Sheikh Hamad Bin Jassim Bin Jaber Al Thani v Advocate David Fisher Le Quesne, on behalf of minor/unborn beneficiaries

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2001] JRC 247C

ROYAL COURT

(Samedi)

Before:

Sir Philip Bailhache, Bailiff.

Between
Sheikh Hamad Bin Jassim Bin Jaber Al Thani
Representor
and
(1) Advocate David Fisher Le Quesne, on behalf of minor/unborn beneficiaries
(2) Standard Chartered Grindlays Trust Corporation (Jersey) Limited

(3) State of Qatar
(4) Her Majesty's Attorney General
Respondents

Advocates G.R. Boxall **and** F. B. Robertson **for the Representor**

Advocate D.F. Le Quesne **for the 1 st Respondent**

Advocate M.J. Thompson **for the 2 nd Respondent**

Advocate J.D. Kelleher **for the 3 rd Respondent**

W.J. Bailhache **QC**, H.M. Attorney General

Authorities

Proceeds of Crime (Jersey) Law 1999 Art. 32(3)(b)(i), Art. 16.

Royal Court Rules 1992: Rule 6/18(3).

Pacific Investments Ltd v Christensen (1997) JLR 170 C of A .

Comet Products (UK) Ltd v Hawkex Plastics Ltd (1971) 2 QB 67 .

Underhill v Hernandez (1897) 168 US 250 .

Oetjen v Central Leather Co (1918) 246 US 297 .

Buttes Gas & Oil Co v Hammer [1982] AC 888 .

Kirkpatrick v Environmental Tectonics International (1990) 493 US 400 .

A Ltd v B Bank and Anor (1997) Fleet Street Reports 165 .

Den Norske Bank ASA v Antonatos & Anor (1999) QB 271 .

Bayer AG v Winter & Ors (No. 2) [1986] 1 WLR 540 .

In the matter of the Yaheeb Trust, the Havana Trust and the Yaheeb No. 2 Trust.

And in the matter of Articles 47 and 49 of the Trusts (Jersey) Law 1984 as amended

Application by Attorney General for leave to cross-examine Representor.

Application by the fourth Respondent, the Attorney General, to cross-examine the Representor and the Managing Director of the second Respondent, in the context of the Representor's application for relief under Article 47 of the Trusts (Jersey) Law, 1984.

Bailiff

THE

INTRODUCTION:

1 This is an application by the Attorney General to cross-examine His Excellency Sheikh Hamad Bin Jassim Bin Jaber Al Thani ("the representor") and Mr. Clive Black, ("Mr. Black") managing director of Standard Chartered Grindlays Trust Corporation (Jersey) Limited ("the trustee") in the context of an application by the representor for relief pursuant to Article 47 of the Trusts (Jersey) Law 1984, as amended. The application is opposed by the representor and by the trustee. Counsel for the State of Qatar and Advocate Le Quesne representing the minor and unborn beneficiaries of the trusts in question also oppose the application. In order to set this application in context, it is necessary to describe the history in outline.

2 On 17 th May 2001, on the application of the representor, this Court made a declaration in the following terms:-

> *"That the trustee of each of the said three trusts holds all of the assets of the said three trusts for the benefit of the beneficiaries named therein respectively and for no other party or parties"*.

The Attorney General was not convened to the hearing of that application. On 5 th July 2001 the representor made this, his second representation, to the Court seeking directions " *that will enable the trustee to resume the administration of the said Declarations of Trust in accordance with their terms within such a time and to such an extent as may be reasonable in all the circumstances of the case*".

