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Representation of Kaplan

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	29 April 2009
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Text

[2009] JRC 82

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, **Kt.**, Bailiff, **and** Jurats Le Breton **and** Clapham.

In the Matter of the Proceeds of Crime (Jersey) Law, 1999, as Modified and included in the Third Schedule to the Proceeds of Crime (Designated Countries and Territories)(Jersey) Regulations 1999
In the Matter of a Saisie Judiciaire in Respect of the Realisable Property of Gary Stephen Kaplan in Jersey
In the Matter of the Representation of Gary Stephen Kaplan

Advocate J. Harvey-Hills **for the Representor**.

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

Advocate A. J. N. Dessain **for the Viscount**.

Authorities

Proceeds of Crime Act 2002.

Proceeds of Crime (Jersey) Law 1999.

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

Re Bird Charitable Trust [2008] JLR 1.

Motorola Credit Corporation v Uzan (2002) All ER (Comm.) 945.

Re the Representation of O'Brien [2003] JLR 1.

Re Illinois District Court [1995] JLR N.10b.

Maxwell on Interpretation of Statutes 12th edition (1969).

Batalla-Esquival.

Acturus Properties Limited v Attorney General [2001] JLR 43.

Investigation of Fraud(Jersey) Law 1991.

Gambling(Jersey) Law 1964.

Criminal Justice Act 1988.

Re O and another (1991) 1 All ER 330.

Proceeds of Crime (Designated Countries and Territories)(Jersey) Regulations 1999.

Re Esteem Settlement [2003] JRC 092.

Ex parte Viscount Wimbourne [1983] JLR 17.

United States -v- Schlotzhauer 2008 WL 320717.

King -v- Serious Fraud Office [2009] UKHL 17.

The Deputy Bailiff

Introduction

1 There is an old French proverb which runs " *Le jeu est le fils d'avarice et le père de désespoir"* or, in English, "Gaming is the son of avarice and the father of despair". Be that as it may, it remains a popular and profitable (for the operators) pastime. It has been estimated that in 2005 global internet gambling revenue, that is the sum lost by gamblers, was not far short of ten billion dollars. Gary Stephen Kaplan ("Mr Kaplan") is a US businessman who saw a commercial opportunity in on-line gambling. In 1995 he established a sportsbook business in Aruba and then moved it to Antigua where he obtained a sportsbook operating licence. The business expanded into Costa Rica in 1998 and to the Dominican Republic in 2003. By 2004 the business operated by BETonSPORTS PLC was large enough to float on the Alternative Investment Market ("AIM"). The flotation was successful, and Mr Kaplan made a great deal of money.

2 Although the business had been based outside the USA, the majority of the 1.2 million registered customers were US citizens. Sports betting via the telephone or internet is unlawful in nearly all American States. When BETonSPORTS PLC was admitted to the AIM in London, it was acknowledged that some of the group's activities were illegal under US law. It was judged necessary to approach the National Crime Intelligence Service ("NCIS") with a Disclosure Report before any shares could be offered for sale. By letter of 2nd July, 2004, NCIS consented to the sale of the shares pursuant to Section 335 of the Proceeds of Crime Act 2002.

3 Unfortunately for Mr Kaplan the US Department of Justice did not take the same view as to the legality of his operations. On 1st July, 2006, an indictment was laid against him and others in the State of Missouri. On 28th March, 2007, he was arrested in the Dominican Republic, and the following day he was extradited to the USA. He has been in custody in Missouri since that time.

4 Mr Kaplan's profits from the sale of shares in BETonSPORTS PLC have found their way into two Jersey trusts entitled The Bird Charitable Trust and The Bird Purpose Trust, to which we shall refer collectively as "The Bird Trusts". The trustee of these trusts was at the material time Basel Trust Corporation (Channel Islands) Limited ("Basel"). Until recently Mr Kaplan was the Protector of each of these Trusts.

5 On 24th May, 2007, on the *ex parte* application of the Attorney General, the Deputy Bailiff ordered a *saisie judiciaire* of the realisable property of Mr Kaplan pursuant to Article 15(1) of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law") and authorised the Viscount to take possession of the property and to manage or otherwise deal with it in accordance with the directions of the Court. The application was made at the behest of the US Department of Justice in accordance with Regulations which have now been replaced by the Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008 ("the 2008 Regulations").

6 The Viscount, pursuant to an authority also conferred by the Act of 24th May, 2007, and by a subsequent Order of the Court, has engaged the services of a leading firm of chartered

accountants to assist him in the management of the Trusts. The principal assets of the Trusts are an estate in Costa Rica and cash held in Swiss banks. The management of the Costa Rican estate involved the necessity to pay staff and various advisers. *Ex parte* applications were made by the Attorney General to the Bailiff on 1st June, 2007, 26th July, 2007, 19th November, 2007, and 12th December, 2007 for permission to vary the *saisie judiciaire* by making a number of payments to individuals and entities in Costa Rica and enabling the Viscount to pay the fees of Basel.

7 On 17th December, 2007, the Viscount made an *ex parte* application to the Bailiff in chambers seeking directions as to the management of the realisable property of Mr Kaplan. A number of issues arise in relation to that application, and we refer to them at paragraph 32 below.

8 On 22nd February, 2008, at the request of the US Department of Justice, a Seizure Order was granted by the *Département Fédérale de Justice et Police* in Berne freezing the bank accounts holding cash and other liquid assets in Switzerland.

9 On 2nd July, 2008, Mr Kaplan made this representation to the court pursuant to Article 16(6) of Schedule 2 to the 2008 regulations seeking the discharge of the *saisie judiciaire* or, failing such a discharge, declarations seeking to limit the scope of the Order in ways which are not at present material.

Parallel Trust Proceedings

10 Before turning to the grounds relied upon by counsel for Mr Kaplan for seeking to discharge the *saisie judiciaire*, it is necessary to touch briefly on parallel proceedings involving the administration of the Bird Trusts. At the time when the Indictment against Mr Kaplan and others was made in July 2006 the employee at Basel responsible for the Bird Trusts was Mr Edmund Bendelow, then the Chief Executive of Basel. Mr Bendelow and Mr Kaplan had built up a close working relationship and were frequently in contact with one another. Although technically Mr Kaplan and members of his family were not beneficiaries of the Bird Charitable Trust, Mr Bendelow clearly regarded them as such pursuant to the letter of wishes. Basel accordingly fell under an obligation to make a Suspicious Activity Report ("SAR") to the police pursuant to the provisions of the 1999 Law. Having made a SAR on 20th July, 2006, Basel was unable for some six weeks to communicate with Mr Kaplan for fear of committing a "tipping off" offence under the 1999 Law. It seems that this inability to communicate and to explain why Basel was unable to act without the consent of the police led to a decision by Mr Kaplan to sideline Basel. On 6th September, 2006, Mr Kaplan executed two deeds purporting to appoint Ghirlandina Anstalt (a Liechtenstein entity) as protector of both the Bird Trusts in his place. On 8th September, 2006, Ghirlandina executed a deed appointing Larona Trust Reg. ("Larona") and Roenne Corporation ("Roenne"), both also entities administered in Liechtenstein, as additional trustees of the Bird Charitable Trust with Basel and a further deed removing Basel as Trustee of the Bird Purpose Trust and replacing it with Larona and Roenne. Further

activities involving both the Trusts and the underlying companies of the Trusts were subsequently undertaken by Mr Kaplan, Ghirlandina, Larona and Roenne. They are not material for our purposes, but they are described in the judgment of Birt, Deputy Bailiff, in *Re Bird Charitable Trust* [2008] JLR 1 to which the reader of this judgment is referred.

