

Representation of Don Thomas Batalla Esquivel

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	02 March 2001
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Text

[2001] JRC 057

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff, sitting alone.

In the matter of an application to discharge a *Saisie Judiciaire* made by Order of the Court on 8th February, 2000.

And in the matter of Articles 8 and 9 of the Drug Trafficking Offences (Jersey) Law, 1988 as modified by Regulation 2(2) of the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1997.

And in the matter of the Queen Noelle Settlement and the New Harmony Trust.

Representation of Don Thomas Batalla Esquivel seeking to set aside or vary a '*saisie*

judiciaire', issued by the Deputy Bailiff on 8th February, 2000, and which resulted from an application by the Attorney General, on behalf of the Attorney General of the United States of America, pursuant to Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1997

Advocate M.P.G. Lewis for the Representor.

Advocate A.J. Belhomme, on behalf of the Attorney General.

Authorities

Maxwell on the Interpretation of Statutes (12th Ed'n: 1969): pp.45, 183, 199–212.

Re S -v- L ([1995](#)) 4 All ER 159 .

The Drug Trafficking Offences Act, 1986 (Designated Countries & Territories) Order 1990.

The Drug Trafficking Offences Act, 1986 (Designated Countries & Territories)(Jersey) Regulations 1997.

In re Illinois District Court (1995) JLR N.10 .

Bennion: Statutory Interpretation (3rd Ed'n: 1997): pp. 523–529.

In re J -v- L & In re the Drug Trafficking Offences Act 1986 (Designated Countries & Territories) Order 1990 (4th May, 1994) T.L.R.

Bailiff

THE

- 1 This is a representation by Don Thomas Batalla Esquivel, the Representor, seeking to set aside or vary a *saisie judiciaire* issued by the Deputy Bailiff on 8th February, 2000. This *saisie judiciaire* resulted from an application by the Attorney General on behalf of the Attorney General of the United States, pursuant to the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1997, ("the 1997 Regulations").
- 2 The Act of the Court records that the Court was satisfied that:

"(i) proceedings are to be instituted against certain property belonging to Paul Edward Hindelang Jr., (hereinafter called "the Defendant") in the United States of America; and

(ii) there are reasonable grounds for thinking that an External Confiscation Order may be made in the proceedings, when instituted."

- 3 The Court accordingly granted a *saisie judiciaire* in respect of the realisable property of the Defendant and authorised the Viscount to take possession of "all the realisable property whether movable or immovable, vested or contingent, held by the Defendant in the Island, pending further order and being in particular, but without prejudice to the generality of the foregoing, the following..." The Act then records particulars of sixteen bank accounts at local banks.
- 4 The Representor contends that the property subject to the *saisie judiciaire*, including the bank accounts, are not the property of the Defendant but are settled under perfectly valid trusts in which the Defendant has no interest. The Representor claims to be interested beneficially in all the bank accounts save four and in all the trusts involved in the realisable property, save one. The Representor submits that the *saisie judiciaire* should be wholly set aside on two grounds, viz. (i) that the Court has no jurisdiction to grant a *saisie judiciaire* where the foreign proceedings are *in rem*, and (ii) that the Court has no jurisdiction to grant a *saisie judiciaire* where the foreign Court's jurisdiction to entertain proceedings depends upon the issuance of the *saisie judiciaire* and has no independent basis. Finally, the Representor submits that the *saisie judiciaire* ought to be discharged in any event to the extent that it embraces property in respect of which no proceedings have yet been issued before the United States Courts.
- 5 I take each of these submissions in turn.

(1) Counsel for the Representor submitted that the Court's power to make a *saisie judiciaire* was restricted to the circumstances set out in Article 8(1) of the 3rd schedule to the 1997 Regulations, which provides:

"(1) The powers conferred on the Court by Article 9 are exercisable where

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(b)

(i) proceedings have been instituted against the defendant in a designated country;

(ii) the proceedings have not been concluded; and

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

(c) it appears to the Court that proceedings are to be instituted against the defendant in the designated country and there are

reasonable grounds for believing that an external confiscation order may be made in them.

- 6 As no proceedings had been instituted in the United States at the time of the application for a *saisie judiciaire* paragraph (c) was clearly the relevant sub-paragraph. That sub-paragraph referred to proceedings being instituted against a “defendant in the designated country”. Article 1(2) defined a “defendant” by reference to Article 3(3). Article 3(3) provides:

“(3) A person against whom an external confiscation order has been made, or a person against whom proceedings which may result in an external confiscation order being made have been, or are to be, instituted in a designated country is referred to in this Law as “the defendant”.”