3 This rather elliptical application disguises the true nature of the problem, both for the representor and for the trustee. The problem arises from the terms of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law") which is designed, broadly speaking, to curb money laundering. The 1999 Law imposes an obligation on fiduciaries, *inter alia*, to report to the police any suspicion that they are holding property which might be the proceeds of criminal conduct. In July, 2000, pursuant to that obligation, the trustee filed a suspicious transaction report with the police in relation to the trust funds under their administration. As a result of that disclosure, the police launched an investigation which is still in train. Following the Court's judgment on 17 th May 2001 to the effect that the funds were not impressed with any constructive trust, the representor asked the trustee to make a capital distribution. The trustee remained concerned, however, that a distribution might involve the commission by the trustee of an offence under the 1999 Law. Under Article 32(3)(b)(i) of the 1999 Law a person who might otherwise commit an offence under Article 32 of assisting another to retain the benefit of criminal conduct is afforded a defence if he discloses to the police the

proposed act and the act is subsequently done with the consent of the police. The trustee applied for that consent to the proposed capital distribution, but the police declined to consent. The application by the representor for directions enabling the trustee " *to resume the administration*" of the trusts is in reality designed to overcome that refusal on the part of the police.

4 The Attorney General has objected that this is tantamount to directing the trustee to do something which might amount to the commission of a criminal offence. On the other hand, the effect of the police refusal to grant consent is to paralyse the administration of the trusts in circumstances where it has not been established that the trust funds are in fact the proceeds of crime. The representor has argued strongly that they derive from legitimate commissions. Furthermore, the Attorney General has taken no steps under Article 16 of the 1999 Law to seek a saisie judiciaire in relation to the trust funds.

5 I hope I will do no injustice to the submissions of any party if I summarize the rival contentions with extreme brevity for the purposes of this application to cross-examine the representor and Mr. Black. The representor, who is a minister in the State of Qatar, accepts that he received substantial commissions from companies seeking to do business with the State of Qatar. He denies that these commissions were in the nature of bribes to secure government contracts. He contends that his actions were authorized by His Highness the Amir and that he was not acting in conflict with any ministerial duty. He was acting in a private capacity. There was therefore no breach of fiduciary duty owed to the State of Qatar. He contends that there is no constructive trust in favour of the State of Qatar or of any other person. The trust funds are therefore not the proceeds of criminal conduct. All this, it is said, was determined by the Court in its judgment of 17 th May 2001, although the representor concedes that the issues must now be determined in the light of the evidence currently available to the Court. It is contended that no purpose would be served by cross-examining the representor. The trustee submits to the wisdom of the Court, but asserts that there is nothing that Mr. Black can say that is relevant to the issues now before the Court. The Attorney General submits that the judgment of 17 th May 2001 was procured by the deliberate misleading of the Court by the representor and that in any event the issue before the Court in this representation is different. The Attorney General also submits that the trustee colluded in the misleading of the Court by the representor on 17 th May 2001. The Attorney General contends that it would be contrary to public policy to grant the relief sought because it is a clear collateral purpose of the representor to use any declaration granted to hinder the criminal investigation and any subsequent criminal proceedings against him or any other party.

6 Counsel for the State of Qatar addressed me at some length to underline his submission that the State of Qatar felt offended at the course which these proceedings had taken. In particular, it was submitted that the affidavits of Detective Inspector Minty contained inferences which were offensive to His Highness the Amir. It is not necessary for the purposes of this interlocutory judgment to dwell on these submissions at any length. It may be that one or two passages in the affidavits could have been expressed with greater sensitivity. Given the close familial relationships in government that are evident from the

papers before the Court, it is not surprising that the investigation being conducted by the police should have given rise to acute concern in Qatar. But in my judgment, counsel went too far in submitting that the peace of nations was being vexed. Both the State of Qatar and the Bailiwick of Jersey are subject to the rule of law. Bribery and corruption and misuse of public office for gain are offences equally under the law of Qatar as under the law of Jersey. The 1999 Law is reflected in the statute law of many European nations. An investigation cannot be stifled because it is the cause of political embarrassment. The law must take its proper course.

THE LEGAL TEST:

7 What then is the test which I should apply in considering this application by the Attorney General? The only relevant provision of the Royal Court Rules 1992 is Rule 6/18(3) which provides –

> ***"Where it appears to the Court that any party reasonably desires the production of a witness for cross-examination and that such a witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit"*** .

