has been (Article 17) vested in the Viscount and property which is otherwise to be transferred to the possession of the Viscount (Article 16). A further distinction is made in Article 16 between the fact that only “**realisable property**” held by the defendant in Jersey shall vest in the Viscount whereas “**any specified person**” may be required to give possession of realisable property to the Viscount where it is said to be the “**duty**” of the Viscount to take possession of realisable property. Advocate Preston made a number of points from these distinctions and the wording in Article 16 and 17:

(a) To vest property must, at most, mean transferring the legal title in that property to the Viscount; it clearly cannot mean transferring the beneficial interests in property given that a *saisie judiciaire* is designed to be a provisional and protective measure pending the final outcome of a case. Indeed an interim transfer of beneficial ownership would violate Article 1 Protocol 1 of the European Convention on Human Rights.

(b) To give possession of property to the Viscount means to give custody or control of property to the Viscount rather than to transfer legal title of the property to the Viscount. Given the presumption against extra-territorial application and the required contextual application of the definition of property, Advocate Preston submitted that the Viscount is not empowered by Article 16 of the Modified Law to take possession of property outside Jersey or to require any person to repatriate property to Jersey (in so far as *Re Kaplan* suggests otherwise it was wrongly decided).

(c) Why is it that the property of the defendant vests in the Viscount when other persons i.e. donees of gifts, may only be prohibited from dealing with their property and/or required to give possession of it to the Viscount? The likely answer must be that defendants and donees are treated differently by the Modified Law at the stage of the *saisie judiciaire*, with donees not automatically being deprived of legal title to their property.

(d) The references in Article 16(5) of the Modified Law to “**hypothecs**” is a reference to a form of legal charge over immoveable property that is particular to Jersey and “**security interests**” is a specific reference to charges over

moveable property under the Security Interests (Jersey) Law 2012, which applies only to property situated in Jersey (Article 1A and 4 of that Law). Notably, Article 16(5) makes no mention of any foreign equivalents, which it ought to have done had it been intended that property outside Jersey could be the subject of a *saisie judiciaire* and enforcement action under the Modified Law. If a *saisie judiciaire* and enforcement were to be granted in respect of property outside Jersey without reference to mortgages and other interests that may be held over such property the effects would be more than just draconian – they would undoubtedly violate Article 1 Protocol 1 of the European Convention on Human Rights.

29 Advocate Preston submitted in conclusion that the Court should recognise and determine that Jersey does not have jurisdiction to grant, maintain and enforce a *saisie judiciaire* over property outside Jersey when providing assistance to requesting states, and he made these concluding remarks, which he said were appropriate:

(i) For Jersey to attempt to exercise exorbitant jurisdiction over property situated in other sovereign countries would not just cause confusion, multiplication of effort and expense (as was recognised by the House of Lords in *King v Director of the Serious Fraud Office*), it would also cause disquiet in other countries; the latter being a point that Jersey would recognise if another country sought to exercise jurisdiction over property situated in Jersey.

(ii) If the position were truly to be that under the Modified Law the Jersey Court may enforce confiscation orders received from one country in yet another country, this would have far-reaching resource implications beyond the present case. It would have to be applied as such in every case in which assistance is sought from Jersey. What would be the limits of such an approach? The answer, he submitted, would be all but none.

(iii) The idea that the Jersey Court has a discretion as to whether or not it should exercise exorbitant jurisdiction would not only require the Court to develop detailed principles to justify how one request for enforcement is to be distinguished from another, but is liable to lead to many results in which unsuccessful requesting countries consider the Jersey discretionary approach to have been unfair in its application to them.

(iv) Lastly, is the role of the world's policeman one that Jersey can afford to take? Is that a role that it ought to take when other nations close to Jersey have eschewed such an approach? Again, he submitted that the answer to each question is no.

Decision

30 I do not accept the contentions put forward on behalf of the Representor, and the interpretation placed upon the Modified Law, substantially for the reasons put forward by the Solicitor General.

