HM Attorney General v Arne Rosenlund and F N B International Trustees Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	09 September 2015
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Text

[2015] JRC 186

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**.

IN THE MATTER OF THE PROCEEDS OF CRIME (JERSEY) LAW 1999, AS MODIFIED AND INCLUDED IN THE SECOND SCHEDULE TO THE PROCEEDS OF CRIME (ENFORCEMENT OF CONFISCATION ORDERS)(JERSEY) REGULATIONS 2008

AND IN THE MATTER OF AN APPLICATION FOR A SAISIE JUDICIAIRE IN RESPECT OF THE REALISABLE PROPERTY OF ARNE ROSENLUND

Between

Her Majesty's Attorney General
Applicant
and
Arne Rosenlund
First Respondent

and

F N B International Trustees Limited
Second Respondent

Advocate A. J. Belhomme, **Esq., Crown Advocate**.

Advocate M. H. Temple **for the First Respondent**.

Advocate A. Kistler **for the Second Respondent**.

Authorities

Proceeds of Crime (Jersey) Law 1999.

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

Income Tax (Jersey) Law 1961.

Bhojwani v AG [2010] JLR 78.

AG v Bhojwani [2008] JRC 172A.

Bennion on Statutory Interpretation 6th edition.

Interpretation (Jersey) Law 1954.

Human Rights (Jersey) Law 2000.

Anchour v France [2007] 45 EHRR 2.

Welch v United Kingdom [1995] 20 EHRR 247.

Jamil v France [1995] 21 EHRR 65.

AG -v- Tantular No 2 [2014] JRC 251.

Scoppola v Italy (No 2) [2010] 51 EHRR 12.

R v Bow Street Magistrates' Court ex parte Pinochet (No 1) [2000] 1 AC 61

R v Bow Street Magistrates' Court ex parte Pinochet (No 2) [2000] 1 AC 119.

R v Bow Street Magistrates' Court ex parte Pinochet (No 3) [2000] 1 AC 147.

United States v Montgomery and another (No 1) [2001] 1 WLR 196.

Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991.

Kafkaris v Cyprus [2009] 49 E.H.R.R. 35.

Del Rio Prada v Spain [2014] 58 E.H.R.R. 37.

Saccoccia v Austria Application no. 69917/01 [2008] ECHR 1734.

In re Kaplan [2009] JLR 88.

De Figueiredo v Commonwealth of Australia [2010] JLR 376.

Pilecki v Circuit Court of Lake Neica, Poland [2008] 1 WLR 325.

R v Home Secretary ex parte Hill [1999] QB 886.

AG v Bhojwani [2010] JLR 24.

Saisie judiciaire — application by the Attorney General to register external confiscation order.

THE COMMISSIONER:

1 The Court has ordered that a preliminary issue of law be determined arising out of the Attorney General's application to register an external confiscation order made by the Lyngby Court in Denmark on 29 th May, 2012, (and confirmed on appeal by the Eastern High Court in Denmark on 6 th March, 2012,) against the first respondent ("Mr Rosenlund"), a resident of Denmark who had been convicted of *"tax fraud of a particularly aggravated nature"* over the period of the Danish tax years 1997 — 2006, and this in relation to a trust established in Jersey of which the second respondent is the current trustee ("the trustee"). The request of the government of Denmark is for the assets of the trust to be seized.

2 Before setting out the issue of law to be determined, it is necessary to place it in context. The Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law") as modified and included in the Second Schedule to the Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008 ("the Modified Law") provides, in so far as is relevant, as follows:–

> (i) A saisie judiciaire can only be made in this case if the Danish order is an ***"external confiscation order"*** (Articles 15 and 16 of the Modified Law).
>
> (ii) An ***"external confiscation order"*** is defined in Article 1(1) of the Modified Law as follows:–

> ***"'external confiscation order' means an order made by a court in a country or territory outside Jersey –***
>
> > ***(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;"***

On the facts of this case we are concerned with (c) namely a pecuniary advantage obtained as a result of or in connection with criminal conduct.

(iii) ***"Criminal conduct"*** is defined in Article 1(1) of the Modified Law as follows:–

> ***"'criminal conduct' means conduct corresponding to an offence specified in Schedule 1;"***

(iv) Schedule 1 of the Modified Law (in so far as is relevant) is in the following terms:–

> ***"'OFFENCES THAT ARE RELEVANT TO THE DEFINITION OF 'CRIMINAL CONDUCT'***
>
> ***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) …"'***

(v) The offence upon which the Attorney General relies is Article 137 of the Income Tax (Jersey) Law 1961 ("the 1961 Law") which following an amendment on the 29th May 2009 and in so far as is relevant, is in the following terms:–

> ***"'Penalties for fraudulently or negligently making incorrect statements, etc.***
>
> ***(1) If any person fraudulently or negligently –***
>
> > ***(a) delivers any incorrect statement for the purposes of Article 16;***
> >
> > ***(b) makes any incorrect statement, return or declaration in connection with any claims for any allowance, deduction or relief;***
> >
> > ***(c) submits to the Comptroller any incorrect amounts in connection with the ascertainment of his or her liability to income tax*** ,
>
> ***The person shall be guilty of an offence.***

(2) If any person fraudulently or negligently delivers or furnishes any incorrect statement, list, return, schedule or certificate under any provision of this Law other than Article 16, the person shall be guilty of an offence.