The Attorney General drew my attention to a judgment of the Court of Appeal in *Pacific Investments Limited v. Christensen* (1997) JLR 170 where the Court cited with approval a decision of the English Court of Appeal in *Comet Products (UK) Limited v. Hawkex Plastics Limited* (1971) 2 QB 67 where, at page 77, Cross LJ stated –

> ***"I have no doubt that the judge had jurisdiction to order cross-examination and that the only question for determination on this appeal is whether he was right to order it.*** It is, I think, only in a very exceptional case that the judge ought to refuse an application to cross-examine a deponent on his affidavit" .

8 On the question of whether the above test was the appropriate one for me to adopt, Mr. Robertson for the representor appeared to me to be rather ambivalent. He submitted that it was unnecessary to find exceptional circumstances but did not develop the argument. He did contend, however, that in any event there were exceptional circumstances justifying the exercise of my discretion to refuse the Attorney General's application. Those exceptional circumstances were —

(i) that the doctrine of act of state precluded cross-examination in decisive areas;

(ii) that cross-examination of the representor would amount to interrogation for a collateral purpose, i.e. to ascertain whether he had committed a criminal offence, and would be oppressive;

(iii) that cross-examination would not go to any relevant issue in the case; and

(iv) that it would be an abuse of the Article 47 procedure for seeking the directions of the Court.

9 Counsel for the trustee submitted that it was not necessary to find exceptional circumstances and that it was a question of discretion for the judge. He relied upon a passage from the judgment of Lord Denning MR in *Comet Products*, where the learned Master of the Rolls stated –

> ***"So that brings me to the final question: ought a judge to rule that Mr. Hawkins should be cross-examined on his affidavit?*** It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case" .

10 It is clear that the Court of Appeal in *Pacific Investments* considered carefully all the judgments delivered in *Comet Products*. It seems to me that those judgments reveal different shades of opinion as to how the judicial discretion to order cross-examination of the deponent of an affidavit should be exercised. These shades of opinion were distilled by Calcutt JA in *Pacific Investments* into the statement that –

> ***"The decision of the English Court of Appeal in Comet Products UK Limited provides support for the broad proposition that only in exceptional circumstances should an application to cross-examine a deponent on his affidavit be refused"*** .

It is true that in *Pacific Investments* the application was to strike out an Order of Justice whereas in this case, there is an application for directions under Article 47 of the Trusts Law. Given the hostile nature of this dispute, it seems to me that this is a distinction without a difference. I propose therefore to apply the test approved by the Court of Appeal in *Pacific Investments*.

APPLICATION TO CROSS-EXAMINE THE REPRESENTOR:

11 What then are the objections relied upon by counsel in support of their respective contentions that there are exceptional circumstances in this case militating against cross-examination of the representor and of Mr. Black? I deal first with the application to cross-examine the representor.

12 The Attorney General contends that the papers exhibited to the affidavits of Detective Inspector Minty give rise to serious questions as to the accuracy of the affidavits filed by the representor upon which he should be cross-examined. Counsel for the representor takes no issue as to the authenticity of the documents which have been exhibited and which result from the police investigation. Counsel contends, however, that the adverse inferences drawn by Detective Inspector Minty in his affidavits are misconceived. It seems to me that it would be inappropriate to make any findings at this stage in relation to these

rival contentions. I pause only to note that there are, on the face of it, unresolved ambiguities in the evidence of the representor for which there may, of course, be entirely innocent explanations.

The doctrine of "act of state"

13 Counsel for the representor argued that, irrespective of any ambiguities, the Court ought not to inquire into certain crucial issues, and, in consequence, order the cross-examination of the representor in relation to those issues. It was contended that those issues were embraced by the doctrine of "act of state" and that the Court should exercise judicial restraint. The issues were helpfully refined by counsel for the representor in a speaking note which was handed up. The acts of state into which the Court ought not to inquire were said to be –

Counsel for the State of Qatar added a fourth act,

> (iv) the assertion that no crime has been committed in Qatar by the representor.

> (i) the act of appointing the representor and the terms of that appointment, i.e. that he was appointed to act in a personal capacity in respect of certain State related contracts;
>
> (ii) the act of consent by the Amir to the payments made to the representor in relation to those contracts;
>
> (iii) the assertion that the State of Qatar makes no claim to the trust assets.

