The Viscount of the Royal Court of Jersey v HM Attorney General and Catherine Louise Arthur and Richard David Arthur Maureen Brunker and Faircliff Property Ltd

Jurisdiction:	Jersey
Judge:	W. J. Bailhache, Bailiff of Jersey, Nigel Pleming., Sir David Calvert-Smith, Bailiff, Pleming, William Bailhache, Calvert-Smith, JJ.A.
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Text

[2017] JCA 052

Court of Appeal

Before:

W. J. Bailhache, Esq., Bailiff of Jersey, President,

Nigel Pleming., Q.C., and

Sir David Calvert-Smith, Q.C.

Between
The Viscount of the Royal Court of Jersey

Appellant
and
Her Majesty's Attorney General
First Respondent
Catherine Louise Arthur
Second Respondent
Richard David Arthur
Third Respondent
Maureen Brunker
Fourth Respondent
Faircliff Property Limited
Fifth Respondent

Advocate H. Sharp, **Q.C. for the Appellant**.

Advocate O. A. Blakeley **as Amicus Curiae**.

Authorities

Proceeds of Crime (Jersey) Law 1999.

Arthur -v- AG and Others [2016] JRC 132.

Court of Appeal (Jersey) Law 1961.

AG v Holley [2005] JLR 275.

Barker v Barclays Bank PLC [1989] JLR Note 5a.

Lake v Lake [1955] All ER 538.

Judicature Act 1925.

Secretary of State for Work and Pensions v Morina and another [2007] EWCA Civ 749.

Maslyukov v Diageo Distilling Limited and another [2010] EWA Civ 443(ch).

R v Secretary of States for the Home Department ex parte Salem [1999] 1 A.C. 450.

Hutcheson v Popdog Limited (Newsgroup Newspapers Limited, third party) [2012] 1 WLR 782.

Pryce v Southwark London Borough Council [2013] 1 WLR 996.

Hamnett v Essex County Council [2017] EWCA Civ 6.

ZZ v Secretary of State for the Home Department [2017] EWCA Civ 133.

In the Curatorship of X [2002] JLR 259.

Buttle and others v Saunders and another [1950] 2 All ER 193.

Cowan and others v Scargill and others [1985] 1 Ch 270.

Bankruptcy (Désastre) (Jersey) Law 1990.

Trusts (Jersey) Law 1984.

Re P (Restraint Order: Sale of Assets) [2000] 1 WLR 473.

Drug Trafficking Act 1994.

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

Drug Trafficking Offences (Jersey) Law 1988.

Proceeds of Crime Act 2002.

Appeal by the Viscount relating to a property vested in her by a saisie judicaire and duties relating thereto.

THE PRESIDENT:

1 This is the judgment of the Court.

Introduction

2 This is an appeal by the Viscount in relation to property vested in her by a *Saisie Judiciaire* under Article 16 of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law") concerning the duties which she has when selling or otherwise managing that property, and the scope of the discretion which the Court gives to her when carrying out those functions.

3 The Royal Court's decision was made on 20th June 2016 when the Court sat to consider an application by the Second Respondent to vary the terms of the *Saisie Judiciaire* originally granted on 20th May 2015 over the realisable property of the Third Respondent. The variation concerned in particular the possible sale of Old Cadet House, Mont Mallet, St Martin ("the Property"). Orders of the Court made by consent on 11th August 2015 had enabled the Viscount to proceed with the sale of the Property, having regard to but not being bound by the views of the Second Respondent as to the choice of estate agent and as to whether any offers received in respect of the Property should be accepted. The Court furthermore went on to direct in August 2015 that out of the net proceeds of sale of the Property, the Viscount should pay to the Second Respondent the sum of £30,000, reserving to the Second Respondent liberty to apply with respect to the distribution of the net proceeds of sale. There seems little doubt that the Royal Court and all parties proceeded at

that time upon the basis that the Property belonged exclusively to the Third Respondent prior to the imposition of the *Saisie Judiciaire*.

4 The judgment below (*Arthur -v- AG and Others* [2016] JRC 132) sets the scene for what we have to consider on this appeal:–

> ***"4. Pursuant to this order [of 11th August 2015], the Viscount obtained advice from two firms of estate agents as to the value and potential sale price of [the property] and in February, 2016 proceeded to market the property through two firms of estate agents. An offer to purchase the property was received in April 2016 and having been increased slightly, was accepted by the Viscount in the sum of £3,415,000. The property was then removed from the market and it was anticipated that it would be sold in late June or early July*** .
>
> ***5. Following the acceptance of that offer, a further offer was received to purchase the property for £3,600,000. It was a cash offer, but subject to survey and title. The purchaser was prepared to enter into a pre-sale agreement and make a non-refundable deposit of 10%*** .
>
> ***6. The Viscount considered this further offer, but decided it would be unreasonable to renege on the offer that had already been accepted. Quoting from the Viscount's letter of 5th May, 2016: –***
>
> > ***'I can assure you that the offer which was passed to us by Gaudin & Co on 3 May 2016 has been considered very carefully.*** After lengthy discussion, however, we have concluded that we will not proceed with that new offer for the following reasons:
> >
> > ***1. As you say, we have already accepted, some weeks ago, an offer from another purchaser. We believe that the purchaser is fully committed to the purchase and has increased his offer on more than one occasion. Acting in reliance on our acceptance of his offer, the purchaser has expended cost and effort in carrying out appropriate investigations into the property and is fully aware of the issues that relate to it. We consider that it would be neither reasonable nor ethical at this stage to withdraw from the transaction and allow that purchaser to be "gazumped" by a later, slightly higher bid. This would not be an appropriate course of action for the Viscount*** .
> >
> > ***2. The property had already been removed from the market. While the new purchaser has indicated an***

offer which is notionally higher at this stage, we consider that once the purchaser carries out further detailed investigations into the property, there is every likelihood that they will make price reductions and that, ultimately, the price settled upon may very well turn out to be significantly less than is currently proposed.'

7. Mrs Arthur sought a direction from the Court to the Viscount that there was no legal or moral impediment to her making appropriate inquiries of the further offer and that she should be directed to accept that offer if she considered it represented the best reasonably achievable price for the property. She also sought an increase in the amount payable to her out of the net proceeds of sale from £30,000 to £100,000 .

8. There are three charges registered on the property totalling £1,176,000 in terms of capital (to which outstanding interest has to be added) but it can be seen that on the basis of the offers made there is a substantial equity. The difference between the two offers is £185,000."