- 7 Counsel submitted that property could not be a “person”, and therefore could not be a “defendant”. It followed that the proceedings instituted by the United States District Court against *“All funds within the sixteen accounts held in the financial institutions located in the States of Jersey [sic] (Channel Islands) as listed in Attachment ‘A’”* could not be described as *“proceedings instituted against the defendant in the designated country.”*
- 8 A similar argument was advanced before the English Court of Appeal in *Re S-L* ([1995\) 4 All ER 159](#) in relation to statutory provisions which are, for practical purposes, identical to those in force in Jersey. In that case L opened bank accounts in London in the joint names of his wife's parents and deposited funds alleged to be the proceeds of drug trafficking in the United States. The United States Government instituted proceedings in New York naming as the defendant all the funds on deposit. Criminal proceedings were not instituted against L who was in Columbia which had no extradition treaty with the United States. Thereafter the United States Government applied for and obtained a restraint order under the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 prohibiting L and his parents-in-law from dealing with the funds. An application was made to set aside the restraint order on the basis that the Act required the external confiscation order to have been made in proceedings instituted “against the defendant”, which was to be construed as a “person”, whereas the New York proceedings were *in rem* where property rather than a person was described as the defendant. The application failed before the High Court and the appeal to the Court of Appeal was dismissed. On appeal, Pill LJ stated:

“I have come to the conclusion that the power to make a restraint order can, on the wording of s.7 of Sch. 3, be exercised. There is no doubt that an external confiscation order, as defined in s.1(1), has been made. The question is whether it has been made ‘in the proceedings’, as contemplated in s.7(1)(c), when s.7(1)(a) requires proceedings to have been instituted ‘against the defendant’. In my judgment the statement in s.1(3) that a person against whom an external confiscation order has been made is referred to in this Act as “the defendant” does not of itself exclude the possibility of such an order being made under s.1(1) without there being a ‘person’ named as defendant. Had that been the intention I would have expected an entry in the interpretation section,

s.38(1), **reading: ‘In this Act “the defendant” means the person against whom ...’ Other entities may also be defendants.** Even allowing for the presence of s.1(3), the word ‘defendant’ in s.7(1)(a) is not limited to defendants who are persons. The description in s.1(3) is necessary to identify the person intended by the word ‘defendant’ for example in s.5(9). It does not in my judgment provide an exclusive definition of ‘defendant’ for all purposes of the Act. Section 7 is concerned to identify the stage of proceedings instituted to obtain an external confiscation order at which a restraint order may be made. I do not read it as requiring a particular form of proceedings or as using ‘the defendant’ in the limited sense described in s.1(3).”

- 9 Mr. Lewis boldly submitted that this case was wrongly decided. He contended that the Court had overlooked the definition of a defendant in s.38(2). I doubt that this was the case, but the submission is, in my judgment, in any event, misconceived. What the English Court of Appeal was saying was that s.7 (the equivalent of our Article 8) was concerned to identify the stage which had been reached in the foreign proceedings and which justified the making of a restraint order. It was not to be read as requiring a particular form of proceedings or indeed that proceedings be *in personam* rather than *in rem*. I respectfully agree with the reasoning of the English Court of Appeal which appears to me to be consistent furthermore with a judgment of this Court in *In Re Illinois District Court* (1995) JLR N.10. This case was concerned with the question whether a forfeiture order made after civil proceedings *in rem* was an “external confiscation order” within the meaning of the Drug Trafficking Offences Regulations which preceded the 1997 Regulations. In the unreported judgment delivered on 16th January, 1995, the Court stated:

“It is true that in this jurisdiction proceedings in rem are rare and are certainly not available, at present, to pursue the proceeds of drug trafficking or any other serious crime. However, it is clear that the phraseology employed in paragraph (1) above is extremely wide; — “an order ... for the purpose of recovering payments or other rewards received in connection with drug trafficking ...”. Furthermore, paragraph (2) provides that it includes an order “however described”. It is plain in our judgment that this language was employed so as to accommodate the widely differing procedures of other jurisdictions designed to curb the menace of drug trafficking and to penalize the concealing or laundering of the proceeds of this pernicious activity. It matters not whether the proceedings in the foreign jurisdiction are civil or criminal, provided that the resulting order has the purpose of “recovering payments or other rewards received in connection with drug trafficking”.

We have considered whether the reference in paragraph (3) to “a person against whom an external confiscation order has been made” necessarily excludes an order made after civil proceedings in rem from the ambit of an external confiscation order. We have concluded, in the **context of the 1991 Regulations as a whole, that it does not have that effect.** In our judgment, paragraphs (1) and (2) are not to be construed as being subject to paragraph (3). In some instances, there will be “a person” against whom an external confiscation order has been made; in others, there will not. We see no need, in

view of the purpose of the 1991 Regulations as a whole, to take a restrictive view.”