11 What is material for our purposes is that by a representation of 30th March, 2007, ("the Validity Representation") Basel challenged the validity of the appointments of Ghirlandina and Larona and Roenne respectively. On 1st August, 2007, Ghirlandina and Mr Kaplan issued a representation ("the Removal Representation") seeking the removal of Basel as a trustee of both the Bird Trusts. On 30th August, 2007, the Viscount issued a summons seeking orders that, on the assumption that Basel were removed as a Trustee, such removal would not affect the *saisie judiciaire*. The Viscount also sought undertakings from Ghirlandina and Mr Kaplan that they would not seek to impair the Viscount's ability to manage the assets subject to the *saisie judiciaire*. On 18th September, 2007, the Deputy Bailiff directed that the Validity Representation should be heard before the Removal Representation, and that the Viscount should be convened to the latter. In the judgment to which we have referred in paragraph 10 above, the Court held that the appointment of Ghirlandina as protector of the Bird Purpose Trust and the appointment of Larona and Roenne as trustees of that trust were invalid. Mr Kaplan accordingly remained the protector and Basel remained the sole trustee. In relation to the Bird Charitable Trust, however, the different appointments were upheld. The judgment of the Deputy Bailiff was handed down on 28th January, 2008.

12 In February 2008, having given the requisite notice to Basel, Mr Kaplan resigned as protector of the Bird Purpose Trust and appointed Ghirlandina in his place. On 8th February, 2008, Ghirlandina appointed Larona and Roenne as additional trustees of that trust. By that time Basel had indicated a willingness to retire as trustee, and the Removal Representation has never been heard. Basel retired as a trustee of both the Bird Trusts on 18th December, 2008.

13 The present position *vis à vis* the administration of the Bird Trusts is that the trustees of each trust are Larona and Roenne, and the protector is Ghirlandina. All these entities are administered in Liechtenstein. The management of the trusts is in limbo, at least to a certain degree. Although Basel has retired as a trustee, it has not been able to fulfil the duty of a retiring trustee to transfer the trust assets to the new trustees, i.e. Larona and Roenne. The reason for that is that the assets are in the possession of the Viscount pursuant to the *saisie judiciaire*. Furthermore, the Basel employees who acted as directors of the underlying companies indirectly holding the property in Costa Rica have also resigned, leavin *i*g those companies rudderless. Finally, the US Department of Justice has obtained freezing orders in Switzerland so that the cash at the Swiss banks cannot be moved. The cash in Jersey has now been exhausted in order to meet, *inter alia*, the costs and expenses of the Viscount. There is, as counsel for the Attorney General put it, a lock-down.

Burden of Proof

14 Both the Attorney General and Mr Kaplan contended that the burden of proving that the *saisie judiciaire* should be discharged or maintained respectively rested on the other side. Mr Harvey-Hills relied upon remarks of Sedley LJ in *Motorola Credit Corporation -v- Uzan* (2002) All ER (Comm.) 945 where a Mareva injunction had been obtained *ex parte*. The Judge stated at paragraph 35:-

> " ***When an order made without notice comes back before a judge on notice and is challenged in part, a hybrid situation arises.*** The judge is not expected to re-enact the original without notice hearing. The reality is that both parties are now before him. But he ought not, it seems to me, to be asking himself whether, a freezing order having been made without notice, he ought now to stay its mandatory element. That approach fixes the defendant with the entire disadvantage of having been excluded, albeit for good reason, from the initial hearing. The fact, as in this case, that the defendant accepts for the present that the freezing order should remain effective and seeks to stay only the mandatory disclosure element cannot logically or fairly make his position worse in this regard. What the judge, in my view, should be asking himself is whether, now that he has both sides before him, this is a proper case for mandatory disclosure, given the imminence of an arguable challenge to the entire freezing order. That puts the burden back on the claimant, which is where it belongs. It may well require the court to give methodical consideration to the question of proportionality since, as the judge recognised, mandatory disclosure impinges on the respect owed by the court to an individual's private life. This process, I venture to think, is appropriate equally on a full application to discharge. It is not, in other words, for the defendant to displace an order made in his absence. It is for the claimant, now in the defendant's presence, to show that it ought to be continued."

He contended that the burden of showing that the *saisie judiciaire* should continue in force vested in the Attorney General.

15 Mr Belhomme submitted that a *saisie judiciaire* had been granted following his *ex parte* application, and that it was for Mr Kaplan to show, on a balance of probabilities, why the order should be disturbed. He contended that the Court's approach in relation to the discharge of *Mareva* injunctions was not in point. These were public law proceedings where the law permits the confiscation of the proceeds of crime. Counsel referred to in *Re the Representation of O'Brien* [2003] JLR 1 where the defendant applied to vary a *saisie judiciaire* in order to enable certain expenses to be met. The headnote of the report records the decision that:-

> " ***It was not appropriate for the Court in the current application to adopt the approach taken in relation to a Mareva injunction, because the saisie judiciare (a) was made when the Court believed the defendant had benefited from serious criminality; (b) vested the defendant's property in the Viscount; (c) could only be obtained by the Attorney General, the principal law officer of the Crown; and (d) was kept under continuous***

review to ensure that no injustice was being perpetrated. It was more appropriate to draw an analogy between the saisie judiciare and a declaration en désastre, which could be discharged or varied in relation to any property on the application of the defendant at any time."