(2A) Where an offence under paragraph (1) –

(a) is committed negligently, the person shall be liable to a fine in accordance with paragraph (2B);

(b) is committed fraudulently, the person shall be liable to imprisonment for a term of 15 years and to a fine.'"

3 Before the 29 th May, 2009, (when the conduct for which Mr Rosenlund was convicted took place) the penalty for an infraction of Article 137 of the 1961 Law was a fine and it would not then have come within Schedule 1 of the Modified Law. The issue which the Court has ordered to be determined is therefore as follows:–

> *"For the purpose of Article 1(1) of the Modified Law, it is necessary to apply Jersey law to transposed overseas conduct ("the conduct") in order to decide whether the conduct "corresponds" to an offence of a category described in Schedule 1 of the Modified Law.* In this case between the date of the conduct and the date of the application to the Royal Court the sentence for the Jersey offence which the Attorney General contends one would apply to the conduct (Article 137 of the Income Tax (Jersey) Law 1961) has changed. At the time the conduct occurred the maximum sentence was a fine; at the time of the application to the Court the sentence was greater than one year in prison. The question to be determined is whether, for the purposes of the Modified Law one applies Jersey law to the transposed conduct as that law existed at the time the conduct occurred or whether one applies Jersey law as that law exists at the time the application is made to the Royal Court."

4 Mr Rosenlund and the trustee contend that one applies Jersey law to the transposed conduct as that law existed at the time the conduct occurred. The Attorney General contends that one applies Jersey law as that law exists at the time the application is made to the Royal Court — if he fails in that contention that will dispose of the whole of his application to register the external confiscation order.

Contentions of Mr Rosenlund and the trustee

5 The trustee's primary contention, advanced by Advocate Kistler, was that as a matter of construction the question of whether the conduct "corresponds to" Schedule 1 of the Modified Law must be asked and satisfied as at the date or dates that the conduct occurred.

6 Schedule 1, he said, imposes a threshold test to exclude less serious offences which do not attract a term of imprisonment of one or more years. The plain meaning of ***"specified"*** in the definition of ***"criminal conduct"*** in Schedule 1 of the Modified Law requires both the conduct constituting the offence and the qualifying criterion of the minimum term of imprisonment to be read together in order for the offence to be ***"specified".*** Accordingly, it makes no difference to the determination of the preliminary issue that the Article 137 offence existed without the potential for a term of imprisonment prior to 29 th May, 2009.

7 Advocate Kistler set out the definition of ***"external confiscation order"*** in the Modified Law reading in the full narrative of the definitions as follows:–

> ***"External Confiscation Order" means an order made by a court in a country or territory outside Jersey:***
>
> > ***"(a) …***
> >
> > ***(b) …***
> >
> > ***(c) For the purpose of depriving a person of a pecuniary advantage [obtained as a result of or in connection with conduct corresponding to any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years]."***

8 He conducted the same exercise in relation to Article 1(2) of the Modified Law as follows:–

> ***"For the purposes of this Law;***
>
> ***(a) references to property obtained, or to a pecuniary advantage derived, in connection with [conduct corresponding to any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years] include a reference to property obtained or to a pecuniary advantage derived both in that connection and in some other connection (whether received before or after the commencement of the Enforcement Regulations).*** (emphasis added)"

9 The definition of ***"external confiscation order"*** is understandably framed by reference to property and pecuniary advantage but it was axiomatic, he said, that the foreign court's order must be made in connection with the same conduct required to correspond to Schedule 1 to the Modified Law. By necessary implication the reference to property and/or a pecuniary advantage obtained ***"…before or after the commencement of the Enforcement Regulations…"*** must include a consequential reference to the conduct with which the obtaining is connected also being capable of occurring before as well as after such commencement.

10 It was instructive, he said, to compare the language used to define ***"criminal conduct"*** in the Modified Law with that used to define ***"criminal conduct"*** in the 1999 Law, where the

term means:–

> ***"criminal conduct" means conduct, whether occurring before or after Article 3 comes into force, that:***
>
> > ***(a) constitutes an offence specified in Schedule 1; or***
> >
> > ***(b) if it occurs or has occurred outside Jersey, would have constituted [an offence specified in Schedule 1] if occurring in Jersey."***

11 As with the definition used in the Modified Law, the conduct may occur before as well as after the commencement of the relevant legislative provision. In the Modified Law and in the context of the requirement for the registration of an order of a Court outside of Jersey limb (a) of the definition of ***"criminal conduct"*** used in the 1999 Law was unnecessary and had been omitted accordingly. It was noteworthy, he said, that the definition of ***"criminal conduct"*** in the Modified Law does not, in terms, use the language in limb (b) which, in the context of the 1999 Law (and the Jersey money laundering offences) requires the application of the process of transposition whereby the Court must determine whether the conduct would have constituted an offence attracting a term of imprisonment of a year or more had it occurred in Jersey. He contended that the difference in the definition of ***"criminal conduct"*** used in the Modified Law simply reflected the exclusion of the purposes of the Modified Law of that part of the transposition process which requires evidential proof of the conduct in issue.