- 10 It is true that this is not directly in point but the passage does nonetheless serve to emphasise (1) that the whole purpose of the legislation is to curb the menace of drug trafficking; and (2) that in furtherance of that end it is undesirable for the Court to adopt a restrictive view.
- 11 Counsel for the Attorney General drew my attention to a passage from Maxwell's Interpretation of Statutes (12th Ed'n) (1969) at p.201 where the learned author states:
- “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.”***
- 12 Suppose, by way of example, that two drug traffickers had placed their proceeds of drug trafficking in Jersey. One was physically in the United States and therefore amenable to the reach of the US Court. The other had fled abroad and was beyond the grasp of the US authorities. It would seem to me anomalous if, given the broad purpose of the legislation, the Jersey Courts were able to grant assistance in the first case but not in the second.
- 13 I do not need however to rely upon such principles of statutory construction. In my judgment the provisions of Article 8 of the 1997 Regulations are perfectly clear. This Court has jurisdiction to grant a *saisie judiciaire* whether the foreign proceedings are *in personam* or *in rem*. I therefore reject this submission.
- 14 The second submission of counsel for the Representor was that the Court had no jurisdiction to make a *saisie judiciaire* because, at the time when the Order was made, the United States District Court for the Southern District of Florida had itself no jurisdiction to entertain an application for a forfeiture order *in rem* against the Jersey assets. Before such jurisdiction arises, it appears that the assets in question must be within the actual or constructive control of the US Court. There is expert evidence before me to that effect but it is unnecessary to refer to it. It is conceded by Mr. Belhomme for the Attorney General that the constructive control over the Jersey assets which founded the US District Court's jurisdiction was itself based upon the willingness of this Court to issue the *saisie judiciaire*. In short, Mr. Lewis submits that the absence of jurisdiction in the US Court at the time when the application for a *saisie judiciaire* was made vitiated the jurisdiction of this Court to issue the *saisie judiciaire*. This is an ingenious argument but is, in my judgment, flawed. The jurisdiction of this Court to make a *saisie judiciaire* does not depend upon the simultaneous jurisdiction of a foreign court in a designated country to entertain an application for an external confiscation order. The jurisdiction of this Court depends upon the relevant Jersey legislation. Article 9 of the Drug Trafficking Offences (Jersey) Law, 1988 as amended by the 1997 Order, empowers the Court to make a *saisie judiciaire* “on an application made by or

on behalf of the Government of a designated country.” Article 8 (1)(c) provides that the power conferred by Article 9 is exercisable where “it appears to the Court that proceedings are to be instituted ... and there are reasonable grounds for believing that an external confiscation order may be made in them.”

- 15 This application was duly made by the Attorney General on behalf of the United States Government. At the time of the application the criteria set out in Article 8(1)(c) were satisfied. There is nothing in the Drug Trafficking Offences (Jersey) Law, 1988 which requires, as a prerequisite to the jurisdiction of this Court to make a *saisie judiciaire*, that the foreign court should have any particular jurisdiction. The protection for the person whose assets are subjected to a *saisie judiciaire* is to be found in Article 8(3). That paragraph provides in terms that if the proposed proceedings are not instituted within a reasonable time the Court shall discharge the order. I therefore reject this submission too.
- 16 The final submission of the Representor is that the *saisie judiciaire* ought to be discharged to the extent that it embraces property in respect of which no proceedings have yet been issued before the US Courts. Counsel for the Representor was unable to tell me which assets were in question but it was conceded by counsel for the Attorney General that there were some such assets.
- 17 The legal position in the context of these assets is relatively clear. A *saisie judiciaire* has been issued pursuant to Article 8(1)(c) of the Law on the basis that “proceedings are to be instituted ... and there are reasonable grounds for believing that an external confiscation order may be made ...”. Article 8(3), to which I have already referred, provides:

“Where the Court has made an order under Article 9 by virtue of sub-paragraph (c) of paragraph (1), the Court shall discharge the order if the proposed proceedings are not instituted within such time as the Court considers reasonable.”

- 18 Counsel for the Representor draws attention to the mandatory nature of this provision. If proceedings are not instituted within a reasonable time ***“the Court shall discharge the order.”*** Counsel for the Representor at first sought to persuade me that the *saisie judiciaire* ought never to have embraced assets other than the sixteen named accounts on the basis that the affidavit of Lenore Catania in support of the original application had sought no more. A careful reading of the affidavit did not, however, support that contention and counsel did not press the point. The question is therefore whether there has been unreasonable delay in instituting proceedings in respect of these assets. Counsel for the Attorney General told me, on the basis of his instructions, that the United States was undertaking a detailed review of the documents but that this task was complicated by virtue of the bulk of paper (87–100 storage boxes) and because investigators had to travel from the USA on each occasion that the documents had to be examined. Counsel told me that any further proceedings would be instituted within 90 days. In the context of a *saisie judiciaire* which was granted over twelve months ago these are not particularly compelling submissions. There is however an additional complication in that the Representor has

convened to this hearing neither Abacus Financial Services Group Limited, the trustee of the trusts involved, nor the Viscount in whom the realisable property has vested. Having regard to the possible practical difficulties which might arise, I am reluctant to discharge any part of the *saisie judiciaire* without first hearing counsel for Abacus and for the Viscount. Counsel for the Attorney General has also told me that he wishes to apply to discharge the *saisie judiciaire* in relation to a property called 'Magpie Farm'. Again it seems to me that I should hear counsel for Abacus and for the Viscount before acceding to that request. I therefore propose to adjourn the hearing of the representation so that Abacus and the Viscount can be convened. If further proceedings have by then been instituted in the United States, the matter can be reviewed in the light of those proceedings. If no further proceedings have been instituted, counsel for the Representor may renew his application for the discharge of the *saisie judiciaire* to the extent that it embraces assets in respect of which no proceedings have issued.