16 It is true that *O'Brien* was not expressly concerned with the burden of proof. Nevertheless it seems to us that, in the context of the exercise of discretion in public law proceedings of this kind, it is inapt to speak of the burden of proof. The 1999 Law was enacted to enable the Court to ensure that criminals were unable to benefit from their ill-gotten gains. A policy objective is to seize and to remove the proceeds of crime. Although *O'Brien* was concerned with drug trafficking legislation, the Court's comment in that case seems equally relevant to the 1999 Law. The Court stated at paragraphs 16 to 18:-

" ***The* saisie judiciaire *is a provisional order but, unlike the restraint order made under the equivalent English legislation, vests the realisable property of the defendant in the Viscount.*** Some might think that this is a draconian process. It is certainly a strong thing to divest a defendant of all his property in the jurisdiction on an **ex parte** ***application in private.***

It seems to me that the legislature has justified this extreme measure on two bases. First, the **saisie judiciaire** ***may only be obtained by the Attorney General.*** The Attorney General is the principal law officer of the Crown, and one is entitled to expect that an application will only be made after the matter has been examined with great care. One is also entitled to expect that the matter will be kept under continuous review, so as to ensure that no injustice is being perpetrated. One is entitled to expect all this because the Attorney General is no ordinary applicant for injunctive relief but is, for these purposes, a Minister of Justice.

Secondly, the Drug Trafficking Offences Law provides that the* saisie judiciaire *may, at any time, be discharged or varied in relation to any property on the application of the defendant or any other interested party. If there is an analogy to be drawn with any other judicial process, it seems to me that the proper analogy is with a declaration **en désastre** ***where, on the making of the declaration, all the bankrupt's property also vests in the Viscount; in this instance, for the benefit of the creditors.*** Here too, the application is made **ex parte** ***but the debtor has the right to apply to the Court to set the declaration aside."***

17 In our Judgement the question for the Court on an application to discharge a *saisie judiciaire* is whether, having regard to the policy objectives of the 1999 Law, *viz.* to deprive criminals of their ill-gotten gains, it is fair, reasonable and proportionate to maintain the order in force. That does not involve placing a burden of proof on either the applicant or the Attorney General. It does involve a weighing in the balance of all relevant considerations before arriving at a conclusion.

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. The argument is relevant to a number of the contentions advanced by counsel for Mr Kaplan, and it is convenient to deal with it as a preliminary matter. Mr Belhomme relied upon a decision of this Court in *Re the Representation of Batalla-Esquival* [2001] JLR 160. That was a case where the Attorney General obtained a *saisie judiciaire* on behalf of the Attorney General of the USA. The representor claimed that the property subject to the *saisie judiciaire* was not the property of the defendant but was settled under valid trusts in which the defendant had no interest. He sought to discharge the *saisie judiciaire inter alia* on the ground that the Court had no jurisdiction to make the order where the foreign proceedings were *in rem.* The Court rejected that submission and, quoting a passage from the Judgment in *Re Illinois District Court* [1995] JLR N-10b, stated at paragraph 10:-

> " ***It is true that this is not directly in point, but the passage does nonetheless serve to emphasise (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 Interpretation of Statutes 12th edition (1969) cited by Mr Belhomme in *Batalla-Esquival* 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 penalise the concealing or laundering of the proceeds of serious crime. We turn now to the grounds relied upon by counsel for Mr Kaplan for setting aside the *saisie judiciaire*.

No reasonable expectation of an external confiscation order being made

20 Counsel for Mr Kaplan submitted that there were no reasonable grounds for believing that an external confiscation order might be made, and that the *saisie judiciaire* could not therefore stand. The statutory background to the *saisie judiciaire* is to be found in the 2008 Regulations which modify the 1999 Law in its application to countries outside Jersey. Schedule 2 to the 2008 Regulations sets out the Law in its modified form. An "external

confiscation order" means an order made by a US court:-

By Article 15 of the 1999 Law, as modified, a *saisie judiciaire* may be made where:-

Proceedings have been instituted against Mr Kaplan in the USA.

> " ***(a) for the purpose of recovering property obtained as a result of or in connection with criminal conduct;***
>
> ***(b) for the purpose of recovering the value of the property so obtained; or***
>
> ***(c) for the purpose of depriving a person of a pecuniary advantage so obtained".***
>
> " ***(a) proceedings have been instituted against the defendant in a country or territory outside Jersey and –***
>
> ***(1) the proceedings have not been concluded, and***
>
> ***(2) 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; …".***

21 Are there reasonable grounds for believing that an external confiscation order might be made? Counsel for the Attorney General placed before us an affidavit sworn on 15th January, 2009, by Steven E Holtshouser, an assistant US Attorney acting for the US Attorney for the Eastern District of Missouri. Mr Holtshouser explains that, under the federal law of the US, a criminal prosecution is commenced when a grand jury files an indictment. An indictment is a formal written accusation that charges a person with a crime, and identifies property that the grand jury has cause to believe is subject to forfeiture. It is common ground that the assets contained in the Bird Trusts are believed by the US Attorney for the Eastern District of Missouri to be liable to forfeiture.

22 Counsel for the Attorney General submitted that that was, in effect sufficient. He cited a passage from the judgment of Birt, Deputy Bailiff in *Acturus Properties Limited v Attorney General* [2001] JLR 43 where the Judge stated at paragraph 52:-

> " ***He is entitled to assume the correctness of the information set out in the letter of request.*** It would not normally be appropriate for him to go back and query information given to him by a prosecuting authority of a friendly jurisdiction. That is not to say that the Attorney General, in order to ensure that orders made under the 1991 Law are not in terms which are wider than is required for the purposes of the investigation, cannot seek clarification or elaboration. For example, it may be that the alleged connection with a particular company in Jersey is not sufficiently spelt out in the letter of request. But that is a matter of judgement for him when holding the balance between the need to investigate serious or complex fraud, wherever committed, and the need to limit

> forced disclosure of confidential information to what is necessary for the purposes of the investigation. He is entitled, as a matter of law, to assume the correctness of what he is told and is under no duty to request sight of the evidence upon which the information in the letter of request is based."

Counsel for the Attorney General contended that this was a principle of general application and that this presumption of regularity under the Investigation of Fraud(Jersey) Law 1991 could be read across to the *saisie judiciaire* obtained on behalf of foreign jurisdictions under the 1999 Law. We think that this contention goes too far. The mere fact that the US Attorney has a reasonable belief that a forfeiture order will be made in the Missouri proceedings does not mean that this Court can simply adopt that belief. It is necessary to delve a little deeper. The statute places an obligation on this Court to satisfy itself that there are reasonable grounds for believing that an external confiscation order will be made.

23 During the course of interlocutory proceedings in Missouri the Indictment laid by the Grand Jury has been amended on several occasions. What is now facing Mr Kaplan and his co-defendants is the Third Superseding Indictment ("the TSI"). The TSI alleges nineteen counts of criminality. Count one is a racketeering conspiracy charge. Counts eighteen and nineteen are the forfeiture counts. Count eighteen is the RICO forfeiture count and is dependant on a conviction under count one. Mr Holtshauser has deposed that all the named assets, including the assets of the Bird Trusts, up to the sum of one hundred and eighty million dollars are forfeitable on numerous grounds. As an example he states that the sportsbooks and assets of the BETonSPORTS organisation were derived from illegal activity and were owned and controlled by members of the organisation prior to the public offering of shares in July 2004.

