

Re Garden Trust

Jurisdiction:	Jersey
Judge:	F.C. Hamon, O.B.E., Jurats Potter, Allo
Judgment Date:	02 May 2003
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Text

[2003] JRC 76

ROYAL COURT

(Samedi Division)

Before:

F.C. Hamon, **Esq.**, O.B.E., **Commissioner and** Jurats Potter **and** Allo.

In the Matter of the Proceeds of Crime (Jersey) Law, 1999.

And in the Matter of the Proceeds of Crime (Designated Countries and Territories) (Jersey)
Regulations, 1999.

And in the Matter of the Late Mr. Kieran Paul Smyth
And The Garden Trust.

Advocate N.G. Pearmain **for the Representor.**

A.P. Belhomme, **Esq.**, **Crown Advocate on behalf of the First and Second Parties**

Convened.**Advocate S.J. Young for the Third Party Convened.****Authorities**

In re Representation of Batalla-Esquivel (2001) JLR N.18.

AG v Kenward [2000] JLR N.59; (12th April 2000) Jersey Unreported; [2000/64]

Representation of Michael O'Brien. [\[2003\] JRC 001](#).

Re S Settlement 24th July 2001 Jersey Unreported; [2001/154].

Proceeds of Crime (Designated Countries and Territories) (Amendment) (Jersey) Regulations 2002.

Trusts (Jersey) Law 1984.

Representation by the Trustee of the Garden Trust, the Continental Trust Company, Ltd, seeking directions under Article 47 of the Trusts (Jersey) Law 1984.**THE COMMISSIONER:**

- 1 On 21st June, 2000, a Production Order was issued pursuant to the Proceeds of Crime (Jersey) Law 1999 and was served on the Continental Trust Company in respect of Mr Kieran Paul Smyth and others. A further Production Order was served on the Continental Trust Company in respect of Mr Smyth, the Garden Trust and Monitian Properties Limited and others. An attempt was made by Mr Smyth during December and January to have the assets of the Garden Trust distributed to him. On 9th February 2001 Mr Smyth was brutally murdered in Ireland.
- 2 On 29th May 2002 the Continental Trust Company received a notice from the Viscount prohibiting them “as the personal representatives of Mr Kieran Paul Smyth” from acting further in the matter. That notice followed on directly from a successful application by the Attorney General on behalf of the Criminal Assets Bureau in Dublin for a *saisie judiciaire* against the realisable assets in the Island of Mr Smyth (now deceased), the Garden Trust and its underlying company Monitian Properties Limited.
- 3 We are today dealing with a Representation dated 23rd August 2002. It has been adjourned without a date on several occasions. Essentially the Representor (“the Continental Trust Company Limited”) asks the Court for directions as to how it should act in the future (it is now eleven months since the *saisie* was obtained) and whether it can take its costs from the Trust fund.

- 4 The Garden Trust is standard but it is unusual in one material respect. The sole beneficiary is the deceased Kieran Smyth who was the Settlor of all the assets in the Trust Fund. But the default beneficiaries are "The Secretaries General, present and future of the United Nations Organisation and their respective spouses from time to time." Those provisions clearly contravene the provisions of Article 9(1) of the Trusts (Jersey) Law 1984 and are ineffective under the laws of Jersey.
- 5 Before we proceed to examine the trust deed there is a matter that has caused some concern. We have had much forensic assistance on this matter from Crown Advocate Belhomme. On 20th March 2002 there was promulgated a regulation known as the Proceeds of Crime (Designated Countries and Territories) (Amendment) (Jersey) Regulations 2002. This sets out the appropriate authority for the purposes of 1(1), 2 and 6 of the 1999 Regulations and for Ireland the appropriate authority is The Department of Justice Equality and Law Reform. That regulation came into force on 21st March 2002 and the *saisie judiciaire* was obtained by the Attorney General on behalf of a department known as the Criminal Assets Bureau.
- 6 On 23rd May 2002 the Attorney General received a very detailed letter from Felix J. McKenna, Detective Chief Superintendent of An Garda Siochana and appointed by Statute to be the Chief Bureau Officer of the Criminal Assets Bureau. That very detailed letter contains this paragraph:

"I am to respectfully inform HM Attorney General that I as Chief Bureau Officer of the Criminal Assets Bureau and a member entitled to bring proceedings to the High Court in Ireland pursuant to the [Proceeds of Crime Act, 1996](#), have made a decision to institute proceedings under the [Proceeds of Crime Act, 1996](#) seeking Interim, Interlocutory and subsequently Disposal Orders pursuant to Sections 2, 3 and 4 of the said Act against specific property which is believed to be under the possession or control of the said Kieran Smyth, deceased, and which now vests in his legal personal representatives and also in the possession or control of Westlodge Freight Limited. I have been advised, I have to take steps (that by way of preliminary application) to cause the limited company, Westlodge Freight Limited to be reinstated to the Companies Register. I have also to apply to the Court to have an administrator ad litem appointed in the estate of the late Kieran Smyth deceased. I have made a decision that all necessary steps are to be taken. The proceedings I intend to take are to include an application in rem affecting the said funds held in Jersey by the "Garden Trust".

I respectfully request HM Attorney General to take such legal steps as are available to him to prevent the disposal, removal or diminution of those funds pending the making of appropriate Court Orders by the High Court in Ireland."

- 7 Regulation 6 of the 1999 Regulations says that:

“Where no appropriate authority is specified in the First Schedule to those Regulations in relation to a designated country or territory, a certificate by the Attorney General stating that an authority specified in that certificate is the appropriate authority of that country or territory for the purposes of these Regulations shall be sufficient evidence of that fact.”

- 8 The Attorney General (perhaps unaware of the 2002 Regulations) issued a certificate that the Criminal Assets Bureau was the appropriate authority under the 1999 Regulations. Ireland was clearly a country or territory designated pursuant to the First Schedule of those and the later Regulations. It is in our view not relevant that the Irish proceedings were to be proceedings in rem. This did not preclude the making of a *saisie judiciaire* by the Royal Court.
- 9 But this is not an application to set aside or vary the *saisie judiciaire*. We have made our ruling on the “in rem” point following the judgment of the learned Bailiff in *re Representation of Batalla-Esquivel* (2001) JLR N.18. Crown Advocate Belhomme appeared before the Court at the *saisie* application and informed the Court that the amendment of 2002 referred to the Department of Justice Equality and Law Reform as the appropriate authority. Nevertheless, the Court granted the *saisie* and clarification was sought by the Crown. We have seen the correspondence and studied it with some care. We remain satisfied that there has been a valid granting of the *saisie judiciaire*. The purpose of the legislation is to curb the menace of money laundering.
- 10 The Attorney General might, however, be minded to confer with the Legislation Committee to decide what, if any, amendment should be made to the Regulations *vis-à-vis* Ireland so that the Criminal Assets Bureau should be there included. We say this particularly in the light of a letter from the principal of the Crime Division of the Department of Justice Equality and Law Reform, Mr W. Byrne, dated 21st February 2003. That letter reads:

“I am directed by the Minister for Justice, Equality and Law Reform to refer to your letter of 13th January regarding the above.

You are essentially correct in your understanding that the role of the Department of Justice, Equality and Law reform in Ireland, in relation to requests for mutual assistance, is restricted to cases of current criminal investigation or criminal proceedings. The position in relation to the matter with which you are concerned before the Royal Court of Jersey is as set out in the letter to the Jersey authorities of 23rd May, 2002 from the Chief Officer of the Criminal Assets Bureau. My understanding of the position is that, while the possibility of a further criminal prosecution cannot be ruled out, none is currently contemplated.

The assistance sought here is not for the purposes of criminal proceedings but rather for the purpose of an application under the Proceeds of Crime Act 1996. That Act provides a mechanism for civil proceedings freezing property alleged to be the proceeds of criminal activity, even when no conviction has been

obtained or sought, with an application for eventual payment over to public funds after seven years.