31 The trust structure of this case is in relatively common form. As Sir Michael Birt, Deputy Bailiff, said in *S D Freeman and Ors v Ansbacher Trustees (Jersey) Limited* [2009] JLR 1 at paragraph 97(ix)):

“Jersey has a very substantial trust industry. In some cases, the investments of the trust are held directly by the trustee (which will in the vast majority of cases be a corporate trustee licensed to carry on business as a trustee by the Jersey Financial Services Commission) but in many, if not most, cases the investments will be held through a company which is wholly owned by the trust and the shares of which comprise the sole directly-held asset of **the trust**. Whereas, in the days when Jersey had corporation tax, the directors of the company might well have been persons who were not employees of the trustee and resided outside Jersey, the strong likelihood nowadays is that the directors of the wholly-owned company will be the very same employees of the corporate trustee in Jersey who are responsible for administering the affairs of the trust. There will, therefore, as a practical matter so far as the beneficiaries are concerned, be no difference between the situation where the trustee holds the trust investments directly and where it chooses to do so through a company which is wholly owned by the trust.”

32 I also take judicial knowledge that these structures frequently have the following additional features:

- (i) the settlor and the beneficiaries are outside Jersey;
- (ii) the activity that gives rise to the wealth occurred outside Jersey;
- (iii) the company or companies in the structure are incorporated outside Jersey; and
- (iv) the underlying assets are outside Jersey.

33 It is the terms of the Modified Law that are determinative and the answer to the issues raised by the Representor are to be found by interpreting that Law. A *saisie judiciaire* can be ordered in relation to any one of a number of categories of “**realisable property**”. We are concerned with the category of realisable property set out in Article 2(1)(b)(ii), namely “**any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law....**”. This category of property is designed to catch the assets of those to whom the criminal defendant has given away property at any time after the conduct to which the external order relates, and the Court has already decided that the Jasmine Investment Trust has received gifts which are caught by the Modified Law.

34 As to the purpose behind these provisions, in the case of *In the matter of the realisable property of Arnold Bengis* [2018] 1 JLR 377, the Court referred at paragraph 116(v) to this passage from the judgment of Toulson LJ in *R v Richards* [2008] EWCA Crim 1841 at

paragraph 21:

“21 The underlying purpose of the tainted gift provisions of the Act 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.”

35 At the enforcement stage the Court is concerned with whether the recipient of the gift currently holds property, with a view to realising no more than the value for the time being of the gifts caught by the Modified Law: see *Mirchandani v Somaia and Anor* [2017] EWHC 1038 (QB) at paragraph 20. Therefore, the question the Court is concerned with is whether H1, as the trustee of the Jasmine Investment Trust, currently has property and there would seem no doubt that as a matter of trust law it does. H1 owns and controls the shares in Jonzelle, which in turn owns the property in Singapore. H1 therefore, as trustee, has assets to the value broadly of the equity in that property.

36 Article 16(1) of the Modified Law provides that the Court may make a *saisie judiciaire* “**subject to such conditions and exceptions as may be specified in it**” which gives the Court a wide discretion to tailor the order to the facts of any particular case. The nature of the *saisie judiciaire* is given greater content by Article 16(4), which provides that:

“(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 ...” (emphasis added)

37 This must be read with the definition of “**realisable property**” in Article 2(1), which applies to a range of property, encompassing property specified in the overseas order, property held by the defendant (without any geographical limit), property held by the recipient of the tainted gift and property to which the defendant is beneficially entitled. There is no cross reference between these categories and each category can, of itself, constitute property as “

realisable property.

38 The enumerated powers in Article 16(4) distinguish between the various categories of realisable property in this way:

- (i) by Article 16(4)(a) all the realisable property held by the defendant in Jersey shall vest in the Viscount.
- (ii) by Article 16(4)(b) any person may be prohibited from dealing with any of the categories of realisable property whether the property is specified in the order or not.
- (iii) by Article 16(4)(c) any person may be prohibited from dealing with any of the categories of realisable property transferred to the person after the making of the order.

39 The scheme created by Article 16(4) therefore provides a mix of powers with at least three elements:

- (i) The realisable property held by the defendant in so far as it is held in Jersey vests in the Viscount;
- (ii) The court is given wide powers to prevent any person dealing with any realisable property. These are conventional freezing powers which would be familiar to most lawyers;
- (iii) Finally, the Court has a discretion (by reason of Article 16(1) and the permissive language in Article 16(4)) to tailor the order in other ways.