24 It is not contested that Section 1962 of the US Code permits forfeiture of any " ***property constituting and derived from proceeds obtained, directly or indirectly from racketeering activity"*** in violation of that section. Counsel for Mr Kaplan asserts that there has been no racketeering activity, and there has been, as yet, no decision of the trial Judge. It does appear, however, that preliminary objections to count one which have been lodged by lawyers acting for Mr Kaplan have not been successful. The motion alleged that the "pattern" of racketeering activity in the charge was too vague and unspecific. On the 20th March, 2008, Mary Ann L Medler, a US Magistrate Judge found that the earlier Indictment complied " ***in all respects with Rule 7 of the Federal Rules of Procedure"***. On 7th October, 2008, the same Magistrate Judge recommended that Mr Kaplan's further objections to the TSI on the grounds of vagueness should be dismissed. Whether or not the predicate acts, or indeed the conspiracy itself, are ultimately made out will of course be issues for the Jury at trial. It is not for us to seek to prejudge such issues. It is clear from the prospectus relating to the flotation in 2004 that there were then concerns that some of the group's activities might be illegal by US Law. Enough material has been placed before us by Mr Holtshouser to satisfy the Court that " *there are reasonable grounds for believing that [an external confiscation order] may be made in the proceedings"*. We find no force in this ground of complaint.

The dual criminality test

25 Mr Harvey-Hills' second ground of objection to the *saisie judiciaire* was that the so called "dual criminality" test was not satisfied. As we have stated above, an external confiscation order is one made, *inter alia*, for recovering property obtained as a result of criminal conduct. "Criminal conduct" is defined in Article 1(1) of the 1999 Law, as modified, as " ***conduct corresponding to an offence specified in Schedule 1".*** Schedule 1 specifies the relevant offences as being " ***any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years (whether or not the person is also liable to any other penalty), but not being a drug trafficking offence".*** Mr Harvey-Hills' contention is that the conduct alleged in the TSI against Mr Kaplan would not amount to an offence in Jersey as a matter of Jersey Law and, if it did, would not satisfy the definition in Schedule 1.

26 We must first consider what is the law of Jersey in relation to unlawful gambling. Article 2 of the Gambling (Jersey) Law 1964 provides that:-

By Article 10 (4) a person guilty of an offence " *shall be liable, in the case of a first offence, to a fine not exceeding level 4 on the standard scale, and, in the case of a second or subsequent offence under the same provision to a fine or to imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment".*

> " ***(1) Except as may be provided by Regulations made under the provisions of Article 3, all forms of gambling are unlawful.***
>
> ***(2) Any person who organises or in any way takes part in any form of gambling, not being lawful gambling, shall be guilty of an offence".***

27 The first question, (assuming that there is an equivalent offence or offences in Jersey), is whether Mr Kaplan's alleged conduct would have constituted an offence carrying " *imprisonment for one or more years".* Article 2 (2) of the Gambling(Jersey) Law 1964 provides that an offence under that Law carries a possible penalty of one year's imprisonment if it is " ***a second or subsequent offence under the same provision".*** Counsel for the Attorney General submitted that there were two answers to this question. The first is that Mr Kaplan was convicted of an offence of promoting gambling before the Criminal Court of the City of New York on 5th December, 1993, and given an unconditional discharge. He has, therefore, a previous conviction for a gambling offence. The second is that the TSI alleges more than one count involving unlawful gambling and that, if convicted it would be a second or subsequent offence in relation to certain of the counts. With some hesitation, and applying a broad construction of the relevant statutory provisions for the reasons given above, we are prepared to accept those submissions.

28 We turn to consider whether what is alleged against Mr Kaplan under the TSI would constitute an offence in Jersey. It seems clear from all the affidavit evidence before us, but

particularly the first affidavit of Mr Holtshauser, that what is alleged against Mr Kaplan falls into three broad categories. First, there is the RICO conspiracy offence in count one and the alleged conspiracy to commit the predicate offences on the indictment. Secondly, there are the predicate offences of using the mail to defraud sports betting customers, using wire communications to transmit sports bets or information, and the alleged interstate transport of gambling paraphernalia to promote the businesses of the BETonSPORTS organisation. Thirdly, there are the forfeiture counts in counts eighteen and nineteen. We heard lengthy submissions from both counsel for Mr Kaplan and for the Attorney General as to whether or not the alleged offences in the TSI constituted criminal conduct in Jersey, but we think that there is a more simple answer to this question. What is alleged against Mr Kaplan under the TSI is, *inter alia*, and applying the broad construction referred to above, that he conspired with others to conduct an unlawful internet gambling business. In Jersey a conspiracy to commit a criminal offence is itself an offence. Internet gambling has not been made lawful by regulations passed under the Gambling (Jersey) Law 1964. Internet gambling is therefore unlawful pursuant to Article 2 (1) of the Law. A conspiracy to conduct an internet gambling business is an offence under the law of Jersey for which the punishment is at large, i.e. the offender is liable on conviction to imprisonment for more than one year. It follows that the dual criminality test is satisfied. To express it more precisely, we are satisfied that what is alleged against Mr Kaplan under the TSI is criminal conduct corresponding to an offence or offences under the law of Jersey.

Is there realisable property situate in Jersey?

29 Counsel for Mr Kaplan submitted that there was no realisable property of the defendant in Jersey and that accordingly there were no grounds for granting nor for maintaining the *saisie judiciaire*. The relevant statutory background is to be found in Schedule 2 to the 2008 Regulations. Article 16 (4) provides:-

> " ***(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."***

30 " ***Realisable property"*** is defined in Article 2(1) as follows:-

> " ***(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 –***
>
> ***(1) any property held by the defendant.***
>
> ***(2) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law, and***
>
> ***(3) any property to which the defendant is beneficially entitled."***

31 " ***Property"*** is defined in Article 1(1) as follows:-

> " ***Property" means all property, whether moveable or immoveable, 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 Article 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 Article 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 and another* (1991) 1 All ER 330.