5 By the time of the hearing before the Royal Court in June 2016, it had become apparent that the Second and Third Respondents owned the Property jointly and for the survivor of them. The application for the *Saisie Judiciaire* had stated, in error, that the Third Respondent held the entirety of the freehold. In the circumstances the Viscount did not have title to the whole Property, but through the Third Respondent's interest held title jointly with the Second Respondent. It followed that the marketing and sale of the Property was something they had to undertake together, and it was for the Second Respondent to decide what price she would accept for her joint interest. On the sale of the Property she would be entitled to one half of the net proceeds. Of course, the Viscount's remedy in that respect was that if she considered that a sale of the Property was appropriate and co-operatively was not possible, she would need to consider an application to the Royal Court for an order for *licitation*. As the Royal Court put it, the recognition of what property had actually vested in the Viscount made the directions sought by the Second Respondent redundant, and the Court did not have to determine whether the Viscount had been correct in considering it unreasonable and unethical to entertain the further higher offer, as all offers had to be accepted both by the Viscount and by the Second Respondent.

6 However, although the Royal Court recognised that it did not have to make that determination, it proceeded to do so. After analysis, the critical part of the Royal Court's judgment in this respect was to be found at paragraph 31 of the Court's judgment:–

"We agree that the Viscount should not act in a way which undermines the public perception of the integrity vested in the holder of that office, a perception that would extend to the Court itself, as the Viscount is the

Court's Chief Executive Officer. However, the Viscount has assets vested in her which she is holding for the benefit of others and in that sense is a trustee. It therefore seems to us that in relation to this ethical issue, some assistance can be gleaned from the above cases."

7 Then, having expressed the view that the second offer received by the Viscount in the present case was one which, in the interests of justice, she should at least have investigated more closely, the Court continued at paragraph 35 in this way:–

> ***"We offer the suggestion that in order to avoid the Viscount being perceived as going back on her word, it may be prudent, in future and in appropriate cases, for it to be made clear to any prospective purchaser whose offer the Viscount is minded to accept, that until such time as the purchaser actually acquires the property, or becomes legally bound to do so, the Viscount may be under a duty to consider any better offers that may be made in the meantime."***

8 The Viscount sought and obtained leave to appeal from the Royal Court, the grounds for which were as follows:–

(i) It was an error of law to state that the Viscount is a trustee;

(ii) It was an error of law to apply cases decided on the basis of the strict duties of a trustee to a decision the Viscount has to take when managing assets vested in her by a *Saisie Judiciaire*;

(iii) It was an error of law to apply the trust cases at paragraph 26 of the judgment of the Viscount when she is selling property vested in her by a *Saisie Judiciaire*;

(iv) It was an error of law not to give the Viscount the wide discretion in exercising her functions that the Court gives her when managing property *en désastre*.

9 The Act of Court of 20th June 2016 amended the earlier Act of 20th May 2015 as varied by the Act of August 2015 and the now recognised nature of ownership of the Property. There is nothing in that Act against which the Viscount appeals. The judgment against which the Viscount now wishes to appeal was handed down on 1st August 2016 and leave to appeal given by the Commissioner on 18th August 2016.

Preliminary Issue

10 The first question which arises in the circumstances is whether this Court should receive the Viscount's appeal at all. Article 12 of the Court of Appeal (Jersey) Law 1961 (the "Law") provides in its material parts as follows:–

> ***"…***
>
> ***(2) Subject as otherwise provided in this Law or in any other enactment, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Royal Court (not being an order or decision of the Judicial Greffier) when exercising jurisdiction in any civil cause or matter*** .
>
> ***(3) For all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Royal Court, and shall have power, if it appears to the Court that a new trial or hearing ought to be had, to order that the verdict and judgment be set aside and that a new trial or hearing be had."***

11 The *lis* between the parties arising out of the application of the Second Respondent to vary the terms of the *Saisie Judiciaire* has come to an end because the variation has taken place by consent. None of the parties to the original application of the Second Respondent have appeared in this Court or made submissions. They no longer have any interest in doing so. The Viscount however is left with a judgment which she contends is wrong in principle and will have a material impact on the way in which she deals with assets pursuant to a *Saisie Judiciaire* or similar order. Accordingly, having received leave to appeal, she asks us to hear and determine it. In support of that position, she asserts that the Royal Court's judgment is the first time that it has been suggested that the Viscount's duties are akin to those of a conventional private law trustee, and the duties thus imposed are both new and onerous, if the Royal Court is correct in its judgment. The effect on the Viscount would be to require her to reconsider the resources she allocates to these cases and her exposure to liability and potential litigation. To give an idea of the extent of the issue as far as the Viscount is concerned, she has informed us that as of February 2017, the sums held by the Viscount under these types of orders are as follows:–

Proceeds of Crime and Drug Trafficking	£35,344,290.87
Civil Asset recovery	£255,113,944.37
Other enforcement	£757,544.98
Total	**£291,215,780.22**

12 Accordingly, the Viscount asserts that there is a public interest in ascertaining what the relevant law is.

13 The question as to whether this Court has the jurisdiction to hear an appeal of this kind

when no *lis* remains between the parties and, if it has jurisdiction, whether it should in its discretion hear it, has not previously been raised in this Court, although a similar point has arisen in the Judicial Committee of the Privy Council. In *AG v Holley* [2005] JLR 275 the Attorney General's appeal in respect of the proper direction to be given to the jury by the trial judge in a case where provocation was the issue was successful. This would normally have meant that the order of the Court of Appeal would be set aside and the defendant's conviction for murder re-instated. However, when seeking special leave to appeal the Attorney General, with encouragement from the Board, had widened his grounds of appeal. As a result, in the written case in support of the appeal, he submitted that the Court had followed the wrong course, both at trial and on appeal. The defendant took objection to that course, because in both the trial and the appeal the prosecution and the defence had been agreed as to what the relevant case-law was — accordingly the defendant submitted that it would be unfair to permit the Attorney General to resile from the agreed basis on which the trial and the appeal were conducted. In response, the Attorney General had undertaken not to seek to restore the defendant's conviction for murder and on that basis the appeal was adjourned to be heard by an enlarged board. Lord Nicholls at page 290 said this:–

> ***"40. The final twist in this history was that, the Attorney General having given this undertaking, the points in issue on the appeal became wholly academic, in the sense that, whether the appeal succeeded or failed, the outcome for the defendant would be the same. The order of the Court of Appeal would not be disturbed in either event. This led the defendant to submit that their Lordships' board should not permit the appeal to continue. Their Lordships rejected this submission. The Attorney General gave his undertaking as a means whereby his appeal could proceed without unfairness to the defendant. It would be strange if an undertaking given for this purpose were to have the self-defeating effect for which the defendant contended in the circumstances of this case."***

14 Accordingly the Judicial Committee heard and determined an appeal on a point of law which was academic in the sense that, regardless how it was decided, the defendant would be unaffected. We should observe however that in advising Her Majesty on the proper outcome of an appeal, the Judicial Committee of Her Privy Council does not operate under the same constraints of statutory construction as must apply to us.