40 This treatment of the different categories of realisable property and the different powers given to the Court can also be seen in the consequential provisions that distinguish between realisable property vested in the Viscount and property which she may have in her possession.

41 The definition of “***property***” is broad and unambiguous, namely all property “....whether situated in Jersey or elsewhere...” It is significant that it is only Article 16(4)(a) that restricts this wide definition of property to realisable property held by the defendant “***in Jersey***” which “***shall vest in the Viscount***”, presumably because it is only property within this jurisdiction that the Modified Law could purport to directly vest in the Viscount. Sub-paragraphs (b) and (c) of Article 16(4) have no such geographical restriction, and as a matter of ordinary reading the wide definition of “***property***” must apply to them.

42 The prohibition in Article 16(4)(b) and (c) relates to what the “***specified person***” may do with property situated in Jersey or elsewhere. A *saisie judiciaire* can therefore effectively freeze any property without geographical limits where the Court, through the “***specified***

person” prohibits that person from dealing with it. The Court in this case has personal jurisdiction over the trustees, directors and shareholders in the structure, and can therefore, prohibit them from dealing with any property within that structure without geographical limits. The Court routinely exercises its trust law jurisdiction over trustees in relation to property held within trust structures in this way.

- 43 Under the last paragraph of Article 16(4), the Viscount has the duty to take possession of and, in accordance with the Court's directions, to manage the realisable property and any specified person having possession of any realisable property may be required to give possession of it to the Viscount. In this case, H1 is now holding the trust assets to the order of the Viscount.
- 44 Turning to the arguments put forward by Advocate Preston in relation to the presumption against extra-territorial reach, the law has moved on. In *R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2019] QB 675, the applicant sought judicial review of the decision under Section 2(3) of the [Criminal Justice Act 1987](#) to require it to produce documents held by its US parent company. The judgment at paragraph 33 draws the distinction between “**personal jurisdiction**” and “**subject matter jurisdiction**”. “Personal jurisdiction” is who can be brought before the Court and “**subject matter jurisdiction**” is to what extent the Court can claim to regulate the conduct of those persons. Quoting from the judgment of Gross LJ at paragraphs 25 – 29:

“(1) A question of construction

25 The question of whether a statutory provision applies to persons or matters outside the jurisdiction depends on its proper construction. It is not or, at least no longer, necessary to search for express authorisation or for necessary implication .

26 In *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, 133, para 10, Lord Mance observed that the ‘principle relied upon is one of construction, underpinned by considerations of international comity and law.’ The principle was that ‘Unless the contrary intention appears ... an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters’. The principle might not apply, ‘at any rate with the same force’, to English subjects. Whether and to what extent it applied to foreigners outside the jurisdiction

‘depends ultimately as Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [ie, [1983] 2 AC 130] (p 152C) upon who is ‘within the legislative grasp, or intendment’ of the relevant provision.
To this a nuanced answer must be given.....’

27 Lord Mance added, at para 19, that the existence of a ‘close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested that

they have taken jurisdiction' would be relevant in determining whether the further jurisdiction has been taken: 'It will be a factor in construing, or ascertaining the grasp and intendment of, the relevant legislation or rule.'

Helpfully, if in a different vein, Lord Mance referred at para 24 to the test of whether 'eyebrows might be raised' at the notion that Parliament had given the jurisdiction in issue to the court concerned .

28 More recently, in Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1, personal jurisdiction (see further below) was not disputed but the court's subject matter jurisdiction was in issue. Lord Toulson and Lord Hodge JJSC said in their joint judgment at para 212:

'... Their challenge is to the court's subject matter jurisdiction ... It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary ... That principle has evolved into a question of interpreting the particular statute ... In Cox v Ergo Versicherung AG [2013] AC 1379 Lord Sumption JSC suggested that an intention to give a statute extra-territorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para 29'

29 While the Bilta case puts it beyond doubt that the question of a statutory provision's extra-territorial application is one of construction rather than (for instance) 'universal principle', I would not, for my part, read the Bilta case as sweeping away the contextual considerations to which Lord Mance made reference in Masri's case; not least, Lord Mance JSC was party to the decision in the Bilta case – and said nothing on this point.

As always, therefore, what is involved is statutory interpretation, having regard to the wording of the provision in question, the statutory purpose and the relevant context.”