33 It is necessary here to interpose that on 17th December, 2007, the Viscount made an *ex parte* application to the Bailiff in chambers. No other party was convened, although the Attorney General was informed of the application. Prior to the hearing of the representation by Mr Kaplan now under consideration, the Court ordered that all the material placed before the Bailiff on 17th December, 2007, should be made available to counsel for the Attorney General and for Mr Kaplan. Both those counsel have made what appeared to us to be rather extravagant submissions as to the nature of the orders made by the Bailiff and in particular have contended that this Court is now *functus officio* in various respects. We reject all those contentions for two reasons. First, the Bailiff was hearing an *ex parte* application in the absence of other parties, and it would be quite unconscionable to hold those other parties bound without having been heard. Secondly, the only purpose of the Viscount's application was to obtain general guidance and directions from the Court as to the management of the realisable property apparently falling within the ambit of the *saisie judiciaire*. Such directions, in particular those relating to the Bird Trusts and their underlying

assets, do not amount to final decisions giving rise to the doctrine of " *functus officio"*.

34 The thrust of Mr Harvey-Hills' submissions was that the underlying assets of the Bird Trusts were not realisable property, and in any event were not situate in Jersey so as to vest in the Viscount.

35 It is common ground that Mr Kaplan has at no relevant time personally held any property in Jersey. The assets which the Attorney General asserts are vested in the Viscount are the underlying assets of the Bird Trusts. That assertion is made on two alternative bases. The first is that Mr Kaplan directly or indirectly gave the property to the trustee of the Bird Trusts and it is therefore caught by virtue of Article 2(1)(b) of the 1999 Law. The second is that the assets of the Bird Trusts are property to which Mr Kaplan is beneficially entitled, and are therefore caught by Article 2(1)(c) of the 1999 Law.

36 Mr Harvey-Hills made a number of detailed submissions in response to the contention of Mr Belhomme that the Court should look to the reality of the situation. He argued that it was not open to the Court to disregard contractual arrangements, to pierce the corporate veils or to ignore trusts which were plainly not shams. We will not lengthen this Judgment by referring to these arguments in greater depth because we intend to do none of those things. In our view Mr Kaplan did gift the relevant assets into the trusts. That was certainly the view taken by Birt, Deputy Bailiff in the Judgment to which we referred at paragraph 10 above. At paragraph 14 of that Judgment Birt, Deputy Bailiff stated in relation to the Charitable Trust:-

> " ***Although Mr Bird was the nominal settlor, it is clear from the letter of wishes that Mr Kaplan and his family are to be regarded as the main persons to benefit from the trust, albeit that none of them has as yet been added formally as a beneficiary".***

At paragraph 30 he added:-

> " ***Mr Kaplan was the effective settlor of both trusts".***

37 Furthermore the affidavit of Mr Ludewig also records that on 9th July, 2004, a Client Acceptance Form for Leecroft Investment Group Limited (one of the companies owned by The Bird Charitable Trust) was completed by Basel. Mr Ludewig continues:-

> " ***Next to the section on the form for the "Origin of Funds" is written "proceeds of sale of shares in BetonSports."*** Next to the section on the form for the "Name of each Settlor/s or name of each Beneficial Owner/s" is the name of "Gary Kaplan". A Glossary of terms for Basel Trust Group defines Beneficial Owner as "The actual or economic owner of an offshore company as distinct to the registered or nominal owner." The same Glossary of Terms defines Settlor as "The settlor is the person who establishes the Trust. He is the person who transfers money or other property to the Trustees for them to hold upon the terms of the Trust".

38 In our Judgement the trust property is caught by article 2(1)(b)(ii) of the 1999 Law. We have no doubt that the assets were given, directly or indirectly, by Mr Kaplan to Basel upon trust.

39 In the light of that finding it is strictly not necessary for us to consider whether Mr Kaplan is beneficially entitled to the trust property so that it is caught by article 2(1)(b)(iii) of the 1999 Law. In deference to the detailed arguments submitted to us, and in case it may be helpful on another occasion, we will nonetheless record our provisional conclusions in relation to those submissions.

40 Mr Belhomme relied essentially upon four matters to support his contention that Mr Kaplan was beneficially entitled to the trust property. First, the history of the trusts shows that it is Mr Kaplan who calls the shots. It was Mr Kaplan who, in his capacity of protector, procured or sought to procure the removal of Basel as trustee of the Bird Trusts and who planned the transfer of the administration of the trusts from Jersey to Liechtenstein. He was clearly regarded by Mr Bendelow as the moving spirit behind the trusts, so that when the Indictment against Mr Kaplan was unsealed it was felt necessary immediately to make an SAR. Indeed consultancy fees and other payments were made from the trusts to Mr Kaplan at his request even when he was not a beneficiary. These advances were treated as loans which no doubt would have been cancelled and treated as distributions as soon as Mr Kaplan had been appointed as a beneficiary. Mr Kaplan's own evidence supports the inference that he is beneficially entitled to the trust property. At paragraph 8 of his affidavit of 10th July 2008 he stated:-

> " *8. On the advice of Basel, when the Trusts were established my family and I were not formally named as beneficiaries. However, it was well understood by Basel from my discussions with them that the purposes of the Trusts were estate planning and asset protection for me and my family and we were the real beneficiaries. This was explicitly recognised and confirmed by Deputy Bailiff Birt at paragraph 46 of his January 28, 2008 decision."*

41 Secondly, a chart was placed before us showing the corporate structure of the different entities involved in this case. At the top of the structure sit the Bird Charitable Trust and the Bird Purpose Trust. The Bird Charitable Trust owns, directly or indirectly, a number of companies including Leecroft Investments Group Limited which holds a substantial amount of cash in Switzerland. The Bird Purpose Trust owns a Liechtenstein Anstalt called Great Plains Anstalt ("GPA"). GPA owns a Singaporean company called Planak Holdings Pte ("Planak") which in turn owns a Panamanian company called Boulder Overseas Corporation ("Boulder") which in turn owns or owned shares in BETonSPORTS PLC. It is to be noted that an option exists whereby the Bird Charitable Trust can acquire from the Bird Purpose Trust the entire legal and beneficial ownership in the founder's rights of GPA for US$1.00. The ultimate owner of the structure is therefore The Bird Charitable Trust.

42 The process involved in the sale by Mr Kaplan of his interests in BETonSPORTS and the creation of this corporate structure is described in an affidavit sworn by Mr Joseph Ludewig

of the US Internal Revenue Service on 29th August, 2008. Mr Ludewig describes a three staged transaction. The first stage involved the sale of Mr Kaplan's 10,000 bearer shares in Boulder to Basel as trustee of the Bird Purpose Trust in exchange for an unsecured, interest free loan of US$20 million due on 10th November, 2023. Mr Kaplan also sold his founder's rights in GPA to Basel as trustee of the Bird Purpose Trust for a US$50,000 unsecured interest free loan due on 18th April, 2024. The second stage involved the sale by Basel as trustee of the Bird Purpose Trust of 10,000 bearer shares in Boulder to GPA for an unsecured interest free loan of US$20 million due on 10th November, 2023. The third stage involved the sale of the 10,000 bearer shares in Boulder by GPA to Planak for an unsecured interest free loan again due on 10th November, 2023.