15 In order to ensure that there was some argument on the matters which are put before us for decision, the Court appointed an *amicus*. We add that we are very grateful to Advocate Blakeley in this respect, for he has presented his submissions crisply and at very short notice indeed. In summary, he submitted that the Viscount was not seeking to appeal any judgment or order of the Royal Court. What was in effect a consent order which had amended the order of 11th August 2015 remained effective. Nothing in the present appeal would result in any change to that order. Having regard to the terms of Article 12 of the Law [supra] the Court should refuse jurisdiction. It was a creature of statute, and the jurisdiction is limited by Article 12.

16 In support of his submissions, Advocate Blakeley relied upon the case of *Barker v Barclays Bank PLC* [1989] JLR Note 5a, a decision of the Court of Appeal. The application before the Court on that occasion was for leave to appeal out of time against an order made in the Royal Court on 10th August 1984, by which it was declared that the movable property of Mr Barker was *'en désastre'*. In the draft notice of appeal, it was clear that the application was for an order the declaration of *désastre* on 10th August 1984 was a nullity on the grounds that it was alleged the Royal Court was not properly constituted at the time of making the order. The Court of Appeal dismissed the application for leave to appeal out of time on other grounds, but it considered the question of jurisdiction at the outset, concluding as follows:–

> ***"We should say at the outset that we are not satisfied that the Court of Appeal would have jurisdiction to make the declaration which is sought in the notice of appeal.*** The jurisdiction of this court is statutory. It is conferred by the Court of Appeal (Jersey) Law 1961, Article 12(2) of which is in these terms:–
>
> > ***'(i) There shall be invested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter*** .
> >
> > ***(ii) Subject as otherwise provided in this law and to rules of court the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Superior Number of the Royal Court when exercising original jurisdiction in any civil cause or matter.'***
>
> ***Whether or not the Superior Number of the Royal Court would, prior to the enactment of the 1961 Law, have had power to review the proceedings of the Inferior Number and make declarations in respect of those proceedings, we do not think that in doing so it could be properly described as exercising an appellate jurisdiction.*** It appears to us essential to the exercise of an appellate jurisdiction that there should be an order against which an appeal can lie."

17 The terms of Article 12 of the Law have been amended since that decision in 1989. Advocate Blakeley however relies on the case for the statement that it is essential to the exercise of an appellate jurisdiction that there should be an order against which an appeal can lie.

18 Reliance is also placed upon a line of cases starting with *Lake v Lake* [1955] All ER 538, a decision of the English Court of Appeal. In that case, the appellant's answer to an allegation of adultery had been one of denial, or in the alternative condonation. Her husband's petition had been dismissed, the court below finding that there had been adultery but that it had been condoned. She sought to appeal the finding of adultery, but the Court of Appeal declined to hear such an appeal. It held that a party's statutory right of appeal was regulated by Section 27 of the Judicature Act 1925, which stated that the

appellant may appeal from ***'the whole or any part of any judgment or order'***. Evershed MR, at page 342 said this:–

> ***"The next question that we must decide is whether, in the circumstances as I have stated them, there is, properly speaking, any subject matter upon which we could properly entertain an appeal.*** I have come to the conclusion that there is not. It is quite clear from the form of order or judgment which I have read that it records accurately the conclusions which, in the end of all, the Commissioner reached. … even if we came to the conclusion that the Commissioner formed the wrong view on the facts, we could not make any alteration in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. Let it be supposed that Mr Laughton-Scott were free to raise this matter in the court, and that the court came to the conclusion — as sometimes does happen — that the manner of the trial of this issue was not satisfactory — I am not, of course, suggesting we should in this case, because we have not gone into it — the right course for the court to take, presumably would then be to order a new trial. A new trial of what? That again as I think shows the impossibility of our acceding to Mr Laughton-Scott's request, for I cannot see how we could possibly order the issue of adultery as such to be re-tried, seeing that a retrial could not possibly lead, in the circumstances, to any effective result whatever."

19 Advocate Blakeley also put before us two more recent cases — *Secretary of State for Work and Pensions v Morina and another* [2007] EWCA Civ 749, and *Maslyukov v Diageo Distilling Limited and another* [2010] EWA Civ 443(ch). Both of these cases involved preliminary points being taken as to whether or not there was jurisdiction to hear the subsequent argument. In *Morina*, *Lake v Lake* was distinguished on the grounds that the wording of Section 15 of the Social Security Act, relevant in *Morina*, did not replicate that of Section 16 of the Supreme Court Act. The Social Security Act language concerned ***'any decision'*** rather than ***'any judgment or order'*** and it was found that *Lake v Lake* was inapplicable as a matter of construction. Interestingly, the Court of Appeal observed that the substantive issue in that case was of general importance, and it was therefore clearly appropriate to exercise the discretion to grant permission to appeal.

20 In *Maslyukov*, the Court also applied *Lake v Lake* in reaching the conclusion that there was no jurisdiction to entertain the appeal which Diageo was bringing against the order of the lower tribunal.

21 It is to be noted that in neither *Morina* nor *Maslyukov* was the *Salem* case, to which we now turn referred to.

22 In *R v Secretary of States for the Home Department ex parte Salem* [1999] 1 A.C. 450, a foreign national who claimed asylum was granted temporary admission and awarded Social Security benefits. Subsequently, without telling him, the Home Office recorded on an internal file that asylum had been refused and that his claim had been determined. He later

was told by the benefits agency that his Income Support had been stopped because he had been refused asylum. By the time the matter reached the House of Lords, an appeal to his special adjudicator had resulted in the applicant having been granted refugee status. As a result his claim to social security benefits had been met and there was no live issue as to his position. The question arose as to whether the appeal should continue. Lord Slynn of Hadley gave a judgment with which the remaining members of the Court agreed in which he said this at page 456G:–

> ***"My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.*** The decisions in [*Sunlife Assurance Co of Canada v Jervis* 1944 A.C. 111] ***and*** *Ainsbury v Millington (Note)* [1987] 1 WLR 379 ***and the reference to the latter (in Rule 42 of the Practice Directions applicable to civil appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to this case***.
>
> ***The discretion to hear disputes, even in the area of public law must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."***

23 The *Salem* judgment has been applied on a number of occasions in the Courts of England and Wales. In *Hutcheson v Popdog Limited (Newsgroup Newspapers Limited, third party)* [2012] 1 WLR 782, there appears a practice note and judgment of Lord Neuberger of Abbotsbury MR (as he then was). For reasons which are not material to the principles to be extracted from the judgment, the appeal in that case had become academic. Lord Neuberger said this:–

> ***"15. Both the cases and general principles seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the Court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the Court is satisfied that both sides of the argument will be fully and properly ventilated."***

24 In his concluding remarks, Lord Neuberger made it plain that there was a balancing of

factors involved in the exercise of discretion as to whether the appeal should be allowed to proceed — would the issues to be raised on the projected appeal be more than just significant but of outstanding public importance; would they be actually determined on the projected appeal; would there be any real damage to one of the parties if the appeal went ahead?