14 This is the first occasion, so far as I am aware, that this Court has had to consider the doctrine of act of state, although it is a doctrine of some antiquity. It was encapsulated by Chief Justice Fuller of the United States in *Underhill v. Hernandez* (1897) 168 US 250 as follows –

> ***"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.*** Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves" .

The principle was again applied by the U.S. Supreme Court in *Oetjen v. Central Leather Co.* (1918) 246 U.S. 297 in these terms –

> ***"To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations"*** .

15 A classic statement of the principle in English law is to be found in *Buttes Gas and Oil Co. v. Hammer* [1982] AC 888 where, at page 931, Lord Wilberforce stated –

> ***"… there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states.*** Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of "act of state" but one for judicial restraint or abstention. The respondents' argument was that although there may have been traces of such a general principle, it has now been crystallised into particular rules (such as those I have mentioned) within one of which the appellants must bring the case – or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted .
>
> ***In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts.*** This principle is not one of discretion, but is inherent in the very nature of the judicial process .
>
> ……
>
> ***More clearly as a recognition of a general principle is*** *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1 ; (1848) 2 H.L.Cas. 1: ***a case in this House which is still authoritative and which has influenced the law both here and overseas.*** There are two elements in the case, not always clearly***separated, that of sovereign immunity ratione personae, and that of immunity from jurisdiction ratione materiae: it is the second that is relevant.*** I find the principle clearly stated that the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority. Thus Lord Cottenham L.C. states the question, quite apart from any personal immunity, as being whether the courts of this country can "sit in judgment" upon the act of a sovereign, effected by virtue of his sovereign authority abroad. His decision is conveyed in the words, at p. 21:
>
> ***"It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick, but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law, we cannot inquire into it."***
>
> ***and he continues by distinguishing cases of private rights (cf*** *. Luther v. Sagor* [1921] 3 K.B. 532). ***He then said, at pp 21–22:***
>
> ***"If it were a private transaction ….*** then the law upon which the rights of individuals may depend, might have been a matter of fact to be inquired into … But … if it be a matter of sovereign authority, we cannot try the fact whether it be right or wrong."

> ***Lord Campbell is still more definite.*** The question he says, at p. 27, is "as to the validity of an act of sovereignty," and he expresses the view, at p. 26, that even if the Duke of Cambridge (i.e. not the sovereign) had been sued, "it would equally have been a matter of state."
>
> ***It is justly said of this case, and of their Lordships' observations, that they are directed to the question whether a sovereign can be brought to account in this country in respect of sovereign acts, and that such general phrases as "sitting in judgment on," "inquiring into" or "entertaining questions" must be read in their context.*** I agree that these phrases are not to be used without circumspection: the nature of the judgment, or inquiry or entertainment must be carefully analysed. It is also to be noted that the acts in question were performed within the territory of the sovereign concerned; reliance is placed on this in some passages; an argument on this I have already dealt with. These qualifications accepted, the case is nevertheless support, no doubt by reference to the issue in dispute, for a principle of non-justiciability by the English courts of a certain class of sovereign acts."

16 I am satisfied that these principles apply equally in Jersey and that this Court ought to exercise judicial restraint and to decline to adjudicate on issues which may properly be characterized as acts of state. I observe in passing that no question of state immunity, or what Lord Wilberforce calls " *sovereign immunity ratione personae*" arises here. The State of Qatar has submitted to the jurisdiction and counsel for the representor and for the State of Qatar concede that state immunity has been waived. There remains, however, the question of whether there exist areas of act of state where judicial restraint should prevent the Court from treading.