43 It is unclear whether the original loan note for US$20 million continues to be held by Mr Kaplan personally or whether it is now held by some corporate entity for him. It would be open to Mr Kaplan to cancel the loan note and to derive benefit through the trusts but he could, alternatively, in due course claim the funds under the benefit of the loan note.

44 Thirdly, there is the affidavit of Mr Ludewig to which we have referred at paragraph 37 above. The Client Acceptance Form for Leecroft Investments Group Limited records that the name of each beneficial owner is Mr Kaplan. " *Beneficial owner"* is defined in Basel's Glossary as " *the actual or economic owner of an offshore company as distinct to the registered or nominal owner"*.

45 Fourthly, the same affidavit of Mr Ludewig further records that on 16th July, 2006 applications to establish bank accounts by Leecroft Investments Group Limited at Banque Privée Edmond de Rothschild SA and Pictet & CIE in Switzerland both recorded Mr Kaplan as being the beneficial owner of the assets in the accounts.

46 Mr Harvey-Hills contended, however, that Mr Kaplan could not be "beneficially entitled" to the trust property because he was merely the object of a discretionary power under the trust. He was a member of a beneficial class but no more. It could be said that he had a beneficial interest, but he was not beneficially entitled. We have previously found that, bearing in mind the purposes of the 1999 Law, it is to be given a broad construction. The statutory words must nonetheless, be given their proper meaning. The affidavit of Mr Kaplan states that the intended beneficiaries of both Bird trusts were him and his family. It appears, although no particulars have been given to us, that Mr Kaplan and members of his family were added to the class of beneficiaries of both trusts in February 2008. There is no suggestion that the Bird Trusts are shams. The existence of other family members in the discretionary class of beneficiaries makes it difficult, on the face of it, to conclude that Mr Kaplan is beneficially entitled to the underlying trust property. Any such finding could only be made, in any event, after giving to other members of the class of beneficiaries the opportunity to be heard. It is unnecessary for us to reach a conclusion on the issue, and we leave open for further argument on another day the question whether the words "beneficially entitled" under the 1999 Law should be given a meaning other than the conventional meaning under the law of trusts.

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 Limited and Basel Two Limited which are registered and controlled in Jersey. The fact that the underlying assets are outside the jurisdiction is, for these purposes at least, immaterial.

48 We accordingly reject the submission that there is no realisable property of the defendant in Jersey.

Material non-disclosure

49 Counsel for Mr Kaplan submitted that the Attorney General had not fulfilled his duty of full disclosure when the application for *ex parte* relief had been made to the Deputy Bailiff on 24th May, 2007. An allegation of material non-disclosure was also made against the Viscount in relation to the hearing on 17th December, 2007, but this allegation was withdrawn during the hearing. In relation to the hearing on 24th May, 2007, Mr Harvey-Hills submitted that the following matters were important enough to have been drawn expressly to the attention of the Judge:-

> " *(a) The complex nature of a RICO conspiracy charge and, in particular, the fact that the existence of an enterprise is crucial;*
>
> *(b) The fact that Bet on Sports PLC could not be the enterprise since it had already been charged as being part of the RICO conspiracy;*
>
> *(c) A RICO forfeiture order is only in respect of interests in or property constituting or derived from the proceeds of racketeering;*
>
> *(d) The fact that there was existing US authority that showed that bets were accepted where they were received and not where they were placed (see Magistrate's Report (Bundle B(2), T15) and reference to State v Oldham*, 98 SW 497, 500 (MO 1906));
>
> *(e) The Jersey authorities of Re Esteem Settlement and Ex p. Viscount Wimborne;*
>
> *(f) The fact that the US court had issued a warrant on the basis of evidence supplied by authorities that there were trust assets in Missouri when there were none and the US authorities were well aware of this;*
>
> *(g) The fact that usual procedure would have been to obtain a restraint order in the USA which Mr Kaplan could have challenged and which would have required the US authorities to satisfy a jury that Mr Kaplan was guilty and that the property was sought would be likely to be subject to forfeiture;*
>
> *(h) The fact that the USA was (and remains) in breach of its GATS obligations in seeking to enforce laws that have been held to be in breach of those obligations by*

the WTO tribunal."

50 Mr Belhomme's response was that he was unaware at the time of his application of the matters set out in paragraphs (a), (b), (c), (d), (g) and (h) above. He contended that the authorities in (e) were irrelevant. We deal with (f) separately.

51 When the application was made to the Deputy Bailiff on the 24th May, 2007, it was made on the basis of a Letter of Request from the US Department of Justice dated 19th February, 2007, pursuant to the 1999 Law and the Proceeds of Crime (Designated Countries and Territories)(Jersey) Regulations 1999 made thereunder. Additional information was provided by the US Government in a memorandum of 26th March, 2007. It was clear on the face of those requests that Mr Kaplan had been charged in the United States with the offences which are now contained in the TSI, amongst others. The proceedings had not been concluded, but it was asserted that there were reasonable grounds for believing that a restraining order would be made, and a Seizure Warrant had been issued. The USA was a "designated country".

52 We have no official record of what transpired at the private hearing in chambers on 24th May, 2007, but it is clear that the Deputy Bailiff required further information about the criminal conduct alleged against Mr Kaplan before he was prepared to grant the *saisie judiciaire*. The hearing was adjourned, and Mr Belhomme wrote a long letter later that day to the Judge supplying that information and transmitting also a copy of a Joint Opinion by senior English counsel. Having considered that additional material, the Deputy Bailiff was prepared to grant, and did grant the *saisie judiciaire* at the end of 24th May, 2007.

53 It is clear to us not only that the application by the Attorney General was fully and carefully considered and prepared, but also that the Deputy Bailiff gave the matter rigorous examination. For the reasons already given, the objections set out in paragraphs (a), (b), (c) and (d) are without substance. We agree with counsel for the Attorney General that, in the context of this application neither *Re Esteem Settlement nor Ex parte Viscount Wimbourne* would have assisted the Judge. In any event, *Re Esteem Settlement* was one of the learned Judge's own Judgments, and he could have directed his attention to it if he had wished. We reject the objection set out in paragraph (e). The allegation that the USA is in breach of its obligations under GATS was not drawn to the attention of counsel for the Attorney General. Whether or not there is any substance in this allegation, we do not consider that it was sufficiently material to Mr Belhomme's application to justify the complaint made by counsel for Mr Kaplan. We also reject paragraph (h) of this ground of complaint. Turning to paragraph (g) of the grounds of complaint, we do not think that this alleged procedural grievance was sufficiently material to have affected the Deputy Bailiff's consideration of the application before him. We turn finally to paragraph (f) of the grounds of complaint.