If it is possible under Jersey law for assistance to be given to Irish authorities pursuing a Proceeds of Crime application, then it is possible that another Irish agency which is in a position under Irish law to seek such co-operation might have to be identified in that law. The appropriate Irish authority would appear to be the Criminal Assets Bureau or its Chief Officer. To cover requests for co-operation arising in the confiscation process post conviction, the Irish Director of Public Prosecutions could also be identified."

- 11 We must essentially consider the 11 months delay since the *saisie* was granted. We can appreciate that there is an enormous amount of investigation into the activities of the Smyth brothers and their company Westlodge Freight Limited. On 23rd May 2002 (eleven months ago) Mr McKenna, the Chief Bureau Officer of the Criminal Assets Bureau said in his letter to the Attorney General, which was subsequently passed to the Royal Court:

"I have made a decision that all necessary steps are to be taken in the High Court in Ireland pursuant to the Proceeds of Crime Act 1996 and I have made a decision to institute proceedings under the [Proceeds of Crime Act, 1996](#) seeking Interim, Interlocutory and subsequently Disposal Orders pursuant to Sections 2,3 and 4 of the said Act against specific property which is believed to be under the possession or control of the said Kieran Smyth, deceased, and which now vests in his legal personal representatives and also in the possession or control of Westlodge Freight Limited. I have been advised, I have to take steps (that by way of preliminary application) to cause the limited company, Westlodge Freight Limited, to be reinstated to the Companies Register. I have also to apply to the Court to have an administrator ad litem appointed in the estate of the late Kieran Smyth, deceased. I have made a decision that all necessary steps are to be taken without delay. The proceedings I intend to take are to include an application in rem affecting the said funds held in Jersey by the "Garden Trust".

The company Westlodge Freight Limited has now been reinstated but apparently no other steps have been taken.

- 12 We are satisfied from what Advocate Pearmain has ably told us that the imposition of the *saisie judiciaire* and the decision of the Trustees to refrain from any active application in respect of the *saisie judiciaire* for the time being (we will examine that phrase later) is one of the second category of cases dealt with by Robert Walker J and referred to in the unreported English case of the *Public Trustee v Cooper* in 1999. The full extract is set out in that part of the judgment in the matter of the *S Settlement* (24th July 2001) Jersey Unreported; [2001/154], authorised for release by the Deputy Bailiff on 24th July 2001.

- 13 This is, in our view, a momentous decision. For there is much that the Trustees could do if

they were so minded — apart from attempts to raise the *saisie* which might not be considered appropriate at this stage but which might lead to criticism of the Trustees by those ultimately entitled to the funds.

- 14 There are complex matters that the Trustees might need to consider. Under Clause 8 of the Trust, in default of the appointment of the Trust fund of the Trust to the beneficiaries (the sole named beneficiary is dead) or the default beneficiaries (a contravention of Article 9(1) of the Trusts (Jersey) Law 1984) the Trust fund and the income from it “*shall be held upon such charitable trusts as the Trustees from time to time determine and subject thereto to charitable purposes generally*”. There is even an argument that the Trustees would, under the provisions of Article 39 of the Trusts (Jersey) Law 1984, be required to distribute the fund to the Settlor's estate. Westlodge Freight Limited was owned at one time by the Settlor and others but it is not an asset of the Trust. Apparently the Criminal Assets Bureau believes that the monies held by the Trust should be applied to settle a tax liability of that company.
- 15 The matter is further compounded by a report in the Irish Independent Newspaper of February 2001 that the Settlor was someone who had a known association with criminals in Dublin, had been involved in smuggling operations in the Netherlands, had connections with the Real IRA and was associated with the trafficking of drugs and guns.
- 16 All of these facts were made known to the Court and on 27th May 2002 (when the Representor withdrew its Representation) the Court made no order as to costs apparently on the basis that such an order would be premature.
- 17 As we have said, that was eleven months ago and no direct action has been taken by the Irish authorities. We entirely agree with Advocate Pearmain (who has acted for the Trustees from the commencement of this matter) that the Trustees should not take any action in the matter at this stage but we will invite the Trustees to return to Court in six months time should there have been no material alteration in the present situation.
- 18 We turn now to the matter of costs. It is trite law that, under the Provisions of Articles 47 and 49 of the Trusts Law, trustees will normally be entitled to payment of their costs from the trust fund on an indemnity basis. In the matter of the Representation of *Batalla-Esquivel* the Court made an order which is recorded in Note 18 of JLR 2001:

“The Court's power under Article 9(4) of the Drug Trafficking Offences (Jersey) Law 1988 to give the Viscount directions relating to realisable property seized by him pursuant to a saisie judiciaire can include ordering the payment of the legal costs of an application to the Court by the trustees of trusts assets seized pursuant to such an order.”
- 19 But it is pellucid that each case should turn on its own merits and the Royal Court has said

as much in the judgment in the matter of the Representation of Michael O'Brien [2003] JRC 001, and two passages are in point:

“In my judgment there should be no automatic expectation that either legal expenses or a living allowance will be made available to a defendant whose property is subject to a saisie judiciaire. When a saisie judiciaire has been ordered, a judge has been satisfied that there is reasonable cause to believe that a defendant has benefited from drug trafficking. Drug trafficking is a serious offence causing great damage to the fabric of society. It seems to me that the intention of the legislature was that the suspected proceeds of drug trafficking should not be available to the defendant. Instead they should **be held by the Officer of the Court pending a determination as to their origin.** Property that is subject to a saisie judiciaire is no longer the property of the defendant; it has vested in the Viscount. In so stating I do not intend to imply that they can never be made available because the Court has a discretion under Article 9(6) which should not be fettered. That discretion is to be exercised on a case by case basis, having regard to the particular facts.”

And

“The proposition that property which might in due course be found to be tainted as being the proceeds of drug trafficking should be used to pay for a defendant's legal costs is one that I find unappealing. I appreciate that, in the English jurisdiction, it has been accepted that a defendant may draw on tainted money to pay legal costs. That, however, seems to me to run counter to the decision of the Superior Number in *AG v Kenward* (12th April 2000) Jersey Unreported: **[2000/64]**; (2000) JLR N59 **where the Court stated:**

“The money in question is, by common agreement, tainted in the sense that it represents a fee for an unlawful agreement to bring heroin into the Bailiwick. It is the proceeds of drug trafficking. The proposition that the Court should lend itself to an arrangement whereby tainted money should be used to pay lawyers for defending drug traffickers is not one which the Court finds attractive.”

- 20 There is, in our view, a distinction to be made between the *O'Brien* case and this case. *O'Brien* was the defendant in criminal proceedings where he was a convicted drug trafficker. We have now had the opportunity to study the affidavit of Peter Laurence Watts, a director of the Continental Trust Company Limited and the person responsible for the administration of the Garden Trust. As we have already stated, Westlodge Freight Limited is not an asset of the Trust.
- 21 We are satisfied that the Representor obtained appropriate take on information and documentation by reference to the “Know Your Client” guidance notes issued by the Jersey Financial Services Commission. Instructions were taken from professional clients and appropriate identification and source of funds information was obtained, and appropriate documentation was maintained in respect to the client file relating to the deceased.

- 22 In the particular circumstances of this case (which may be exceptional) we are going to order that the costs of and incidental to the Representation should be paid out of the funds forming part of the Garden Trust, in accordance with the Court's powers under Article 16(11) of the Proceeds of Crime (Jersey) Law 1990. The Viscount is directed to pay such costs as the Greffier shall authorise as reasonable after tax. We allow liberty to apply but any further costs must be the subject of a Court Order.
- 23 Advocate Young appeared as a matter of courtesy in the Court on behalf of Mr Brian Smyth. His contribution, as always, was most helpful but in the circumstances of this case we are not minded to allow him his costs at this stage.