25 That analysis, relevant on the facts of that case, was essentially the same exercise which Pill LJ went through in *Pryce v Southwark London Borough Council* [2013] 1 WLR 996. At Paragraph 12 of his judgment, having referred to *Salem*, said this:–

> ***"Following submissions the Court decided to proceed to judgment.*** The issue was one involving housing authorities and relates to a question of public law of some importance. Having regard to the significance of the point involved and its likely application to many cases, there is a good reason in the public interest for a public hearing at which judgments available to housing authorities and applicants for housing benefit are given. I regard that as preferable to allowing the appeal on the basis of the submitted statement of reasons some of which are contentious as has emerged in the course of the hearing, but which would be likely to be cited in other cases .
>
> ***13. I bear in mind in this appeal nobody has appeared to oppose the joint submissions of the parties on the central issue on which they and the Secretary of State are at one."***

26 The dicta of Lord Neuberger in Hutcheson were applied in the cases this year of *Hamnett v Essex County Council* [2017] EWCA Civ 6 and *ZZ v Secretary of State for the Home Department* [2017] EWCA Civ 133.

27 The reluctance of the English Courts to engage in making declarations on matters of academic interest only has been matched in various decisions of the Royal Court, although in *Re Curatorship of X* (2002) JLR 259, Birt, Deputy Bailiff, was prepared to take a broader approach than might have been followed in the courts of England. At paragraph 18, he said:–

> ***"We think that the broad and flexible approach summarised above (referring to the Scottish approach) is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey.*** The principles of Scottish law described above offer a sensible and convenient approach to the question of when the Court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law … In our judgment the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or hypothetical right. The Court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief."

28 We are satisfied in this case that the Viscount wishes to raise matters of genuine public law importance for the administration of the *Saisie Judiciaire*. The quantum of money which she has under her control pursuant to such *Saisies* is very significant and, if there be any doubt under the statute as to the basis upon which she holds those moneys, it is very much in the public interest that this should be resolved. Where it is a matter of discretion, we consider this Court should consider the issue on the principles set out at paragraphs 22–26 above.

29 The more difficult question is whether there is in fact jurisdiction in this Court to hear such an appeal given the express terms of Article 12 of the Law.

30 Although this Court is a creature of statute, we think that the language of Article 12 ought to be so construed as to enable us to address issues of public law importance if the circumstances are otherwise right that we should do so. We cannot think that when the legislature was contemplating the enactment of the Law, it had the intention of being so prescriptive that the Court of Appeal which it was creating would not be able to hear a case where the Court itself was satisfied matters of genuine public importance had arisen even if there was no longer a *lis* between the parties to the appeal. First of all, in civil cases, the Court of Appeal was created as a replacement for the Superior Number of the Royal Court, thus enabling points of law to be considered by an intermediate court between the Royal Court on the one hand and the Judicial Committee of the Privy Council on the other. There was every reason for the interposition of a three member court between the Royal Court and the Judicial Committee. Secondly, given the size of the island, case law in Jersey is inevitably less extensive than it is in England and Wales because there are fewer courts delivering judgments. It therefore is less likely that important points of law will be ventilated quickly if there is some uncertainty around a previous decision.

31 Article 12 of the Law allows the Court of Appeal to hear "…any appeal, and the amendment … of any judgment or order made thereon…". We construe that language to be sufficient in principle to give us jurisdiction to deal with the present appeal. In our view, the word ***"judgment"*** is capable of being given a wide meaning and the restrictive approach taken in *Lake v Lake* is unnecessary in this smaller jurisdiction. This will enable this Court to deal with matters of genuine public importance, even when there is no longer any *lis* between the parties, albeit the discretion to receive such appeals will almost certainly not be exercised with a view to reopening any decisions of fact in the court below. Indeed we do not do so in this case, and we approach our consideration of the appeal on the assumption that the facts are as stated in paragraphs 4–8 of the judgment of the court below.

32 However, even if we are wrong in our approach to the construing widely of the word ***"judgment"*** in Article 12 of the Law, we think that on a proper analysis of the Royal Court's decision in the present case, the Court intended that the guidance which is to be found at paragraphs 25–35 of the judgment should stand as general directions to the Viscount to be applied in all cases including the instant case, and therefore form part of the Court's judgment or order in this case. As will be plain from what is said later, we respectfully do

not think that the Royal Court should have approached the matter in that way but we do accept for the purposes of considering this preliminary issue that that is what the Court intended, and therefore it is right to construe what it did as falling within the expression ***"judgment"*** for the purposes of Article 12 of the Law. For these reasons, we accept we have jurisdiction.

33 In reaching this conclusion we would like to emphasise these points. First of all, by distinction from the *Barker* case, the point which the Viscount seeks to raise on appeal here was dealt with before the Royal Court. In *Barker*, a point was sought to be raised in the Court of Appeal for the very first time. Secondly, we agree with the approach taken in *Salem* that the discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic should not be heard unless there is good reason in the public interest to hear them. Thirdly, the Court should be satisfied that both sides of the arguments will be fully and properly ventilated if it is to hear such an appeal and in this context we are grateful that Advocate Blakeley as *amicus* has been willing to ensure that such argument does take place.

The substantive appeal

34 The Court below considered case law concerning the duties of trustees when selling trust property and went on to conclude at paragraph 31 that the Viscount was holding assets for the benefit of others and in that sense is a trustee. In particular, reference was made to *Buttle and others v Saunders and another* [1950] 2 All ER 193, and *Cowan and others v Scargill and others* [1985] 1 Ch 270. In *Buttle*, it was said that the overriding duty upon trustees was to obtain the best price which they can for the beneficiaries. In *Cowan* it was said in relation to the trustees of an employees' pension scheme that it was the duty of trustees to exercise their powers in the best interests of the beneficiaries, and in the case of a power of investment, that power must be exercised so as to yield the best return for the beneficiaries. Sir Robert McGarry VC went on to say that:–

> ***"The paramount duty of the trustees is to provide the greatest financial benefits for the present and future beneficiaries."***

35 At page 288, having cited the case of *Buttle*, the Vice-Chancellor said:–

> ***"The duty of trustees to their beneficiaries may include a duty to 'gazump', however honourable the trustees."***

36 The summary submission on behalf of the Viscount was put in this way:–

> *"When a saisie judiciaire is made under the 1999 Law and property is vested in the Viscount she is not thereby made a trustee of that property.* She does have duties in relation to the property, which duties she exercises 'in accordance with the Court's directions'. However, these are not the same duties that the law

> imposes on trustees. To regard the Viscount as a trustee or to impose analogous duties on her when a saisie judiciaire is made would be unduly onerous. The Viscount is a public officer funded by the taxpayer, she is appointed in all criminal cases where assets must be 'frozen' and some saisies involve very large sums of money. It would also be inconsistent with the statutory scheme created by the 1999 Law."