The Warrant

54 Counsel for Mr Kaplan placed before the Court a copy of the warrant to which we have referred in paragraph 49 above. The materiality of the warrant to which reference was made before the Deputy Bailiff was that it tended to support the argument that an external confiscation order " ***may be made in the proceedings"*** (see article 15(a)(ii) of the 1999 Law). That there are reasonable grounds for believing that an external confiscation order may be made is a pre-requisite for the making of a *saisie judiciaire* at the instance of the authorities of a designated foreign country. Mr Harvey-Hills submitted that the warrant was flawed, and had been obtained in the eastern district of Missouri on the basis of incorrect evidence, namely that there was property subject to forfeiture in Missouri. That submission was based upon the affidavit evidence of Mr David I Faust, a New York Attorney advising Mr Kaplan. The Seizure Warrant issued by Magistrate Judge Medler on 26th February, 2007, does indeed record " *affidavits having been made before me by Joseph Ludewig who had reason to believe that in the eastern district of Missouri there is now a certain property which is subject to forfeiture by the United States".* On 6th February, 2009, Mr Faust swore a further affidavit to which he appended part of a memorandum (unsworn) of Mr Samuel J Buffone, a partner of a Washington law firm instructed by Mr Kaplan. Mr Harvey Hills was permitted to lay that affidavit before the Court at the hearing on 6th February, 2009, on the footing that the US Department of Justice would be permitted to file an affidavit in reply. The memorandum of Mr Buffone asserted that the only basis for forfeiture in the original indictment laid against Mr Kaplan was the RICO charge. The affidavits on which the warrant of seizure was based, Mr Buffone alleged, stated that Mr Kaplan's property was subject to seizure and forfeiture under US Code section 1963(a)(3)(c)(d)(1). The only legitimate process by which the Government could have sought a freeze of Mr Kaplan's assets was a restraining order under the RICO forfeiture provisions, section 1963(d)(1). Instead, Mr Buffone asserted, the Government had obtained a Warrant of Seizure under a blatantly inapplicable statute *viz*. 21 US Code Sect. 853. Mr Buffone claimed that the District Judge had wrongly relied upon Sect. 853 and that the US Government had violated Mr Kaplan's procedural rights in order to give this Court the impression that a domestic seizure had taken place, thereby justifying the application for a *saisie judiciaire* in Jersey.

55 The US Department of Justice filed an affidavit in response. The second affidavit of Mr Holtshouser was sworn on 12th February, 2009. He pointed out, first of all, that the US Government was limited by ethical and court rules from commenting publicly on matters that might impact upon a forthcoming trial. He pointed out that Mr Kaplan had placed before the Court the warrant but not the affidavits upon which the warrant had been issued, notwithstanding the fact that those affidavits had been available to Mr Kaplan's advisers since 17th September, 2008. On that day Judge Medler had unsealed the affidavits and supporting documents on the application of Mr Kaplan. The warrant itself was a computer generated form on which the phrase "in the Eastern District of Missouri" had (mistakenly) not been altered either by the agents or by the Judge. The affidavits themselves made it very clear, however, that no assertion was made to the effect that Mr Kaplan's property subject to forfeiture was then located in the eastern district of Missouri.

56 As to the merits of the excerpts from Mr Buffone's memorandum, Mr Holtshouser stated that reliance had been placed on statutory provisions that were out of date. In particular Mr

Buffone had ignored an amendment to US Code Sect. 2461(c) which was enacted in 2006. That amendment removed any doubts as to whether all the procedures set out in Title 21 US Code, Sect. 853 applied to all criminal forfeiture efforts. This interpretation was confirmed in *United States v Schlotzhauer* 2008 WL 320717. At paragraph 9 of the Judgment, District Judge Fenner referred to the 2006 amendment and stated:-

> "' ***Upon conviction' language no longer appears in the statute.*** Instead the procedures set out in 21 U.S.C. Sect.853 are to apply to 'all stages' of a criminal forfeiture proceeding. It appears that Congress has clarified its intent that Sect.2461(c) authorises the pre-trial restraint of assets."

57 While we find the arguments of Mr Holtshouser to be highly persuasive, we do not think that it is appropriate for us to express a view on the interpretation of procedural provisions in the US Codes, except to this extent. We are entirely satisfied that, at the time when the application was made to the Deputy Bailiff, there was no failure on the part either of the Attorney General or the US Department of Justice to place material documentation before the Judge. Counsel for the Attorney General was perfectly entitled to submit that the issuance of the warrant gave reasonable grounds for believing that an external confiscation order might be made.

58 In summary, we reject all the submissions advanced by counsel for Mr Kaplan to the effect that the *saisie judiciaire* ought not to have been granted. There remains a discretion, however, as to whether the *saisie judiciaire* should be continued in force or discharged, and to that more difficult issue we now turn.

Discretion

59 Much water has passed under the bridge since the *saisie judiciaire* was first issued by the Deputy Bailiff on 24th May, 2007. We have referred to the decision of this Court in the parallel trust proceedings at paragraphs 10 to 13 above. Basel has retired as a trustee of The Bird Trusts and the current trustees are now Larona and Roenne which are administered in Liechtenstein. Larona and Roenne are powerless to act because Basel is prevented by the existence of the *saisie judiciaire* from vesting the trust property in the new trustees. Neither the former trustee nor the new trustees are able to fulfil their fiduciary duties. The assets in Switzerland are the subject of freezing orders. The assets in Costa Rica are not subject to any form of restraint, but it is not clear how or by whom they are now being administered. As counsel for the Attorney General put it, there is a "lock down". We would describe it rather as a stalemate. Is it sensible to perpetuate this state of affairs?

60 Mr Belhomme for the Attorney General and the United States Government submitted that it was. The criminal proceedings against Mr Kaplan were still pending, and it was contended that a forfeiture order relating to all the assets in the Bird Trusts was likely to be made. At present the Viscount has effective control of the Trust property through the *saisie judiciaire*, and the Court should not allow its order to be frustrated by Basel's resignation as trustee.

Mr Kaplan had lied to millions of Americans in stating that his gambling business was lawful, counsel submitted, and justice demanded that his ill-gotten gains should be removed. If the *saisie judiciaire* were discharged, the US Government would lose the opportunity to forfeit the land in Costa Rica. It would also create an incentive for criminals to place the proceeds of crime in Jersey.

61 Mr Harvey-Hills contended that the maintenance of the *saisie judiciaire* in the current circumstances was an abuse of the process of the Court. The application for a *saisie judiciaire* had been a holding operation by the US Government pending the obtention of assistance from the Swiss authorities. Freezing orders had now been obtained in Switzerland, and there was no longer any justification for maintaining the *saisie judiciaire* in Jersey.