45 It is, as this judgment makes clear, a matter of construction as to the extent of the Court's subject matter jurisdiction. In the context of the Modified Law and Jersey's international obligations to which I refer later, it cannot be said, in my view, that eyebrows would be raised at the suggestion that the legislature has given the Court subject matter jurisdiction, namely jurisdiction to regulate the conduct of trustees over whom it has personal jurisdiction.

46 The fact that Article 39 refers to enforcement of the external order in Jersey does not, in my view, assist. Enforcement in Jersey is achieved by the statutory mechanisms set out in

Articles 17, 20 and 24 of the Modified Law. These powers are sufficiently wide to extend to trustees, directors and shareholders within the Court's jurisdiction. All three categories of individuals are in Jersey in this case.

- 47 There is no support for the Representor's assertion that the wide definition in Article 1 of the word “**property**” is required to be utilised to catch within its grasp property which is held in Jersey by a donee who has received it from a defendant outside Jersey. It is not supported by anything and it is hard to see how this could have been the only reason for the wide definition. It is far more likely that the purpose of the words was to cater for the very common way that property is held in Jersey through structures such as that in issue in this case.
- 48 The submission that this wide definition is a drafting anomaly, i.e. that these words have been left in by mistake, cannot be accepted. The ordinary rule of statutory interpretation is that the legislature must have intended the words it used to have an effect, and there is no evidence to support the suggestion they were a mistake.
- 49 The Representor concedes that in a domestic case, the Court can make orders against Jersey persons convicted before it in relation to overseas property by virtue of the same definition of property “**in Jersey or elsewhere**”. As the Solicitor General argues, once it is conceded that:

then it must follow that the provision has the same meaning in the Modified Law.

- (i) the Modified Law applies the Jersey domestic statute to overseas requests with the modifications in the 2008 Regulations;
- (ii) that the relevant provision in the domestic statute extends to property overseas by persons subject to the jurisdiction of the Court; and
- (iii) that that provision has been retained in the Modified Law

- 50 The fact that Article 2(2) of the Modified Law refers only to Jersey statutes as exceptions to realisable property does not assist. I agree with the Solicitor General that it would have been impossible to list all the types of equivalent legislation in overseas jurisdictions and would have led to endless satellite arguments about “*equivalence*” if blanket words such as “*or equivalent legislation*” were used. The fact is that the Court has a discretion both to tailor the *saisie judiciaire* and at the registration stage (the interests of justice limb of Article 39), any arguments about equivalent overseas orders can be raised under those provisions.
- 51 I agree with the Solicitor General that the Representor's arguments as to the distinction between property which is to be and has been vested in the Viscount and property which has otherwise to be transferred to or which has been transferred to the possession of the Viscount do not support the interpretation of the legislation put forward. As stated above,

when considering the Modified Law, there are a number of categories of realisable property in the Modified Law, and only one sub-category is automatically vested in the Viscount, the rest being dealt with by possession.

- 52 The Solicitor General concedes that there might be an element of ambiguity in the final words of Article 16(4) which gives the Viscount a duty to take possession of realisable property, but says that any specified person “**may be required**” only to give possession to the Viscount. These words may take the Representor a little further but do not undermine the otherwise clear words of the statute for the following reasons. First, they are not very clear. On the one hand they say that the Viscount has a duty to take possession of property and on the other only that a person “**may be**” required to give possession to the Viscount. Secondly, and more importantly, they are capable of being read consistently with the Solicitor General's interpretation of the Modified Law. If the relevant persons in control of the structure are subject to the Court's jurisdiction, they are capable of giving possession of all the property in the structure to the Viscount. In fact, that might not be appropriate in many cases at the interlocutory stage, but even if the ambiguity between duty and permission already referred to is interpreted against the Solicitor General, Article 16(1) permits the Court to manage that reality by permitting it to make the order “**subject to such conditions and exceptions as may be specified in it ...**”
- 53 As to Article 16(5), which refers to property vested in the Viscount pursuant to paragraph 16(4)(a) being subject to all hypothecs and security interests, this takes the Representor no further, as it is clear that Article 16(5) is expressly confined to the property referred to in Article 16(4)(a), namely property held by the defendant in Jersey. It provides no guide to the breadth of the other categories of realisable property provided for in the Modified Law.
- 54 Turning to English domestic cases, the position is summarised in *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* as follows:

“3.124, DTA, [s 62\(2\)](#) and [CJA s 102 \(3\)](#) [the position is the same under [POCA: s 84](#)] means that the definition of realisable property applies to property ‘wherever situated’.