17 The English and United States authorities show that the nature of the act must be examined so as to ascertain whether it falls within the doctrine. In *Kirkpatrick v. Environmental Tectonics Corporation International* (1990) 493 US400, the chief executive officer of a New Jersey company agreed to pay a bribe to a Nigerian minister in order to secure a valuable contract with the government of Nigeria. Both the payment and the receipt of bribes in connection with the award of a government contract were prohibited by Nigerian law. An unsuccessful bidder subsequently sought damages from the New Jersey company under various U.S. statutes. The defendant claimed that the action was barred by the act of state doctrine. On appeal, the U.S. Supreme Court held –

> ***"(1) the act of state doctrine – insofar as it required that, in the process of deciding cases and controversies properly presented to them, federal and state courts should deem valid the acts of foreign sovereigns taken within such sovereigns' own jurisdictions – had no application to the case at hand, because the validity of a foreign sovereign's official act was not at issue in such case, where neither the claim nor any asserted defense in the case required a determination that Nigeria's contract with the successful bidder was or was not effective, and (2) regardless of what the court's factual findings might suggest as to the legality of the successful***

bidder's contract with Nigeria, its legality was not a question to be decided in the case, and thus there was no occasion to invoke such doctrine's requirement that a sovereign state's act within its own boundaries becomes a rule of decision for courts in the United States" .

18 In *A Limited v. B Bank and Another* (1997) Fleet Street Reports 165, the question was whether the English Court should hear an action for breach of patent in relation to the banknotes of a foreign country which had been printed on security paper which was subject to the patent and disposed of by an English bank. No claim was made against the foreign state, but its central bank intervened to argue that to interfere with the circulation of its currency in the United Kingdom would be to adjudicate upon the transactions of a foreign state. It was held by the Court of Appeal that when considering the non-justiciability of acts done by foreign states it was necessary to consider the nature of the relevant act which formed the basis of the claim. Such acts had to be acts of a foreign state as a state rather than commercial acts, and had to occur within the territory of that state. Legatt LJ stated, at page 170 –

> ***"..that certain acts of foreign sovereigns are non-justiciable is not disputed. As Lord Wilberforce expressed it in*** *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888 ***at p.932E, "the Courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority." All the authorities in England and the United States emphasise that to be non-justiciable acts must be those of another government done within its own territory: see for example*** *Underhill v. Hernandez* (1897) 168 U.S. 250 . ***This theme is constantly reiterated.*** The principle depends on the nature of the issues rather than the identity of the parties."

19 Having adopted those principles as expressive of the law of Jersey, I turn to apply them to the facts of this case. The decision of the Amir to permit the representor to act in commercial transactions involving the State of Qatar without being in breach of any ministerial or fiduciary duty owed to the State of Qatar seems to me plainly to be an act of state. It would be quite wrong for this Court to allow any challenge to the statement of the Amir that he agreed to permit the representor to act in a private capacity in relation to certain contracts. Equally the statements of the Amir that he consented to and approved of the payments made to the representor, as listed in his statement, and that the State of Qatar makes no claim to them, are acts of sovereign authority and are not amenable to inquiry in this Court. Cross-examination should not be permitted to challenge the Amir's statements that he did all those things for to do so would be to purport to sit in judgment on the acts of a foreign sovereign authority done within its own territory. I leave over for decision at a later stage the question whether the assertion of the Minister of Justice that no crime has been committed in State of Qatar is an act of state.

20 Those conclusions do not, however, *ipso facto* mean that the representor cannot be cross-examined as to his own actions and as to the extent to which they can be reconciled with the permissions and consents afforded to him by the Amir. The actions of the representor

seem to me to be clearly distinguishable from the actions of the Amir. In any event, the representor asserts that he was acting in a private capacity when he received these commissions and not in a governmental capacity. It is difficult to see how the circumstances surrounding the receipt of the commissions by the representor, subject to the qualifications set out at paragraph 19 above, can be regarded as acts of sovereign authority.

Interrogation for a collateral purpose

21 I turn to consider the objection that cross-examination of the representor would amount to interrogation for a collateral purpose, i.e. to ascertain whether he had committed a criminal offence, and would be oppressive. Mr. Boxall submitted that cross-examination would take place in a quasi-criminal context but in civil proceedings where none of the usual safeguards available to an accused person or potential accused person would be present. The Attorney General has volunteered an undertaking that nothing said in cross-examination of the representor would be used in any future prosecution of him, although such an undertaking would not, of course, prevent the use of any material obtained independently of anything said by the representor. Mr. Boxall accepted that undertaking but contended that it was insufficient to meet his general objection that the representor was entitled to protection from the risk of incriminating himself, a risk that was all the more evident because the Attorney General could not say precisely what offence or offences were being investigated.