12 In *Bhojwani v AG* [2010] JLR 78, the Jersey Court of Appeal undertook a comprehensive review of the authorities relevant to the extent of the process of transposition (paragraphs 35–45 of the judgment) and, having done so, approved (in paragraph 45 of the judgment) the form of direction which the trial court had set out in its judgment of 1 st October, 2008, (*AG v Bhojwani* [2008] JRC 172A). Advocate Kistler contends that the words ***"conduct corresponding to .."*** used in relation to the definition of ***"criminal conduct"*** in the Modified Law do no more than reflect the application (*mutatis mutandis*) of that part of the transposition process set out in the fourth stage of the approved directions (at paragraph 24(iv) of the Royal Court's judgment) as follows:–

> ***"The fourth stage is the process by which the elements of the Jersey offences are applied to the transposed conduct.*** It is only if all the elements of at least one of the Jersey offence are found by [the Court] to be present in the transposed conduct, that the conduct is constituted 'criminal conduct."

13 In the context of an external confiscation order the foreign court will, as a tribunal of fact, have found the conduct to have been undertaken for the purpose of an ***"external confiscation order"*** already made (as in the present case) or, for the purposes of a protective *saisie judiciaire*, it is assumed it will make in due course, failing which the saisie judiciaire is discharged. Advocate Kistler submits that the reliance on the foreign proceedings for relevant findings of fact does nothing to change the significance, as a

matter of Jersey law, of the date at which the relevant conduct occurs. A qualifying ***"external confiscation order"*** necessarily locks in the date at which the proven conduct occurred. The date of the conduct is, accordingly, an essential (and certainly not adventitious) circumstance locked into the transposed conduct. In short, the date at which the conduct occurs is a part of the figurative 'DNA' of the proved transposed conduct.

14 The requirement that transposed conduct (whether occurring before or after the commencement of the Enforcement Regulations) is conduct ***"corresponding to"*** an offence specified in Schedule 1 must be construed having regard to the propositions that:–

> (i) the transposed conduct is necessarily evidentially invested with the date of its occurrence; and
>
> (ii) the conduct can occur prior to the commencement of the Enforcement Regulations and will necessarily have occurred prior to the date of an application for a *saisie judiciaire*.

15 In *Bhojwani v AG*, when addressing the issue of legal certainty concerning what conduct the defendant was being tried for, the Court of Appeal held:–

> ***"We do not accept the applicant's contention.*** He is not being prosecuted for his actions in Nigeria in 1996 and 1997: he is being prosecuted for his actions in Jersey in 2000, those actions being alleged to be the conversion or removal of the proceeds of criminal conduct. When the conversion or removal is said to have occurred, the Jersey statute was in force and clearly identified the elements of the offence. One such element is that the money should be proceeds of conduct that would have constituted an offence in Jersey had it occurred there. The prosecution must therefore prove that what the applicant did in Nigeria in 1996 and 1997 would have amounted to an offence in Jersey if the applicant had done it there in 1996 and 1997. That will be assessed according to the state of the law in Jersey at that time. Nothing in the 1999 Law changes the law prevailing in Jersey prior to its enactment; nor does it otherwise change the legal consequences that the applicant's acts would have attracted had they in fact occurred in Jersey." (Advocate Kistler's emphasis).

16 Although the Court of Appeal was contemplating a situation in which the Jersey Court would undertake the evidential stages of the transposition process, Advocate Kistler submits that the Court of Appeal's finding that the prosecution is required to prove that what the defendant did in Nigeria in 1996 and 1997 would have amounted to an offence if it had been done in Jersey in 1996 and 1997 (i.e. that the Schedule 1 threshold test was satisfied as at those dates and in relation to a specified offence) is no less relevant and correct where, as in the present case, the evidential stages of the transposition process are addressed by evidence of findings in a foreign tribunal. Likewise, it is no less true in such circumstances (applying the construction contended for by Advocate Kistler) that nothing in the Modified Law changes "… the legal consequences that the … acts would have attracted

had they in fact occurred in Jersey…."

17 In the context of the preliminary issue, Advocate Kistler submits that it is materially instructive to recognise the consequences, as a matter of Jersey law, of the proposition that conduct occurring in Jersey on, say 1 st May, 2009, (for example in relation to a tax return for the year 2008), did not attract a term of imprisonment of one or more years. Notwithstanding that 'all crimes' money laundering offences would have been in place for 10 years, the Article 137 offence could not (applying limb (a) of the definition of ***"criminal conduct"*** in the 1999 Law) give rise to a money laundering offence for the purposes of the 1999 Law. Accordingly, there could be no prospect, in turn that the conduct could have given rise to a Jersey confiscation order.