37 Advocate Sharp contended that the scheme of the 1999 Law was designed to ensure that criminals would lose the benefit of the proceeds of their crimes, and the *Saisie Judiciaire* was an important first step on that road to prevent dissipation of the assets which might ultimately be confiscated. Thus it was that the Viscount has the realisable property vested in her. He gave the example of that property including £1 million credited to a bank account. He submitted the Viscount was not obliged to take investment advice or to get the best, or any yield. That was not part of her duty.

38 When pressed upon the provisions of Article 16(4) of the 1999 Law, set out below, he submitted that the word *"deal"* is not the same as the word *"manage"* but it includes *"sell"*. He pointed to Articles 23 and 25 of the Law as limiting the circumstances available for payment of damages or compensation which was another sign post to the Viscount's duties. The construction of the words *"deal with"* as including *"sell"* also followed from the fact that the property vested in the Viscount. As it vested in her, she could sell it or decide not to sell it, repair it, or decide not to repair it and she would not need the defendant's consent. Indeed, in similar fashion to the désastre cases, the Viscount should not be micro-managed by the Royal Court in this respect.

39 By contrast Advocate Blakeley submitted that the real question for this Court was whether the Viscount held the property which vested in her for the benefit of others. If the whole beneficial and legal interest vested in the Viscount, then it *followed that there was no question of being a trustee.* He submitted that the fact that the word "realise" was used in the post confiscation order cases of Article 17, and the words *"deal with"* appeared in the *Saisie Judiciaire* provisions of Article 16 indicated that the legislature must have contemplated a different range of powers for the Viscount according to whether she was acting pursuant to Article 16 or Article 17.

40 Put shortly, the submissions of Advocate Blakeley as amicus on the substance of the Viscount's appeal were these. The comments of the Royal Court, he submitted, should be confined to the particular facts of the case before it. The Court expressly drew attention to the two trust cases which both held that a trustee's personal opinions and ethical code should not cause them to refrain from taking advantage of an opportunity which would be financially beneficial to a trust. The duties of the trustee in effect trumped whatever social and political morality would otherwise trouble him. The Royal Court had expressly recognised that the Viscount should not act in a way which undermined the public perception of the integrity vested in the holder of that office. But Advocate Blakeley went on to contend that the Royal Court had not held that the Viscount became a trustee when property vested in her pursuant to a *Saisie*, and that that was made clear by the limiting

remark that “the Viscount has assets vested in her which she is holding for the benefit of others **and in that sense** is a trustee.” This, he said made it plain that the Court below did not in fact suggest that the Viscount was a trustee.

41 As an alternative it was contended that the Viscount did have trustee duties in respect of the property held pursuant to a *saisie*. She was holding that property for the benefit of others, and the beneficial interest therefore did belong to others. Bound as she was by the obligations under the law, her liability was limited. Furthermore, her actions in respect of property vested in her was subject to the directions of the Court but even so she remained a fiduciary and there was an analogy between the supervision of her by the Royal Court pursuant to the Law and the supervision by a protector of the trustee's performance of its duties pursuant to a trust deed.

Discussion

42 The role of the Viscount is many faceted. She is the executive officer of both the Royal Court and the States Assembly. At one time a Crown appointment, the Viscount's functions today extend across the whole spectrum of the administration of justice. She has judicial functions herself when acting as coroner or when conducting a *Vue du Vicomte* or when taking evidence on commission. She is responsible in many instances for the proper service of process; she has functions akin to a receiver where companies are declared *en désastre* by means of insolvency, and a trustee in bankruptcy in relation to individuals; she can be appointed as an administrator of the affairs of individuals under the Royal Court Rules; she is the enforcement officer of the Court in relation to judgments which have been delivered, which include provisional judgments such as the *Ordre Provisoire*. Many of these functions involve dealing with the assets of others. The particular rules which relate to the performance of those functions may have grown up as part of the customary law of this Island, but may also on occasions be found in the terms of particular statutes. The Bankruptcy (Désastre) (Jersey) Law 1990 is but one such example where the statute provides a detailed framework for the performance of the Viscount's functions, but as the recital to that legislation makes plain, it is a law “to amend and extend the law relating to the declaring of the property of a person to be en désastre” — in other words it builds upon the customary law of the *désastre* procedure which was judicially designed to obviate the problems arising out of creditors hurrying to obtain judgment against an insolvent debtor in order to gain a preference over each other and causing mayhem in the court process as a result. Save to the extent that the statutory regime introduces changes, the customary rules relating to declarations of *désastre* would continue to apply, and indeed one such rule is the inherent power of the Royal Court to give the Viscount directions.

43 In our judgment the relevant conclusion to draw from the wide nature of the Viscount's functions is that the nature of the duty imposed upon her in relation to each of those functions is likely to be affected by such particular statutory provisions as have been adopted for governing their exercise. It may well be that there are some common themes which can be applied across the different functions, but in the case of every function it is

necessary to look at the relevant statutory provisions which apply to her exercise of that function. It is not necessarily appropriate to conclude that because the Viscount has a particular duty in relation to the administration of the *désastre*, it follows that the same duty necessarily applies in relation to the administration of a *Saisie Judiciaire*.

44 Although we have been fortunate to have had the benefit of Advocate Blakeley's submissions as *amicus curiae*, the lack of a genuine contest between parties with an opposing interest in the outcome of an appeal leads us to the conclusion that we should frame our judgment narrowly upon the scope of the Viscount's duties in relation to the *Saisie Judiciaire* under the 1999 Law and accordingly we do not intend that our conclusions should be applied any more widely than is necessary.