22 Mr. Boxall drew my attention to *Den Norske Bank ASA v. Antonatos & another* (1999) QB 271 the headnote of which provides –

> ***"The first defendant, the manager of the plaintiff bank's Greek shipping finance business, was alleged to have taken bribes and been involved in multi-million dollar self-lending frauds against the bank.*** The bank obtained Mareva and Anton Piller orders prohibiting the first defendant from disposing of assets, moneys in identified bank accounts and other assets and property he was alleged to own. The Mareva order required him to inform the bank's solicitors of the value, location and details of "specific assets" and stated that any information in respect of which he claimed the privilege against self-incrimination was to be provided to a supervising solicitor who would hold it to the court's order. The first defendant provided details in respect of certain assets but claimed privilege in respect of the "specific assets". In the meantime the bank obtained further evidence allegedly against the first defendant and applied for and was granted an order for cross-examination relating to the disclosure of assets and documents. After hearing argument the judge concluded that the case was sufficiently urgent to merit the cross-examination to proceed immediately and that any questions relating to privilege could be dealt with as they were raised. During the examination the first defendant asserted the privilege on several occasions and also sought leave to appeal. The judge ruled against him, holding in general that the examination should continue because nothing that he was being asked would increase his existing risk of

prosecution and because his attitude was a ***deliberate and determined attempt to frustrate the bank from obtaining effective relief*** .

On the application of the first defendant for leave to appeal on the grounds that he was entitled to refuse to answer any questions put to him which might tend to incriminate him, and that the cross-examination should be discontinued:-

Held, granting the application and allowing the appeal in part, that a witness was entitled to claim the privilege against self-incrimination not merely on the ground that an answer might increase the risk of prosecution, but in respect of any piece of information or evidence on which a prosecuting authority might wish to rely in establishing guilt or in determining whether to prosecute, and that the court should uphold the privilege even if he was acting from mixed motives or mala fide as a result of not fully appreciating the risk; that to order incriminating information to be placed in the hands of a supervising solicitor did not provide adequate protection; that, although the urgency of the situation had entitled the judge to allow some cross-examination, the first defendant's claim to the privilege should have been upheld in respect of any question that sought to establish the receipt of money coming from a client of the bank or the amount thereof; and that, accordingly, the first defendant was not required to provide answers to his own solicitors or the supervising solicitor and he or his solicitors were free to make use of any answers or information already given to his solicitors and remaining subject to the order of the court" .

That case does not however seem to me to help the representor. What was of concern to the Court of Appeal in that case was that the arrangements made for the placing of material which might otherwise have incriminated the first defendant in the hands of a supervising solicitor was inadequate protection for him. Waller LJ referred to the provisions of section 31(1) of the Theft Act 1968 which provide that, for the purposes of that section, a person shall not be excused from answering questions by reason that to do so might incriminate him but that "no statement or admission made …. shall, in proceedings for an offence under this Act, be admissible in evidence against [him]". The learned Lord Justice continued (at page 284) –

"If its ambit were wider so that it not only applied to offences under the Theft Act 1968 but to criminal offences more generally, D.A. could have been required to answer questions even though they incriminated him; the bank would have been able to protect such assets as they could have traced; and D.A. would have been protected from having the answers used in evidence against him in any criminal proceedings. The call for Parliament to act made in ***cogent terms in January 1990 by Sir Nicolas Browne-Wilkinson V.-C.*** in *Sociedade Nacional de Combustiveis de Angola U.E.E. v. Lundqvist* [1991] 2 Q.B. 310, 338 , ***repeated by others since including Lord Lowry in the House of Lords in****A.T. & T. Istel Ltd. v. Tully* [1993] A.C. 45, 69, ***appears to have gone unheeded.*** Unfortunately the court

> itself has no power to fill the gap left by Parliament. It has been recognised, all too clearly, that nothing that a civil court can do can prevent the prosecuting authorities obtaining information supplied".