The drug trafficker and other acquisitive criminal alike are tempted more and more by the idea of placing their assets outside the jurisdiction.

Accordingly, the court has made orders requiring a defendant or even a third party holding realisable property of the defendant to bring it within the jurisdiction .

The issue is not where the property might be located but it is whether the person against whom the order is sought is himself subject to the jurisdiction of the High Court. Thus, a person who has realisable property abroad but is himself within the jurisdiction can be ordered to bring that property back to or within the jurisdiction or face an application to be committed to prison for failing to comply with the repatriation order ...

..

Again, like much of the development of the restraint regime the power to order repatriation is not unique to the legislative scheme for restraint within the Acts. In conventional civil proceedings the Court of Appeal first concluded that the jurisdiction of the High Court was not based on the location of the assets but more on the unlimited nature of the power of the court to be able to make any orders relating to persons who were properly parties to proceedings before it .

In DPP v Scarlett the Court of Appeal relying on the inherent power, as identified in Re O of the Court to make ancillary orders to ensure that a restraint order is made effective concluded that a repatriation order was a proper adjunct to the restraint procedure.”

- 55 In [King v Serious Fraud Office](#), the House of Lords was concerned with the meaning of the words used in the English legislation it was construing. The Court's reasoning is to be found at paragraphs 34–38 and begins:

“34 The peripheral matters that I have been considering lend support to what I find to be the clear meaning of the relevant provisions of the Order ...”

and ends in Paragraph 38:-

“38 In summary, there is no reason not to give the provisions of the Order their natural meaning and good reason to give them such meaning.”

- 56 The House of Lords found at paragraph 36 that there was a significant distinction between [POCA](#), which deals with domestic orders and contains the wide definition of “ **property**” and the [POCA](#) Order, secondary legislation which deals with external orders and which refers back to the [POCA](#) for the definition of “ **property**”. It was clear from the provisions of the [POCA](#) Order, which the House of Lords considered in detail, that it could only relate to property in England and Wales. The wider definition of property in [POCA](#) had therefore, in the context of the [POCA](#) Order, to be read down to refer only to property in England and Wales (paragraph 37).

- 57 The Modified Law is different. It contains the wide definition of property on its face. The definition cannot therefore be read down for the purposes of the Modified Law. The only purpose of the definition in the Modified Law is to supply the definition of property for the Modified Law, and it therefore applies according to its terms. As for the submission before the House of Lords that there was good reason why the scope of the [POCA](#) Order should be restricted to property within the jurisdiction, the Solicitor General put forward two answers which I accept:-

(i) In the context of the structures administered in Jersey, considerations of public policy would point in the opposite direction. It would be contrary to public policy to on the one hand allow a defendant the administrative benefits of a Jersey structure but on the other to set up serious obstacles to overseas authorities with a legitimate interest in freezing and confiscating it.

(ii) The fears expressed are, in the context of this jurisdiction and the Modified Law, overblown. Jersey could only freeze assets outside Jersey in so far as it has a personal jurisdiction over those who control those assets. This means that only certain assets overseas can be the subject of a *saisie judiciaire*. It is hard to see what principled objection there can be to the Court with jurisdiction over the person who controls assets being able to freeze them through orders made against that person.

58 In *King v H M Procureur*, the Court in Guernsey applied the decision in [King v Serious Fraud Office](#) notwithstanding the differences between the legislation in England and the legislation in Guernsey, which is very similar to that in Jersey. It was not referred to the previous decision of this Court in *In re Kaplan*, and to the decision of this Court in ([\[2004\] JRC 066](#) *Baroque Trust Company Limited and Ors v The Viscount* 2004 JLR note 17) which is a useful illustration of how the Jersey Courts have used their powers under the Modified Law and its equivalents. The latter case concerned trusts administered in Jersey with underlying companies in at least the BVI, Panama, Costa Rica, England and Jersey. A *saisie judiciaire* had been granted at the request of the United States authorities. The case came before the Court because the Viscount had, in the course of administering the *saisie judiciaire*, realised some of the assets of the underlying companies and held the proceeds in cash. He wanted to return the companies to the trust and corporate services provider. The following passages from the judgment of Sir Michael Birt, then Deputy Bailiff, are relevant:

“1. ...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 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 .