18 This analysis was consistent, Advocate Kistler said, with the established principles of statutory interpretation. He referred to the plain meaning rule at section 195 of Bennion on Statutory Interpretation 6th edition which provides as follows:–

> ***"It is a rule of law (in this Code called the plain meaning rule) that where, in relation to facts of the instant case:–***
>
> > ***(a) the enactment under enquiry is grammatically capable of one meaning only, and***
> >
> > ***(b) on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislature*** ,
>
> ***the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly."***

19 At Section 202 (page 539) *Bennion* addresses the use of context for the purpose of applying the informed interpretation rule, as follows:–

> ***"For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts in pari materia, and all other facts concerning the subject matter of the Act."***

Below this passage the commentary states:–

> ***"Viscount Simmonds stressed the interpreter's need to read and absorb the whole Act before deciding whether real doubt exists as to the legal meaning of an enactment:–***
>
> ***… it must often be difficult to say that any terms are clear and unambiguous until they have been read in their context … the elementary rule must be observed that no one should profess to understand any part***

> ***of a statute … before he has read the whole of it.*** Until he has done so he is not entitled to say that any part of it is clear and unambiguous. …"

20 Advocate Kistler summarised the relevant context in this way:–

> (i) the scheme of the Modified Law as, in particular, it concerns and applies the definition of ***"external confiscation order"***;
>
> (ii) the language used in Article 1(2) of the Modified Law;
>
> (iii) the comparative analysis of the definitions of ***"criminal conduct"*** as used in both the 1999 Law and the Modified Law (as a product of subordinate regulations);
>
> (iv) the identical nature of the language used in both the Schedule 1 to the 1999 Law and Schedule 1 of the Modified Law, particularly where the States could have achieved the position contended for by the Attorney General by modifying the language used; and
>
> (v) the legal policy underpinning the 1999 Law.

21 Against this background he submitted that the requirements of limb (a) of the plain meaning rule were satisfied. As to limb (b), there was no doubt, he said, as to the relevant legislative intention. It was material that the language of Schedule 1 remains, save for its heading, in identical terms to that of the 1999 Law in which context it has received its authoritative interpretation from the Court of Appeal in *Bhojwani -v- AG*. That proposition is the clearest and most unambiguous reflection of relevant legislative intention, namely that the Modified Law, properly applied to the instant case, cannot enforce by *saisie judiciaire* an ***"external confiscation order"*** made in connection with conduct which (albeit occurring outside Jersey) cannot satisfy the Schedule 1 threshold test when applied to the conduct at its date or dates.

22 Both the trustee and Mr Rosenlund, through Advocate Temple, argued that in any event the presumption against retrospectivity precluded the opposing construction contended for by the Attorney General.

23 The presumption is recorded and discussed by *Bennion* at Section 97, pages 291 to 303. At page 291 it is summarised in this way:–

> ***"Unless the contrary intention appears, an enactment is presumed not to be intended to have retrospective operation."***

The commentary, at page 292, records as follows:–

> ***"The general presumption, which applies only unless the contrary intention appears, is stated in Maxwell on the Interpretation of Statutes in***

the following emphatic terms:–

> ***'It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.'"***

24 Advocate Kistler drew attention to the manner in which the legislature specifically provided for retrospective application to conduct and connected property and pecuniary advantage as set out above and submitted that such clear and express provision for retrospective application marked the proper limit of such application for the purposes of the Modified Law.

25 Advocate Temple referred to Article 17(2) of the Interpretation (Jersey) Law 1954 which states:–

> ***"17 Effect of repeal and re-enactment, and expiry***
>
> ***(2) Where any enactment, whether passed before or after the commencement of this Law, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not –***
>
> > ***(a) revive anything not in force or not existing at the time at which the repeal takes effect;***
> >
> > ***(b) …***
> >
> > ***(c) …***
> >
> > ***(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or***
> >
> > ***(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing enactment had not been passed."***

Article 137 of the 1961 Law in its earlier form had in effect been repealed on the 29th May, 2009, he submitted.

26 Finally, both the trustee and Mr Rosenlund argued that interpreting the Modified Law in the way contended for by the Attorney General was incompatible with Mr Rosenlund's rights under Article 7 of the Convention and thus contrary to Article 4 of the Human Rights (Jersey) Law 2000 which requires that legislation must be read and given effect in a way which is compatible with Convention rights.

27 Article 7 of the Convention provides that:–

> ***"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.*** Nor shall a heavier ***penalty be imposed than the one that was applicable at the time the criminal offence was committed.***
>
> ***This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."***

28 The Grand Chamber of the European Court of Human Rights ("ECtHR") reiterated the nature and extent of the Article 7(1) obligation in *Anchour v France* [2007] 45 EHRR 2 (paragraphs 41/43) as follows:–

> ***"41 … Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (nullem crimen, nulla poena sine lege) and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see*** *Kokkinakis v Greece*, ***25th May 1993 p 52, Series A no 260-A).*** While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him criminally liable (see among other authorities, *Cantoni v France*, ***15th November 1996, p 29, Reports of Judgments and Decisions 1996 V)***.
>
> ***43 The Court must … verify that at the time when an accused performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see*** *Coeme and Others*, ***loc cit.)***."