45 At paragraph 24 of the Royal Court's judgment, the Court said this:–

> ***"This recognition of what property had actually vested in the Viscount made the directions sought by Mrs Arthur redundant and the Court did not therefore have to go on to determine whether the Viscount had been correct in considering it unreasonable and unethical to entertain the further higher offer; all offers had to be accepted by both the Viscount and Mrs Arthur."***

46 In our judgment, it was unfortunate that the Royal Court did not stop there. The Royal Court correctly identified that the Second Respondent's summons no longer needed to be dealt with because the basis upon which the previous orders had been obtained was now recognised to be false — the Property was jointly owned and not owned by the Third Defendant alone. In those circumstances, the Royal Court fell into error in discussing the nature of the Viscount's duties and obligations in a context which was wholly academic. The result was the absence of any real contest between the parties on the subject matter which then followed in the judgment delivered.

47 Given our view that the Royal Court fell into error in this respect, it is not for us to fall into the same error and seek to lay down any hard and fast rules or conclusions as to the relevant powers under the 1999 Law. However, given that the Royal Court has expressed the views it has, we think that it is necessary to say something about the suggestion that the Viscount's duties under the 1999 Law should be measured against the duties of a trustee. Our conclusion is that they should not and we now set out our reasons for that conclusion.

48 The first point to make is that if the Viscount's duties were intended to be those of a private trustee, it would naturally follow that the Trusts (Jersey) Law 1984 would be expected to have some purchase. However, it clearly does not. At Article 59(1), the following saving provision is to be found:–

> ***"(1) Nothing in this Law shall –***
>
> ***(a) abridge or affect the powers, responsibilities or duties under any***

provision of law of the Viscount …"

49 It would take some very clear language in a subsequent statute to impose upon the Viscount any duties found in the 1984 Law.

50 Secondly, the structure of the 1999 Law does not point to the *Saisie Judiciaire* provisions creating a trustee obligation on the Viscount. The general purpose of the law is as set out in its recital:–

> ***"A law to provide for the confiscation and forfeiture of the proceeds of crime, to establish new offences of money laundering and new procedures to forestall, prevent and detect money laundering, and to enable the enforcement in Jersey of overseas confiscation orders, and for connected purposes."***

51 The amendment of the recital in 2008 did not substantially change the terms as originally drafted, merely adding that the new procedures were also to forestall and detect money laundering as well as prevent it. We also note that when the 1999 Law as first adopted, drug trafficking and terrorism offences were excluded from its ambit as there were provisions in other legislation which covered that territory. The exclusions were removed in 2014.

52 In other words, the intention of the legislation is to ensure, by introducing money laundering offences, provisions in relation to regulation making powers concerning financial services business and provision for confiscation orders that crime does not pay. As part of the regime to make sure that confiscation orders made by the Court could be effectively enforced, provision was made for the seizure of assets at a stage before confiscation. That might obviously be necessary in some cases because the confiscation order is made towards the end of the criminal process — after conviction and usually before sentence — and the defendant would have too great an opportunity so to re-arrange his affairs as to defeat enforcement of the order. Thus it is that Article 15 of the 1999 Law provides that the power to order a *saisie judiciaire* arises where:

> (i) The Court has made a confiscation order; or
>
> (ii) Proceedings have been instituted in Jersey against the defendant in respect of an offence carrying on conviction a potential exposure to a term of one or more years imprisonment, or the Court is satisfied that proceedings will be instituted in Jersey against the defendant for such an offence; and
>
> (iii) Where a confiscation order has not already been made, the Court is satisfied that there is reasonable cause to believe that the defendant has benefitted from the offence.

53 We have summarised those provisions for the purposes of simplicity. There are more complex provisions where the jurisdiction to make a *saisie judiciaire* also arises, but they have no impact on the reasoning which underpins this judgment.

54 Article 15 of the 1999 Law therefore provides for a process which enables the Court to make a restraining order in respect of the realisable property of a defendant or putative defendant with a view to ensuring that if the confiscation order comes to be made, there will be property against which it can be enforced.

55 We now set out Articles 16 and 17 of the 1999 Law in full.

> ***"16 Saisies judiciaires***
>
> ***(1) The Court may, subject to such conditions and exceptions as may be specified in it, make an order (in this Part referred to as a saisie judiciaire) on an application made by or on behalf of the Attorney General*** .
>
> ***(2) An application for a saisie judiciaire may be made ex parte to the Bailiff in chambers*** .
>
> ***(3) A saisie judiciaire shall provide for notice to be given to any person affected by the order*** .
>
> ***(4) Subject to paragraph (5), on the making of a saisie judiciaire –***
>
> > ***(a) all the realisable property held by the defendant in Jersey shall vest in the Viscount;***
> >
> > ***(b) any specified person may be prohibited from dealing with any realisable property held by that person whether the property is described in the order or not;***
> >
> > ***(c) any specified person may be prohibited from dealing with any realisable property transferred to the person after the making of the order*** ,
>
> ***and the Viscount shall have the duty to take possession of and, in accordance with the Court's directions, to manage or otherwise deal with any such realisable property; and any specified person having possession of any realisable property may be required to give possession of it to the Viscount*** .
>
> ***(5) Any property vesting in the Viscount pursuant to paragraph (4)(a) shall so vest subject to all hypothecs and security interests with which such property was burdened prior to the***

vesting .

(6) A saisie judiciaire –

(a) may be discharged or varied in relation to any property;

(b) in a case falling within paragraph (1A) of Article 15 –

(i) may be discharged, on the application of the alleged offender and before the commencement of any proceedings against the alleged offender, where the Court is satisfied that there has been undue delay in commencing proceedings in pursuance of the criminal investigation;

(ii) shall be discharged, where the Attorney General informs the Court that proceedings will not be commenced in pursuance of the criminal investigation;

and

(c) shall be discharged on satisfaction of the confiscation order .

(7) An application for the discharge or variation of a saisie judiciaire may be made to the Bailiff in chambers by any person affected by it and the Bailiff may rule upon the application or may, at the Bailiff's discretion, refer it to the Court for adjudication .

(8) Where it appears to the Court that any order made by it under this Article may affect immovable property situate in Jersey, it shall order the registration of the order in the Public Registry .

(9) For the purposes of this Article, dealing with property held by any person includes (without prejudice to the generality of the expression) –

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from Jersey .

(10) Where the Court has made a saisie judiciaire a police officer may, for the purpose of preventing the removal of any realisable property from Jersey, seize the property .

(11) Property seized under paragraph (10) shall be dealt with in accordance with the Court's directions .

17 Realisation of property

(1) Where –

(a) in proceedings that have been instituted for an offence, a confiscation order is made or an order is varied under Article 14 or 19;

(b) the order is not subject to appeal;

(c) the proceedings relating to the order have not been concluded; and

(d) the Court has made a saisie judiciaire ,

the Court may empower the Viscount to realise, in such manner as it may direct, any realisable property that has vested in the Viscount or come into the Viscount's possession pursuant to Article 16 .

(2) The Court shall not in respect of any property exercise its power under paragraph (1) unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the Court."