...

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 ...

9. In our judgment the assets to be confiscated here should reflect the assets forfeited by the external confiscation order 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 third parties such as Baroque and Abacus ...

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 and Baroque to continue to deal with the proceeds of drug trafficking ...

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 been needed to be and the property has generally been managed. Article 10 deals with the realisation of property and provided 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."

59 The Guernsey Court's reasons in *King v HM Procureur* are set out in paragraph 12 of the judgment. A significant reason is the Court's assertion that:

“The scheme for restraint or charging orders in Part 1 of the 1999 Law as modified is directed only to property in Guernsey.”

The Guernsey Court does not say why, at least in the case of restraint orders (*the equivalent to a saisie judiciaire*) that is the case. The Solicitor General submitted that unlike the provisions of the [POCA](#) Order, which has been construed by the House of Lords, it was difficult to see anything in the Guernsey Modified Law to say that the power to restrain is directed only to property in Guernsey.

60 The Guernsey Court went on to say that this meant that: ***“ The definition in section 50 does not override that natural meaning and does not apply in the context of Part 1.”*** The Solicitor General said it was also difficult to see how this can be correct if one applies ordinary rules of statutory interpretation. The definition in section 50(2) reads:- ***“ This Law applies to property whether it is situated in the Bailiwick or elsewhere”***. As with the Jersey Modified Law, this definition appears on the face of the Guernsey Modified Law whose only purpose is to deal with overseas requests to freeze and confiscate assets. This would seem to be a positive statement as to the territorial subject matter jurisdiction conferred by the Guernsey Modified Law.

61 The Solicitor General went further to submit that the Guernsey Court would not appear to be correct in saying that the approach to the definition in the Guernsey Modified Law is the same as that in the English statute (where the subordinate legislation cross-refers to a definitions section in a lengthy Act of Parliament rather than providing its own definition).

62 It would not be appropriate for me to question the Guernsey Court's interpretation of its own legislation, but I am not persuaded that the decision of the Guernsey Court in *King v HM Procureur* provides good reasons for saying that the decision of this Court in *Re Kaplan* was wrongly decided. Turning to the decision in *Re Kaplan*, the Court's interpretation of the Modified Law was as follows:

“A broad construction of the 1999 Law

18 Counsel for the Attorney General contended that, in interpreting the 1999 Law, the court should not adopt a restrictive approach ... Mr Belhomme relied upon a decision of this court in In re Batalla-Esquivel (2) ... [the Court] quoting from a passage from the judgment in In re Illinois Dist. Ct. (5) stated (2001 JLR 60 at para 10):-

‘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’

19 Counsel for Mr Kaplan did not argue that Mr Belhomme's submissions on this point were incorrect. 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..."

63 This approach has been consistently followed by the Court when interpreting the Modified Law and similar legislation—see, for example, *In re Doraville* [2016] (2) JLR 34 and *In re Rosenlund* [2015] (2) JLR 29.

64 The structure in *Re Kaplan* was a more complicated version of the structure at issue in this case. In summary, the Jersey trustees (Basel Trust Company (Channel Islands) Limited) held (through two wholly owned Jersey subsidiaries) a series of foreign companies and other entities which ultimately held property in Switzerland and Costa Rica. The two particularly relevant passages from the judgment are at paragraphs 30–32 and 47. They read:-

"30 "Realisable property" is defined in art. 2(1) as follows:-

'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 .

31 “Property” is defined in art. 1(1) as follows: “‘Property’ means all property, whether movable or immovable, or vested or contingent, and whether situated in Jersey or elsewhere.”