29 I was also referred to the decisions of the European Court of Human Rights in *Welch v United Kingdom* [1995] 20 EHRR 247 and *Jamil v France* [1995] 21 EHRR 65. Although the Royal Court in the case of In the matter of the realisable property of *Robert Tantular No 2* [2014] JRC 251 held that proceedings to enforce an external confiscation order are civil in nature, the issue in that case did not engage the application of the Convention, and no issue of compatibility with the Convention was before it. In *Scoppola v Italy (No 2)* [2010] 51 EHRR 12, the European Court of Human Rights held that the classification in domestic law of the legislation concerned cannot be decisive.

30 It was argued that to interpret the Modified Law so as to find the Schedule 1 threshold met would operate to the detriment of Mr Rosenlund and others (the beneficiaries of the trust) and constitute a penalty that was heavier than the one that was applicable at the time the conduct for which Mr Rosenlund was convicted took place.

Decision

31 Having taken all of the submissions of the trustee and Mr Rosenlund into account (of which the above is only a summary), I prefer the interpretation contended for by the Attorney General, as put forward by Crown Advocate Belhomme, to which I now turn and which in large part I gratefully adopt.

32 The starting point is the *Pinochet* litigation in the United Kingdom. There were four decisions, firstly the decision of the Divisional Court (presided over by Lord Bingham) and reported in the Times on 3 rd November, 1998; secondly the decision of the House of Lords on appeal from the Divisional Court in *R v Bow Street Magistrates' Court ex parte Pinochet (No 1)* [2000] 1 AC 61; thirdly the decision of the House of Lords in *R v Bow Street Magistrates' Court ex parte Pinochet (No 2)* [2000] 1 AC 119 setting aside its decision in *Pinochet (No 1)* on the ground of bias; and fourthly the decision of the House of Lords re-hearing *Pinochet (No 1)*, namely *R v Bow Street Magistrates' Court ex parte Pinochet (No 3)* [2000] 1 AC 147.

33 One of the issues in the *Pinochet* litigation was whether the dual criminality requirement in the relevant United Kingdom extradition legislation required the notional UK offending to be criminal at the time the conduct occurred. The Divisional Court and the only Law Lord to consider the issue in *Pinochet (No 1)* decided that the notional UK conduct had to be criminal in the United Kingdom at the time of the extradition request but that it did not have to be criminal at the time the conduct occurred. In *Pinochet (No 3)*, the House of Lords changed its position. It held that there was room for two possible views on the question but the statutory context meant that the legislation should be construed so as to require the United Kingdom offence to have existed at the time the conduct occurred. Quoting from the relevant part of the judgment of Lord Browne-Wilkinson:–

> ***"The question is whether the references to conduct 'which, if it occurred in the United Kingdom would constitute an offence' in section 2(1) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition ('the request date') or the date of the actual conduct ('the conduct date').*** In the Divisional Court, Lord Bingham of Cornhill C.J. held ***that the words required the acts to be criminal only at the request date.*** He said:
>
> > ***'I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad.*** There is nothing in section 2 which

> so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the relevant time 'have constituted' an offence and section 2(3)(c) would have said 'would have constituted'. I therefore reject this argument.'

Lord Lloyd (who was the only member of the Committee to express a view on this point at the first hearing) took the same view. He said, at p. 88:

> ***'But I agree with the Divisional Court that this argument is bad.*** It involves a misunderstanding of section 2 of the Extradition Act 1989. Section 2(1)(a) refers to conduct which would constitute an offence in the United Kingdom now. It does not refer to conduct which would have constituted an offence then.'

My Lords, if the words of section 2 are construed in isolation there is room for two possible views. I agree with Lord Bingham of Cornhill C.J. and Lord Lloyd that, if read in isolation, the words 'if it occurred … would constitute' read more easily as a reference to a hypothetical event happening now, i.e. at the request date, than to a past hypothetical event, i.e. at the conduct date. But in my judgment the right construction is not clear. The word 'it' in the phrase 'if it occurred ..' is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. The question then would be 'would that past event (including the date of its occurrence) constitute an offence under the law of the United Kingdom'. The answer to that question would depend upon the United Kingdom law at that date.

But of course it is not correct to construe these words in isolation and your Lordships had the advantage of submissions which strongly indicate that the relevant date is the conduct date. The starting point is that the Act of 1989 regulates at least three types of extradition."

34 It is not necessary to set out in this judgment the three types of extradition which Lord Browne-Wilkinson then went on to examine, from which it was clear from the statutory language that the relevant date was the conduct date, as there is no such equivalent language in the Modified Law, (or indeed in the 1999 Law). As Crown Advocate Belhomme pointed out however, in the *Pinochet* litigation judges of the highest calibre disagreed as to which interpretation to apply.