62 Mr Dessain who appeared for the Viscount, made a number of submissions which the Court found to be very helpful. Counsel reminded the Court that the Viscount took a neutral stance as to whether the *saisie judiciaire* should be maintained or discharged. He saw his function as being limited to assisting the parties and the Court to arrive at the just solution.

63 The second affidavit of Mr Edward Shorrock, sworn on 11th December, 2008, sets out clearly the current state of affairs. Mr Shorrock is the Viscount's accountant and formerly a director of Deloitte and now a director of Forensic and Regulatory Services at Baker Platt, and is advising the Viscount. The resignation of Basel from the trusteeship of both the Bird Trusts was to take effect on 18th December, 2008. Counsel confirmed that those resignations had taken place and that Basel employees remained as directors of Basel One Limited and Basel Two Limited which are held to the order of the Viscount pursuant to the *saisie judiciaire*. The subsidiary companies are now however without directors. Larona and Roenne had shown no inclination to cooperate with Basel while the *saisie judiciaire* remained in force.

64 Until the end of 2008, the Viscount's costs and expenses of managing the *saisie judiciaire* had been met out of the assets of The Bird Charitable Trust. The liquid assets of The Bird Trusts in Jersey have now been exhausted.

65 It is clear that the continuation of the *saisie judiciaire* would have the following consequences:-

(i) The costs and expenses of the Viscount can no longer be met from the assets of the defendant, and would have to be met from public funds.

(ii) The administration of the trust assets in Costa Rica would continue to be paralysed, with no one seemingly willing or able to take responsibility for them.

(iii) Basel, as the owner of its nominee companies Basel One Limited and Basel Two Limited, would continue to hover uncertainly in a legal no-man's land; it has divested

itself of its fiduciary responsibilities as a trustee, but remains unable to transfer the trust property to the new trustees in Liechtenstein. There are no liquid funds to pay Basel's fees and legal expenses.

(iv) Larona and Roenne, having assumed the responsibilities of a trustee, are unable to fulfil the duties of that office.

66 On the other side of the coin, what are the consequences of discharging the *saisie judiciaire*? From the perspective of the US Government, nothing would change in terms of the trusteeships of The Bird Trusts. They have already moved from Jersey to Liechtenstein. The liquid assets in Jersey have been exhausted; the only remaining liquid assets of the trusts are in Switzerland where they are subject to freezing orders which have been obtained by the US authorities. It is true that the legal control through the Basel nominee companies of the property in Costa Rica would go. Counsel for the Attorney General told us that no proceedings had been instituted by the US Department of Justice in Costa Rica to seize or restrain assets there, but gave no explanation as to why that was the case.

Conclusion

67 In our Judgement the balance tips in favour of discharging the *saisie judiciaire.* Our principal reason for arriving at that conclusion is that we think it is inappropriate to allow the Viscount to remain in an impossible position. Power without responsibility is the prerogative of the harlot, but responsibility without power is equally dangerous. The Viscount is powerless to exercise effective control over the assets subject to the *saisie judiciaire*. Article 16(4) of the 1999 Law, as modified by the Proceeds of Crime (Designated Countries and Territories)(Jersey) Regulations 1999, (and now replaced by the 2008 Regulations as defined in paragrpah 5 above) provides that, on the making of a *saisie judiciaire*, 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;".***

The Viscount is unable to fulfil that duty. The assets in Switzerland have been frozen as a result of action taken by the US Department of Justice. The assets in Costa Rica are principally immoveable property which is beyond his reach.

68 A subsidiary reason for our decision is that it would, in our Judgement, be unfair upon Basel, which appears to have acted with perfect propriety throughout, to be condemned to some form of legal purgatory for an indefinite period. It is true that Basel resigned its trusteeship of its own volition, but only after it had been made clear that it had lost the confidence of Mr Kaplan and that the basis of the trust relationship had gone. As a minority trustee, it was too was in an impossible position.

69 After Judgment had been reserved, counsel for Mr Kaplan drew to the attention of the Court a recent Judgment of the House of Lords in *King -v- Serious Fraud Office* [2009] UKHL 17. Counsel submitted that this Judgment was relevant to the question whether the *saisie judiciaire* embraced property outside the Island. We accordingly invited counsel for the Attorney General and for the Viscount to submit any written observations that they thought appropriate and we have taken those observations into account. The statutory provisions in England and Wales are different from those applicable under the 1999 Law. Nonetheless, some of the observations of Lord Phillips of Worth Matravers are interesting and relevant, in our Judgement, to the exercise of our discretion. The issue for the English Courts was whether the Crown Court had jurisdiction to include within the ambit of its restraint order property outside England and Wales. We observe in passing that the 1999 Law makes it clear that a *saisie judiciaire* vests in the Viscount only realisable property held by the defendant in Jersey, even if "realisable property" is defined, as in England, to be capable of embracing property outside the jurisdiction. The House of Lords held that the restraint order should be restricted to the property within England and Wales, and that there could be no justification for a world wide order.

70 During the course of his Judgment Lord Phillips stated, at paragraphs 31 to 32:-

> " ***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 world wide 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 also involve significant and unnecessary multiplication of effort and expense."

71 At paragraph 37 he continued:-

> " ***I can see no reason why the existence of property of the respondent in this jurisdiction should justify a request from South Africa for this country to attempt to procure, on South Africa's behalf, a worldwide restraint on the respondent's property.*** Mr Mitchell founded much of his submission in respect of the interpretation of the Order on the definition of property in section 447 as 'all property wherever situated'. Whether property bears that meaning must depend, however, on the context in which the word is used. Where the Order expressly or by implication refers to property in England and Wales it necessarily refers only to property there situated.
>
> ***In summary, there is no good reason not to give the provisions of the Order their natural meaning and good reason to give them such meaning.*** I would uphold the decision of the Court of Appeal as to the scope of the

> Restraint Order. Contrary to the view of Judge Wadsworth, I do not believe that the NPA had any intention that the Letter of Request should seek assistance in relation to property outside the United Kingdom. This dispute has arisen because the appellant supplied for their use an inappropriate form."

72 By contrast, it is clear that in this case the US Department of Justice does wish to seek assistance from Jersey in relation to property situate outside the jurisdiction. 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 the repatriation of realisable property situate 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.

73 In this case there is a real risk of conflicting orders by this Court and Courts in Switzerland which would place any trustee or person specified in the Order in a very difficult position. Furthermore, as we have stated, the proposition that the Viscount should continue in a position where he has significant duties but is powerless to fulfil them, is inherently unattractive. In the exercise of our discretion we accordingly discharge the *saisie judiciaire* with immediate effect. The Court heard further submissions from counsel, and refused leave to appeal, but granted a stay of the order for a period of one month.