56 Article 20 provides as follows:–

"(1) The following sums in the hands of the Viscount, that is to say –

(a) money that has vested in the Viscount or come into the Viscount's possession pursuant to Article 16; and

(b) the proceeds of the realisation of any property under Article 17,

shall, after such payments (if any) as the Court may direct have been made out of those sums and then after payment of the Viscount's fees and expenses, be applied on the defendant's behalf towards the satisfaction of the confiscation order .

…

(3) If, after payment of the Viscount's fees and expenses and of the amount payable under the confiscation order, any sums remain in the hands of the Viscount, the Viscount shall distribute those sums –

(a) among such of those persons who held the property that has

been realised under this Part; and

(b) in such proportions ,

as the Court may direct after giving them a reasonable opportunity to make representations to the Court."

57 The primacy of the statutory regime under the law over bankruptcy process is apparent at Article 22:–

"(1) Where a person who holds realisable property becomes bankrupt –

(a) no property for the time being subject to a saisie judiciaire made before the order adjudging the person bankrupt; and

(b) no proceeds of property realised by virtue of Article 16(4) or 17 for the time being in the hands of the Viscount ,

shall form part of the person's estate for the relevant bankruptcy proceedings."

58 Finally it is relevant to set out the limitation of liability of the Viscount which is provided for by Article 23 in these terms:–

"Limitation of liability of Viscount

Where the Viscount –

(a) takes any action in relation to property that is not realisable property, being action that the Viscount would be entitled to take if it were such property; and

(b) believes and has reasonable grounds for believing that the Viscount is entitled to take that action in relation to that property ,

the Viscount shall not be liable to any person in respect of any loss or damage resulting from the Viscount's action, except in so far as the loss or damage is caused by the Viscount's negligence."

59 Finally, Article 25 of the 1999 Law contains provisions for the payment of compensation where the defendant is not convicted:–

"(1) If proceedings are instituted against a person for an offence or offences specified in Schedule 1, and either –

(a) the proceedings do not result in the person's conviction for any such offence; or

(b) where the person is convicted of one or more of those offences –

(i) the conviction or convictions concerned are quashed, or

(ii) the person is pardoned by Her Majesty in respect of the conviction or convictions concerned ,

the Court may, on an application by a person who held property that was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order .

(2) The Court shall not order compensation to be paid in any case unless it is satisfied –

(a) that there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence or offences concerned; and

(b) that the applicant has suffered loss in consequence of anything done in relation to the property by or in pursuance of a saisie judiciaire .

(3) The Court shall not order compensation to be paid in any case where it appears to the Court that the proceedings would have been instituted or continued even if the serious default had not occurred .

(4) The amount of compensation to be paid under this Article shall be such as the Court thinks just in all the circumstances of the case .

(5) Compensation payable under this Article shall be payable out of the annual income of the States."

60 In *Re P (Restraint Order: Sale of Assets)* [2000] 1 WLR 473 the Court of Appeal of England and Wales was considering whether to authorise the Receiver of assets frozen under the Drug Trafficking Act 1994 to sell those assets despite the defendant's objections. In approaching that question, Simon Brown LJ, having earlier described the ultimate purpose of that legislation was to strip drug dealers of their assets to the extent of their criminal gains said this at page 481F:–

"It is at this stage that I would return to what I have already suggested is the central policy underlying this legislation — Parliament's desire to strip criminals of their present assets to the extent of their past criminal profits. The Act is designed essentially to impoverish defendants, not to enrich the

Crown. That this is so, indeed, is arguably evident even from the language of Section 31(2) itself. In a case like the present (and no doubt the great majority of cases) where the assumed proceeds of crime far exceed the defendant's realisable assets, the amount of the confiscation order will be dictated by the latter not the former. The sub-section speaks only of 'satisfying the confiscation order' not of producing assets equivalent to past criminal gains. Even assuming, therefore, that a defendant holds depreciating assets, I see no great compulsion to require their sale even before any confiscation order comes to be made. After all, returning to the Mareva analogy, there is in the present context no plaintiff whose expectations will be defeated if the defendant's worth has in the meantime depreciated. Nor, indeed, absent a tracing claim, would the Mareva jurisdiction allow the appointment of a receiver and the realisation of assets prior to trial .

Why, then, does the criminal legislation provide for the appointment of a receiver at the interlocutory stage? In part, no doubt, this is because, with the defendant in custody, the practicalities demand some coherent control over his affairs. But more particularly, I suspect that the receiver's appointment is to guard against attempts by determined defendants, less concerned than most at the thought of the sanctions attending breach of restraint orders, to salt away their assets beyond the reach of any eventual confiscation order .

In short, I see as the primary task of an interim receiver the safeguarding of the defendant's assets from dissipation and secretion rather than their realisation so as to maximise the amount of any future confiscation order."

61 Although *In the matter of the Representation of O'Brien* [2003] JLR 1 the Royal Court was unpersuaded that the analogy with a Mareva injunction is necessarily appropriate, the Court there approached the *saisie* granted under the Drug Trafficking Offences (Jersey) Law 1988 in this way:–

"15 The primary purpose of the legislation as expressed in the long title is to make provision for the recovery of the proceeds of drug trafficking. Until the Drug Trafficking Offences Law was passed, no statutory provision had been made for the confiscation of the proceeds of crime. A defendant would be punished for his crime whether by imprisonment or otherwise but would then be free, having served his sentence, to enjoy his ill-gotten gains. It was that injustice that the Drug Trafficking Offences Law was designed to remedy, at least in relation to the proceeds of drug trafficking .

16. For my part, I am not persuaded that in this jurisdiction, the analogy with a Mareva injunction is necessarily apt. A Mareva is granted in civil proceedings, essentially to preserve the status quo pending adjudication of a dispute between two or more parties. A saisie judiciaire is granted because the Court has been persuaded by the Attorney General that there is reasonable cause to believe that a defendant had benefitted from drug trafficking. The order is made against the background of alleged serious

criminality, which does not necessarily exist in relation to a Mareva. The saisie judiciaire is a provisional order but, unlike the restraint order made under equivalent English legislation, vests the realisable property of the defendant in the Viscount. Some might think that this is a draconian process. It is certainly a strong thing to divest a defendant of all his property in the jurisdiction on an ex parte application in private."