35 On my reading of the definition of ***"criminal conduct"*** in the Modified Law, it means conduct corresponding to an offence in Schedule 1 now, i.e. at the time of the application. In my judgement the difference in the definition of ***"criminal conduct"*** in the 1999 Law and the Modified Law is significant. There is no *"it"* in the Modified Law definition as there is in the phrase used in the 1999 Law, upon which for the purposes of the equivalent English provision Lord Browne-Wilkinson focused as a possible reference back to the actual

conduct of the individual abroad. The Modified Law refers merely to conduct which corresponds to an offence in Jersey.

36 If that is not correct, what is clear is that grammatically this provision can be read in two ways. This is significant in that the plain meaning rule of statutory interpretation has no application as it first requires that "the enactment under inquiry is grammatically capable of one meaning only". This two stage process can be seen from the commentary to section 195 of *Bennion* which provides:–

> ***"This section sets out the plain meaning rule, namely that where the legal meaning is plain it must be followed.*** For this purpose a meaning is 'plain' only where no relevant interpretative criterion (whether relating to material within or outside the Act or other instrument) points away from that meaning.
>
> ***In other words the plain meaning must be given, but only where there is nothing to modify, alter or qualify it."***

37 I agree with Crown Advocate Belhomme that it is impossible to argue that the provision concerned here is grammatically capable of one meaning only whether construed in isolation or within the context of the 1999 Law as a whole.

38 It also follows from the *Pinochet* litigation that the correct interpretation of the relevant provision is to be discovered by looking at the statutory context and I will come to that in a moment. None of the considerations which influenced the House of Lords in *Pinochet (No 3)* to adopt the narrow interpretation applies to the Modified Law. Extradition is a criminal procedure which allows the State to incarcerate and transfer an individual to face trial abroad (see Lord Browne-Wilkinson in *Pinochet (No 3)* at pages 35–37). By contrast, the regime created by the Modified Law is entirely civil in nature as made clear in *Tantular*. It is concerned only with a foreign government enforcing confiscation orders.

39 Crown Advocate Belhomme placed reliance upon the decision of the House of Lords in Government of the *United States v Montgomery and another (No 1)* [2001] 1 WLR 196, a case in which the power to a make restraint order in aid of a confiscation order made in the U.S. was conferred upon the High Court after the confiscation order was made and this pursuant to the provisions of the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 referred to in the judgment as "the DCO". It was argued that the power to make a restraint order should be limited by the general presumption against retrospective legislation. Quoting from the judgment of Lord Hoffmann at paragraph 30:–

> ***"30 … This was the basis upon which Latham J held that the DCO did not apply to the 1984 Florida order.*** In the case of the imposition of a confiscation order by the criminal court, I can see that there are strong arguments for applying the presumption so as to limit the power to offences committed after the legislation came into force: see *In re Barretto* [1994] QB 392. ***Indeed, in*** *Welch v United Kingdom* (1995) 20 EHHR 247 ***the European Court of Human Rights***

> ***decided that the application of the power to make a confiscation order in respect of an offence committed before Part VI came into force offended against the prohibition on retrospective penalties in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd 8969).*** But, as Lord Mustill said in *L'office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] AC 486, 525, ***'the basis of the rule is no more than simple fairness'.*** There is no suggestion that the Florida confiscation order was imposed in respect of an offence committed before the power conferred by RICO came into force. It was made under existing powers in respect of property which Larry Barnette had obtained by a fraud upon the United States. In my opinion the enforcement in this country of rights conferred upon the United States by an order made before the DCO came into force is a very different matter from the retrospective imposition of a penalty. Even if there was nothing which the United States government could have done before 1 August 1994 to recover its assets from Mr or Mrs Montgomery by proceedings in this country, I see no unfairness in it now being allowed to do so."

40 Advocate Kistler pointed out that the decision in *Montgomery* was in part concerned with the jurisdiction of the Court to hear an appeal which depended on whether such an order was made in a criminal cause or matter. It was held that such an order, albeit granted in consequence of criminal proceedings, was essentially civil in character. As to the question of retrospectivity, he argued that the finding that the DCO could be applied retrospectively did not rest on the status of the proceedings in which the restraint order was made. It rested instead on the construction that the House of Lords placed on the relevant statutory provision that did not preclude retrospective application and that there was no overriding issue of fairness to preclude the same. In the present case, he said, there could be no question that the change in the sentence for the Article 137 offence has retrospective effect.

41 I agree with Crown Advocate Belhomme, however, that no reason has been given why *Montgomery* is not authority for the propositions that the Attorney General relies on the case for, namely that an application under the Modified Law is a civil application so far as domestic law is concerned and none of the objections to the retrospective operation of legislation preclude legislation such as the Modified Law applying to events that occurred before it was passed. The change in Article 137 of the 1961 Law merely has the effect of extending the Modified Law so that it applies to a larger range of overseas orders.