32 It is clear from these definitions that “Realisable property” embraces property held outside the Island. It is also clear that art. 16(4) vests in the Viscount, following a saisie judiciaire, only realisable property held by the defendant in Jersey. Mr Dessain for the Viscount contended, and we agree, that the effect of art. 16 is to empower the Viscount to require any specified person to repatriate to Jersey any realisable property situated outside the jurisdiction. In practice, such a specified person would no doubt be in the jurisdiction of this court. Counsel for the Viscount also submitted, and again we agree, that the court has an inherent jurisdiction to compel a defendant to disclose his assets, as the English Court of Appeal found to be an incident of a restraint order under the [Criminal Justice Act 1988](#) in *Re O Restraint order; Disclosure of assets* (8).

...

47 Counsel for Mr Kaplan submitted that the property was not situate in Jersey and was not therefore caught by the saisie judiciaire. We reject that submission. The trust property was and continues to be held by Basel through two companies, Basel One Ltd and Basel Two Ltd., which are **registered and controlled in Jersey**. The fact that the underlying assets are outside the jurisdiction is, for these purposes at least, immaterial.”

- 65 As can be seen from these passages, the Court applied the plain words of the Modified Law, which is the proper approach, and came to the same conclusion as that for which the Solicitor General contends.
- 66 As to the policy statement made by the Court at the end of the judgment referred to above, the Solicitor General points out that this statement was made without the benefit of full argument. The case of [King v Serious Fraud Office](#) came to the attention of the Court after the hearing and was dealt with only on written submissions. It is not a reliable basis, he said, on which to make such a broad policy statement about such an important and multi-faceted issue. The Solicitor General submitted that the statement was incorrect. The International Community and Jersey public policy would, he submitted, expect the Court to make all the orders within its powers to deal with Jersey structures alleged to be involved in criminal cases. There is force in these submissions, in my view, when one has regard to Jersey's international obligations.
- 67 The purpose of the mutual assistance regimes is to ensure that criminals cannot take advantage of the international nature of the financial system to avoid confiscation orders. It was summarised by the Court in *AG v Ljungman* [2014] (2) JLR 1 at paragraph 33:

“33 In conclusion, bearing in mind the rationale of these provisions is to

enable the courts of one jurisdiction to give assistance to the courts of the original jurisdiction in order to prevent criminals benefiting from the worldwide financial system and being able to hide their proceeds of crime for their benefit, we were of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice and accordingly we ordered its registration and gave certain ancillary directions to the Viscount.”

68 The core obligation the Conventions create is set out in the judgment in *Doraville* and it is only necessary to refer to some of the ways that the judgment records (paragraphs 77 to 89) that the core obligation is expressed:-

“... rapidly, constructively and effectively provide the widest range of international cooperation ...” (FATF Recommendations)

“The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.” (the Anti-Corruption Convention) (the Palermo Convention is in similar terms)

“The parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.” (the Warsaw Convention) emphasis added)

69 The only relevant territorial limitation is the one that is concerned to prevent the Courts of one country purporting to take action on the territory of another. There is nothing in the Conventions that prevents the Courts of one country making orders which may have an effect on property in the territory of another and Advocate Preston does not cite any such prohibition. This is “***subject matter jurisdiction***” and is permitted if the legislation provides for it, as made clear in *R(KBR) v Director of the Serious Fraud Office*.

70 If the domestic Court has subject matter jurisdiction its orders have effect either because it has personal jurisdiction over those in control of the property or because it can itself use the system of international co-operation to request that its orders are registered and enforced in the overseas country.

71 In this case, the Court is being asked to exercise subject matter jurisdiction but only in respect of property controlled by persons over whom it has personal jurisdiction. The court is not as suggested by Advocate Preston “***attempting enforcement action in a third state***” or exercising “***exorbitant jurisdiction over assets located abroad in a third country***”. The Court is exercising its personal jurisdiction and, if necessary, enforcing its orders against those subject to that personal jurisdiction. Those persons can only be ordered to deal with property outside Jersey in a manner which complies with the law of the jurisdiction in which that property is situated. In this case H1, acting through Jonzelle, can

only exercise whatever rights Jonzelle may have as owner of the property under the laws of Singapore. In regulating H1's conduct in this way, the Court is not purporting to exercise jurisdiction over the property itself or seeking to enforce its orders in Singapore.