This problem has no application in the circumstances of this case. The Attorney General is the prosecuting authority and he has given an undertaking that seems to me to meet completely the objection on grounds of risk of self-incrimination.

23 The Attorney General's response to counsel's submission that the cross-examination would be for a collateral purpose was that it was not a collateral but a perfectly legitimate purpose. At the heart of the application for directions, he submitted, was the question whether the trust funds represented or might represent the proceeds of crime. Inherent in that question were the issues of whether there had been criminal conduct on the part of the representor or any other person. Counsel for the representor did not, it seemed to me, contend that the question whether there had been any criminal conduct on the part of the representor was immaterial; on the contrary it was asserted that there had been no criminal conduct on his part. I was addressed at some length on what conduct was hypothetically to be transposed to Jersey for the purpose of determining whether or not the trust funds could represent the "proceeds of criminal conduct" as defined in the 1999 law. I do not find it necessary to resolve these interrelated issues at this stage. It is sufficient for me to state that, in my judgment, cross-examination of the representor in relation to the circumstances in which the commissions came to be paid and subsequently settled on trust would not be for a collateral purpose.

24 Would it be nonetheless oppressive to require the representor to submit to cross-examination? It is true that the cross-examination, if the Attorney General's application were granted, might well be wide-ranging. Counsel for the representor suggested that it would extend to the capacity in which the representor was acting when he involved himself in the contracts and received his commissions, how much negotiating the representor personally performed, and indeed anything going to disprove the contents of the affidavits which he has sworn. Counsel referred me to a passage from the judgment of Scott J in *Bayer A.G. v. Winter and others (No. 2)* [1986] 1 WLR 540 at 544 –

> ***" Star Chamber interrogatory procedure has formed no part of the judicial process in this country for several centuries.*** The proper function of a ***judge in civil litigation is to decide issues between parties.*** It is not, in my opinion, to preside over an interrogation .
>
> ***The police, charged with the upholding of the public laws, cannot subject a citizen to cross-examination before a judge in order to discover the truth about the citizen's misdeeds.*** How then, as a matter of discretion, can it be right in a civil case, in aid of rights which, however important, are merely private rights, to subject a citizen to such a cross-examination? A fortiori it cannot be right to do so in a case where the plaintiff seeking the cross-examination of the defendant is holding itself free to use the defendant's answers for the purpose of an application to commit him to prison for contempt .

For these reasons I am not prepared to order the first defendant to submit himself to cross-examination on his answers given to the plaintiffs' solicitors last Monday nor on the affidavit, which he has yet to answer, in verification of those answers."

That was however, in my judgment, a rather different kind of case. In *Bayer* the plaintiff had obtained ex parte an Anton Piller, order in advance of the service of a statement of claim, directing the defendants to disclose certain information relating to the alleged distribution of a counterfeit product. The plaintiffs were dissatisfied with the disclosure they obtained and sought to cross-examine the 1 st defendant on his affidavit. Here, by way of contrast, it is the representor who is seeking to obtain relief from the Court. He seeks relief on the basis of a factual matrix set out in his affidavits and other material in support. The Attorney General challenges the accuracy of that factual matrix. It cannot in my judgment properly be characterised as oppressive to seek to cross-examine the representor.

Cross-examination would not go to any relevant issue

25 I turn now to the objection that cross-examination would not go to any relevant issue in the case. For the reasons that I have already given it does not seem to me that this point has any substance. Counsel for the representor submitted that there was one primary issue, viz. whether the Court ought now to direct that the trusts be administered in accordance with their express terms. This was said to turn on –

On the assumption that those are the key issues, it seems to me that cross-examination directed to those areas, subject to the ruling which I have made on the question of acts of state, must be relevant.

(a) whether the assets were subject to a constructive trust and/or

(b) whether there was sufficient evidence before the Court that the funds are the proceeds of crime so that the trusts should not be administered in accordance with their terms.

Abuse of Article 47 procedure

26 I turn next to the submission that cross-examination of the representor would be an abuse of the Article 47 procedure for seeking the directions of the Court. While the second representation might be said to be an unusual example of an application for directions under Article 47, it does not seem to me that, in context, the application of the Attorney General to cross-examine the representor could be said to be an abuse of the statutory procedure. This submission is accordingly rejected.