42 There is no difference in principle between extending the Modified Law in this way and extending similar legislation by, for example, designating a new country so that the legislation applies to orders made in that country, such as the legislation considered in *Montgomery*. If the Modified Law expressly applies as it does to foreign orders made in respect of conduct that occurred before it commenced (Article 1(2) set out above), it is entirely consistent with the statutory scheme for it to apply where a foreign order is made in respect of conduct that occurred before the conduct fell within Schedule 1.

43 As to retrospectivity I cannot see the relevance of Article 17(2) of the Interpretation (Jersey) Law 1934 to which Advocate Temple referred. None of the provisions in issue in this case have been repealed. The commentary in *Bennion* on the statutory interpretation to which Advocate Kistler referred above, continues on page 293:–

> ***"It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law.*** However the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes not that a past event has happened, and bases new legal consequences upon it.
>
> ***Example 97.3 The Estate Agents Act 1979, which introduced a new scheme for the regulation of estate agents, authorises the making of an order prohibiting a person from engaging in estate agency work if he appears unfit to practice on any of various grounds including that he 'has been convicted of an offence involving fraud or other dishonesty or violence'.*** Held This includes a conviction incurred before the commencement of the 1979 Act because that indicated unfitness just as much as a conviction incurred after the commencement would."

44 The basis of the rule is no more than simple fairness (see extract from *Montgomery* above). The Modified Law does not alter the legal nature of Mr Rosenlund's conduct; it merely bases new legal consequences upon it. I see nothing unfair in the application of the Modified Law to him. He has been convicted in Denmark in 2012 and a confiscation order made against him where he had the benefit of all the rights conferred by the Convention. It is to be assumed by this Court therefore, that his conviction was entered into and the confiscation order was imposed in a Convention compliant manner. This Court is simply assisting in the enforcement of that order, which brings me on to the issue of Article 7 of the Convention.

45 The Attorney General accepted that on the authority of *Achour v France* and *Welch v UK*, Article 7 applies to the making of a confiscation order on the basis that it constitutes a penalty and in this respect I note that Article 4(1) of the 1999 Law defines a confiscation order as ***"the penalty".*** However, the European Court of Human Rights has drawn a distinction between the imposition of a penalty, a process to which Article 7 can apply, and the ***"execution"*** or ***"enforcement"*** of the penalty, a process to which Article 7 does not apply — see *Kafkaris v Cyprus* [2009] 49 E.H.R.R. 35 at paragraphs 143, 149, 152 and 153 and *Del Rio Prada v Spain* [2014] 58 E.H.R.R. 37 at paragraphs 83, 84, 85 and 90.

46 In *Saccoccia v Austria* Application no. 69917/01 dated 5 th July, 2007, confiscation orders were made against the defendant in the United States following his conviction there of money laundering and related charges. He resisted the enforcement of those orders

against assets in Austria on the grounds that the forfeiture of his assets there violated Article 7 of the Convention. Quoting from page 18 of the judgment of the European Court of Human Rights: –

> ***"The Court considers that the present case has to be distinguished from*** *Welch* ***albeit for reasons differing from those relied on by the Government.*** In *Welch* ***the confiscation order was based on legal provisions which had entered into force after the commission of the offences.*** Given that it was punitive in nature this amounted to the retroactive imposition of a penalty (*Welch*, ***cited above, p.14 paragraphs 34–35).*** In the present case, it has ***not been alleged that the forfeiture of the applicant's assets had not been foreseen in the relevant laws of the United States at the time of the commission of his offences.*** The applicant complained in essence that the enforcement of the forfeiture in Austria was not foreseeable. However this issue does not concern the penalty itself but its execution.
>
> ***The Court has already held that Article 7 does not apply to the enforcement of a sentence (see*** *Grava v Italy* ***(dec.), no. 43522/98, 5 December 2002)*** .
>
> ***It follows that this complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 paragraph 3 and must be rejected in accordance with Article 35 paragraph 4."***

47 In this case, the confiscation order was imposed by the Danish courts and the present proceedings are concerned only with the enforcement of that order. Accordingly, Article 7 has no application.

48 In circumstances therefore where there are two possible constructions of the relevant provisions and in circumstances in which the considerations which led previous courts (in *Pinochet*) to choose one of those constructions do not apply and where there can be no objection based on considerations of retrospectivity or the Convention, the Court should apply, as Crown Advocate Belhomme argued, a purposive approach to its task of construction and choose that meaning which best gives effect to the statutory purpose. Quoting from Section 3 of *Bennion*:–

> ***"Section 303 Presumption that enactment to be given a purposive construction***
>
> ***Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose.*** A construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction."

49 Quoting from the commentary on Section 303:–

> ***"… the purpose or object of Parliament in passing an Act, other than a purely declaratory Act, is to provide an appropriate remedy to serve as a cure for the mischief with which the Act deals.*** The legislative purpose of a particular enactment contained in the Act is to be arrived at accordingly. Lord Steyn said:–
>
> > ***'No explanation for resorting to a purposive construction is necessary.*** One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation.'"