- 72 As to Advocate Preston's submissions on European Law, the Solicitor General points out that the EU is a separate legal order that operates between and only between member states, and it is not possible to take a provision of EU Law and use it to interpret legislation in an entirely separate legal system.
- 73 The long-standing principles of conflict of laws are similarly inapplicable. The position is as follows:
- (i) Indonesia has made confiscation orders in relation to the assets of the Jasmine Investment Trust. Any international law objection to such orders has been removed by the International Conventions already referred to.
 - (ii) Indonesia has requested the Jersey authorities to register and enforce those orders. Any private international law objection to Jersey complying with that request has been removed by the Modified Law (see generally *United States v Abacha* [2015] WLR 1917 and the second *Doraville* judgment, namely *Republic of Nigeria v Doraville Properties Corporation* [2017] (1) JLR 46 at paragraphs 14–16).
 - (iii) The Court is exercising statutory *in personam* jurisdiction against persons who are subject to its jurisdiction. The fact that those orders affect property outside the jurisdiction cannot be prohibited by any common law rule of private international law (*R(KBR) v Director of the Serious Fraud Office*).
- 74 The Court is not concerned to determine title to, rights in or possession of the Singapore property. All parties accept that the title to the Singapore property is held by Jonzelle. Nor is the Court concerned with the common law prohibition on the enforcement of foreign penal laws. Nor is the Court being asked to decide on the validity of a foreign domestic law or foreign domestic governmental act.
- 75 As to the *situs* of the shares in Jonzelle, I accept that the relationship between the shareholder and the company is governed the law of the place of incorporation, but the Solicitor General makes the point that the relationship with the shareholder as owner of the property in the shares vis-à-vis third parties is not necessarily governed by the law of the place of incorporation and is not geographically limited. In *Macmillan v Bishopsgate Investment Trust Plc (No 3)* [1995] EWCA Civ 55, Staughton LJ said:

“We have the authority of the House of Lords for the proposition that to some extent, as between transferor and transferee, the effect of an assignment of shares is determined by the law of the place where the assignment takes place. ... Colonial Bank v Cody and Williams
15 App Cas 267”.

- 76 This can be seen in the present case at least in the document which records that the registered shareholder of Jonzelle holds its shares on trust for the trustee of the Jasmine Investment Trust. By that document, governed by Jersey law, the shareholder validly deals with its property in the shares vis-à-vis a third party.
- 77 Similarly, it would be entirely unobjectionable for the Court to make an order requiring the Jersey resident shareholder or directors to exercise their powers in relation to Jonzelle. The fact that the law of the British Virgin Islands determines what the powers of the shareholders and directors are and the method by which they can be validly exercised does not restrict the Court's powers in this respect.
- 78 Advocate Preston's submissions on the “*situs*” of the shares must therefore be approached with caution in that the question of “*situs*” depends on the legal question to which the answer is directed. The issue that does arise is whether the Court has power to freeze the property rights represented by the shares and the underlying assets of the company. That question is concerned with the extent of the subject matter jurisdiction of the Court in relation to persons within the Court's personal jurisdiction, and the answer to that question is one of statutory interpretation. It is determined by interpreting the Modified Law.

Conclusion

- 79 In conclusion, the Court's powers under the Modified Law are not limited to property within its jurisdiction as contended by the Representor. Properly construed, the Modified Law empowers the Court to regulate the conduct of a person, over whom it has personal jurisdiction, in relation to property that person owns outside the jurisdiction, in this case over H1 and the property it ultimately owns in Singapore.
- 80 The purpose of the Modified Law and analogous legislation is to comply with Jersey's international obligations to assist in the fight against cross-border financial crime, and it would be surprising if this legislation did not apply to assets held through the very structures for which Jersey is most known. It would also be surprising if a defendant could use a common feature of such structures to argue that certain assets were beyond the Court's reach.
- 81 I would add finally that the argument before this Court has centred exclusively on whether the assets of the trust constitute “**realisable property**” as defined in Article 2(1)(b) of the Modified Law, but as the Court noted in *Tantuler v H M Attorney General* in its postscript, it might be argued that if an external confiscation order has been made and if property in Jersey is specified in that external confiscation order, then such property could be made the subject of a *saisie judiciaire* under Article 2(1)(a) of the Modified Law, even if it is not realisable property from within the three categories set out in Article 2(1)(b).