62 We agree that Part 2 of the 1999 Law provides a structure for the confiscation of the defendant's proceeds of crime, and the safeguarding of those proceeds pending their confiscation. We do not think that it is a proper construction of Part 2 of the 1999 Law to treat the Viscount as a form of trustee. The obligations and duties of the Viscount, whatever they are, fall to be construed in accordance with the structure of the statutory regime. To the extent that the statutory regime leaves gaps or is uncertain, the Viscount can and no doubt will protect herself either by proceeding with the consent of all those involved or by seeking the directions of the Court. Classically that might take place in connection with any possible sale or realisation of the property of the defendant in Jersey which has vested in the Viscount pursuant to the *Saisie Judiciaire* prior to the making of a confiscation order, where the issue which will face the Court is whether the power to *"deal with"* the property in question includes a power to sell.

63 It is not desirable to express any firm view of the matter on an appeal of this kind where there is no party with an interest in opposing any views expressed, and so we leave the matter open for further consideration at a later date. However, it is certainly arguable that even on the assumption that Article 16(4) should be construed favourably to the defendant as a penal statute, the article allows for the sale of realisable property but only in the course of managing a business or otherwise in exceptional circumstances. Those exceptional circumstances might well include a case where, even in the absence of a confiscation order and even before trial, the defendant and anyone else holding an interest in the property agree to and are positively encouraging the sale.

64 We note that this construction is consistent with the views which have been expressed in England. The Proceeds of Crime Act 2002, at Section 51(10) includes "the power to manage or otherwise deal with the property" which is expressly extended to include "selling the property or any part of it or interest in it, even where there is the express power to 'realise the property' by Section 51(2)(c)." However in *Re P (Restraint Order: Sale of assets)* [supra], which preceded that Act, the Court of Appeal was faced with interpreting and applying Section 26 of the Drug Trafficking Act 1994. Simon Brown LJ said at page 483F:

"As it seems to me, however, it is one thing to say that a receiver and manager has power to deal with property in the course of carrying on a business, another to say that he or she is thereby empowered without more to realise the business in its entirety. Selling ice creams, as Mr Newman submitted in argument, is not the same as selling the ice cream van itself. The first involves the sale of assets in the ordinary course of the business,

the other the disposal of the essential assets without which the business cannot be carried on. So far as possible I would be inclined to interpret an order in the general terms made by Latham J. here as one authorising the former rather than the latter. That approach, moreover, appears to me the more consistent ***with paragraph 10(e) of the order: why else confer an express power of sale for the purpose of paying the receiver's costs?***

No less importantly I believe that this narrower construction of the order is necessary for it to have been justified in the first place. Consider the legislation as a whole. There is strikingly absent from section 26 (the interim stage) any provision comparable to section 29(5) — the court's discretion after a confiscation order has been made to "empower any such receiver to realise any realisable property in such manner as the court may direct." That discretion itself, be it noted, is qualified by the requirement under section 29(8) that any person interested in the property (such as the defendant's wife here with regard to Just Flora) should have had an opportunity to make representations. Read in that light, the court's interim power under section 26(7)(a)(ii) — the power to direct a receiver, appointed to take possession of realisable property, "to manage or otherwise deal with" that property — ought to be restrictively construed. I have the gravest doubts whether the court could properly confer on a receiver appointed under section 26(7) a broad discretion without any further direction whatever to sell all the defendant's property, least of all upon an application made ex parte .

I do not go so far as to say that the court cannot at one and the same time (a) make a restraint order, (b) appoint a receiver and (c) confer on the receiver certain management powers to preserve the business and assets — though one notes that it is only a restraint order that is expressly permitted to be made ex parte (section 26(4)) and that the power to appoint a receiver only arises once a restraint order has been made (section 26(7)). But to justify the making of such composite orders on an ex parte basis there must in my judgment be an urgency about the matter (or a need not to alert the defendant) such as to preclude putting the defendant on notice, and the order initially made should be in the narrowest terms necessary to meet the strict requirements of the situation… .

Whilst the defendant remains unconvicted, his assets should not be sold against his wishes except for compelling reason."

65 It does not appear to us that the legislature could possibly have contemplated that Part 2 of the 1999 Law should create a status for the Viscount akin to that of a trustee. The exclusion of liability on the Viscount's part contained at Article 23 makes it plain that even if the property should turn out not to be realisable property the Viscount is not liable in respect of loss or damage except such as is caused by her negligence. It follows that in terms of the management of the property restrained by the order of the *Saisie Judiciaire*, the Viscount is at risk only to the extent that she acts negligently, and does not carry a potential liability as a trustee.

66 In our judgment, similar reasoning carries through to the potential liability of the Viscount in relation to the realisation of property. Leaving open the possibility, without deciding it, that a sale of assets might take place under Article 16(4) on a contested application by the Viscount when the Court is the ultimate guardian of the parties' rights, any realisation is likely only to come about following a confiscation order. The underlying premise is that the defendant has been convicted and the Court has resolved that he has benefitted from his crime and that that benefit should be removed from him. The provisions of Article 20 which direct the Viscount to pay off the confiscation order as a first charge against the realised property after payment of her fees and expenses militate against any conclusion that the Viscount owes a duty of care to the defendant in relation to the realisation process. Indeed, Article 20(3) makes it plain that the Court will scrutinise carefully the identity of the persons who might be entitled to share in any surplus which might exist. In any event, the realisation of property under Article 17 is subject to the Court giving directions as to the manner in which such realisation should take place.

67 None of the foregoing should be taken to indicate that the Viscount is entitled to act in any cavalier fashion in the management or realisation of property subject to a *saisie judiciaire* nor indeed do we suggest that it is likely that she would act in such a way. The exclusion of liability except in negligence in effect generally establishes that the Viscount does owe a duty of care to those who might be adversely affected by her actions. That duty is to act fairly and reasonably having regard to the overall purposes for which the 1999 Law was passed, and in particular the relevant provisions in relation to the confiscation of assets. Once the confiscation order has been made, the primary duty of the Viscount under Article 17 is to ensure that the assets are realised in such a manner as enables that confiscation order to be paid. It is not her duty to conduct the realisation in such a way as maximises the value of the assets realised. We do not take the view that the Viscount might be obliged in some circumstances to gazump. Indeed it would be odd to reach the conclusion that the duty of fairness on the part of the Viscount operated so as to require her to ignore the ethical consideration of completing a transaction which she had agreed to complete on the terms which had been settled and instead give primacy to a contingent obligation owed to a convicted criminal whose assets were being removed from him so as to ensure that he did not benefit from his crimes. If the criminal ended up suffering a greater loss then that would just be the way the cards fell and he would only be in that position in the first place as a result of his offending.

68 As we indicated in relation to our finding on the preliminary issue, no order falls to be made in relation to the Act of the Royal Court below because there is no longer any *lis* between the parties. However, for the reasons given, we consider that the Royal Court was in error in treating the Viscount as a trustee when managing and dealing with property pursuant to Article 16 and 17 of the Law and applying private law trust cases to a construction of the duties imposed upon the Viscount under this legislation.