50 The purpose of the Modified Law is to facilitate international cooperation in the recovery of assets from criminals. This statutory purpose is supported by important considerations of domestic and international public policy. Provisions based on this public policy are contained in a number of treaties. The interpretation which is most in accord with this statutory purpose is that which makes it easier for Jersey to cooperate and recover assets when requested to do so by foreign governments; that is to say, the interpretation contended for by the Attorney General.

51 This approach is consistent with previous decisions of the Royal Court. In *In re Kaplan* [2009] JLR 88 the Royal Court said (at paragraphs 18 and 19):–

> ***"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 *In re Batalla-Esquival (2)*. ***That was a case where the Attorney General obtained a saisie judiciaire on behalf of the Attorney General of the United States.*** 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 on the ground, inter alia, 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 *In re Illinois Dist.* Ct. (5), ***stated*** (2001 JLR 160, ***at para. 10):–***
>
> > ***'It is true that this is not directly in point, but the passage does nonetheless serve to emphasize (a) that the whole purpose of the legislation is to curb the menace of drug trafficking; and (b) that in furtherance of that end it is undesirable for the court to adopt a restrictive view.'***
>
> ***19 Counsel for Mr Kaplan did not argue that Mr Belhomme's submissions on this point were incorrect.*** We agree that the court should try to give effect to

the purpose of the legislation. A passage from Maxwell on the Interpretation of Statutes, 12th ed., at 201 (1969), cited by Mr Belhomme in *Batalla-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.***'"

52 In Tantular the Bailiff said (Paragraph 43(i):–

> ***"I place weight upon the important public interest of depriving criminals of the proceeds of their offending and the importance that the legislature and Island has placed on offering assistance in that respect in enforcing confiscation orders made in foreign jurisdictions."***

53 The purpose of the legislative provisions that require overseas conduct to be transposed to domestic substantive criminal offences is to ensure that domestic views as to what conduct should and should not be criminalised are applied (*De Figueiredo v Commonwealth of Australia* [2010] JLR 376 at paragraph 17). The purpose of limiting the application of the test to offences which attract more than a specified minimum sentence is different. It is to ensure that these statutes are only used for more serious offences (*Pilecki v Circuit Court of Lake Neica, Poland* [2008] 1 WLR 325. It follows that all that the amendment to Article 137(1) of the 1961 Law has done is to bring an existing offence into the ambit of the Modified Law by reclassifying it, a process which is analogous to extending legislation to a designated country after the original confiscation order was made in that country as in *Montgomery*. It is also analogous to the process of applying legislation to a new country by designating the country in accordance with the provisions of an extradition statute as in *R v Home Secretary ex parte Hill* [1999] QB 886 at 902–903 where it was held that there was no objection to complying with an extradition request which alleges conduct that occurred before the requesting country was designated.

54 I do not accept Advocate Kistler's submission that the date or dates of the conduct is part of the figurative DNA of the proved transposed conduct. It is clear from the *Bhojwani* litigation that each reference in the 1999 Law to an offence in Schedule 1 of that Law must be interpreted separately, having regard to the place it occupies in the statutory scheme. The reference means different things in different places (even within the same Article) depending on the purpose the reference serves. At least as the 1999 Law was drafted at the time of the *Bhojwani* case, where the reference to a Schedule 1 offence was being used to define the predicate offence and therefore an element of the substantive offence of money laundering, the prosecution had to prove the elements of the Schedule 1 offence and, in the case of the then Article 34(1)(b), that the elements were committed by the money laundering defendant himself. On the other hand, where the reference to a Schedule 1 offence was used to describe the defendant's state of mind, as in the purpose element of the then Article 34 offence, there was no requirement for the prosecution to prove the

elements of a Schedule 1 offence (or even that a Schedule 1 offence existed, which the defendant could have avoided). The purpose of the reference to a Schedule 1 offence and the purpose element of the Article 34 offence was simply to ensure that the defendant was only convicted where he sought to avoid prosecution for a serious offence in Jersey (*AG v Bhojwani* [2010] JLR 24 at paragraphs 90–93).

55 It follows that the reference to Schedule 1 in the Modified Law must be interpreted autonomously, having regard to the purpose the reference serves in that Law. That purpose is to be found by considering the character of the Law which is that it is solely concerned with the enforcement of a foreign state's rights under a financial order properly made by an overseas court. Its purpose is to enforce such orders whenever the underlying conduct occurred and whether it passes the threshold at the time of the application both in terms of Jersey standards of what is criminal and the Jersey standard of seriousness.

Conclusion

56 For all these reasons I accept the construction placed upon the relevant provisions of the Modified Law by the Attorney General and reject that placed upon it by the trustee and Mr Rosenlund. With reference to the preliminary question of law, I conclude that one applies Jersey law as that law exists at the time the application is made to the Royal Court.