Conclusion

27 Taken in the round, I cannot find that any of the objections to the cross-examination of the representor on his affidavits put forward by counsel amounts to an exceptional circumstance justifying the exercise of my discretion to disallow cross-examination. The representor has filed affidavits on the basis of which he is asking the Court to issue directions to the trustee. The Attorney General has been convened and seeks to cross-examine the representor in order, as he contends, that the Court may have a fuller picture of the background. This does not seem to me to be in any way unfair to the representor. In my judgment the application is proper and is accordingly granted. It will, of course, be open to counsel to object to any particular line of questioning either on the ground of lack of relevance or indeed on any other appropriate ground.

APPLICATION TO CROSS-EXAMINE MR. BLACK:

28 I turn now to the application to cross-examine Mr. Black. In the case of the representor, the Attorney General has undertaken that nothing said in cross-examination by Mr. Black would itself be used in any future prosecution of him or the trustee. During argument that undertaking was extended to embrace all present employees and directors of the trustee together with certain other persons.

29 The Attorney General contended that the trustee had colluded in the misleading of the Court by the representor in relation to the hearing in May. He did not allege fraud on the part of the trustee; but he did allege that the trustee had failed to draw to the Court's attention flaws in the representor's case that were within its knowledge. In short, the Attorney General submitted that the trustee had tried too hard to placate a valuable client and had failed in its duty of full disclosure of all relevant material. The Attorney General particularized these allegations but it is unnecessary to record them here.

30 Mr. Thompson for the trustee denied that there had been any deliberate failure to disclose relevant material. He contended that the only issue before the Court in May was whether there was a constructive trust in favour of the State of Qatar or some other party. On that basis all relevant material was before the Court. I am not particularly impressed by this argument. Even if the sole issue presented to the Court in May by the representor was the constructive trust issue, it must have been clear to the trustee that there was or might be another material issue – viz. whether the trust funds might constitute the proceeds of crime and accordingly be affected by the provisions of the 1999 Law. It is true that there was some material before the Court touching upon this issue. Indeed at paragraph 41 of his affidavit of 11 th May 2001 Mr. Black expressly refers to the possibility that, even if the prayer of the representor were granted, the trustee's ability to deal with the assets would still be subject to police consent under the 1999 Law. However it is not for the Court to ferret out and to analyse potentially relevant issues when an application is presented upon an entirely different basis. Furthermore, the Court is entitled to rely upon the parties, but particularly the trustee, for guidance as to whether all appropriate persons have been convened. With the benefit of hindsight it is plain that the Attorney General should have been convened to the hearing in May. It was the duty of the trustee, inter alia, to convene

him. It is not necessary nor desirable for the Court at this stage to express any concluded view as to whether the conduct of the trustee measured up to the high standard which is required when an application for directions is made under Article 47. It may be, however, a matter to be considered in the context of costs in due course and in the light obviously of any further submissions that may be made.

31 But is it appropriate nonetheless for Mr. Black to be ordered to appear for cross-examination? The Attorney General argued in his opening submissions that it was relevant to ask Mr. Black why certain documents and relevant information were not brought to the attention of the Court in May. He then submitted that the principal question for Mr. Black was whether he suspected that the trust funds were the proceeds of criminal conduct and, if so, why.

Conclusion

32 In my judgment these questions, while interesting and arguably relevant to the issue of the trustee's conduct, are peripheral to the issues raised by the second representation. Mr. Black has no direct knowledge of the relationship between the representor and the foreign companies which contracted with the State of Qatar; nor does he have anything to offer in the context of the procedures for awarding contracts in the State of Qatar and the part, if any, played by the representor. Mr. Black cannot, it seems to me, substantially assist on the question whether the trust funds are or might represent the proceeds of criminal conduct. In my judgment these considerations amount to exceptional circumstances justifying the exercise of my discretion to decline to accede to the application to cross-examine Mr. Black. I accordingly refuse the Attorney General's application in that respect.