First Trust Management Ltd AG (as trustee of the Gamma, Lambda and Delta One Trusts) v The Attorney General

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Nicolle, Ronge
Judgment Date:	23 March 2018
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Text

[2018] JRC 064

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Nicolle and Ronge.

IN THE MATTER OF THE SAISE JUDICIAIRE OF THE REALISABLE PROPERTY OF ARNOLD MAURICE BENGIS

Between
First Trust Management Limited AG (as trustee of the Gamma, Lambda and Delta One Trusts)
Applicant
and

The Attorney General
Respondent

Advocate H. Sharp **for the Applicant**.

A. J. Belhome **Esq; Crown Advocate for the Respondent**.

Authorities

Title 16, United States Code, Section 3372(a)(2)(A).

Biema Holdings and Ors -v- SG Hambros [2017] JRC 122 .

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

Proceeds of Crime (Jersey) Law 1999.

Norris v Government of The United States of America [2008] 1AC 920 .

Re Collins (No 3) (1905) 10 CCC 80 .

Bhojwani v Attorney General [2010] JLR 78 .

Proceeds of Crime (Jersey) Law 1999.

R (Al-Fawwaz) v Brixton Prison Governor [2002] 1 AC 556 .

R v Governor of Pentonville Prison, Ex p Osman [1990] 1 WLR 27 .

Attorney General v Rosenlund [2015] (2) JLR 29 .

Saccoccia v Austria [2010] 50 EHRR 11 .

R v Bow Street Metropolitan Stipenduary Magistrate Ex p Pinochet (No 3) [2000] 1 AC 147 .

AG v Hall [1995] JLR 102 .

Corruption (Jersey) Law 2006.

Sea Fisheries (Jersey) Law 1994.

Crime (Transnational Organised Crime) (Jersey) Law 2008.

Police Procedures and Criminal Evidence (Jersey) Law 2003.

Customs and Excise (Jersey) Law 1999.

Re Tantular [2014] JR 243 .

Prest v Prest [2013] 2 AC 415

Durant International Corporation v Federal Republic of Brazil [2013] (1) JLR 273 .

R v Richards [2008] EWCA Crim 1841 .

AG v Rosenlund [2016] 1 JLR 37 .

Re Tantular [2014] (2) JLR 25 .

Saisie Judiciaire — application of the realisable property of Arnold Maurice Bengis.

THE COMMISSIONER:

1 This is an application to lift the *saisie judiciaire ("saisie")* issued *ex parte* on 27 th July, 2017, in respect of the realisable property of Arnold Maurice Bengis ("Mr Bengis"). The *saisie* was granted on the application of the Attorney General following a request for assistance dated 21 st July, 2017, from the US Department of Justice. The application raises a number of interesting points.

2 We propose to begin by setting out the background to events in South Africa, the United States and Jersey before turning to consider the issues raised by the application.

Events in South Africa

3 Hout Bay Fishing Industries (Pty) Limited ("Hout Bay") was a South African company which had a substantial fishing business in South Africa. It was formed in 1962. According to the South African plea agreement (referred to later), it was purchased by Mr Bengis in 1975 and he became a director and chairman. Hout Bay was a substantial business and at times it employed more than 400 employees.

4 There are two species of rock lobster (we shall for the sake of simplicity hereafter refer simply to lobster) in South Africa. South Coast lobster is typically harvested by large sea-going vessels in deep ocean waters, often in areas a considerable distance from the South African coast. West Coast lobster is typically harvested by smaller vessels close to the shore of South Africa. Historically the fishing industry was not strictly regulated but during 1986 a quota system was introduced to regulate South Coast lobster and quotas were also introduced for other species. The quota for South Coast lobster for Hout Bay was substantially reduced following 1994 such that, according to the South African plea agreement referred to later, by 1999 the quotas were trimmed to such an extent that Hout Bay could no longer financially support its infrastructure and expenses.

5 During the period 1999 to 2001, Hout Bay over-harvested South Coast lobster by fishing for more than its quota. The company had never fished for West Coast lobster and therefore

did not have a quota, but during the same period it assisted those who did hold such quotas to over-harvest West Coast lobster and these lobsters were supplied to and in due course sold by Hout Bay. It follows that, in relation to South Coast lobster, some lobster were caught legally but everything caught in excess of quota was caught illegally. In relation to West Coast lobster, all of the lobster processed or exported by Hout Bay was illegally caught.

6 In 2002 Hout Bay was prosecuted in South Africa for breaching various conservation laws by overfishing. It entered a plea agreement on 29 th April, 2002, whereby it admitted for the period 1999 to 2001 to over-harvesting fish products and to facilitating the relevant quota holders from over-harvesting West Coast lobster. As part of the plea, Hout Bay admitted landing fish products whilst no fishery control officers were present and/or without recording the true amount of fish product landed as it was obliged to do. The same indictment charged the operational director of Hout Bay with multiple offences of bribing fishery control officers so that they turned a blind eye to Hout Bay's landing of fish product in excess of its permitted amounts and were party to the under recording by Hout Bay of the amount of fish product so landed.

7 According to the plea agreement, Hout Bay was fined and confiscation orders of 19 million rand were made to reflect the benefit derived from the commission of the offences. According to the skeleton argument filed on behalf of the representor, the confiscation orders made amounted to the equivalent of US$5.5m. The judgment of the Southern District Court of New York (“the New York Court”) referred to below suggests that confiscation orders equivalent to approximately US$7m were made. When this judgment was circulated in draft, Advocate Sharp suggested that the correct equivalent figure was US$6m. It is not possible for the Court at this stage to ascertain the correct figure but it seems to us that nothing turns on it. The exact amount does not affect the issues which we have to consider. What is clear is that Hout Bay lost its licences and its fishing vessels were confiscated with the consequence that it shut down its business.

Events in the United States

8 In August 2003 an indictment was laid in the the New York Court against five individuals including Mr Bengis and his son David Bengis (“David Bengis”). The indictment contained 21 counts. Count 1 alleged a conspiracy to breach Title 16, United States Code, Section 3372(a)(2)(A) (“the Lacey Act”) and to commit smuggling and counts 2–21 alleged specific breaches of the Lacey Act.

9 The Lacey Act makes it an offence in the US to import, receive, transport or sell in interstate or foreign commerce any fish or wildlife that has been taken, possessed, transported or sold in violation of any foreign law.

10 The offence of smuggling is defined in Title 18, United States Code, Section 545 as:–

> ***"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law … shall be … imprisoned not more than 20 years …."*** .

11 Essentially, the indictment alleged that South Coast lobster, West Coast lobster and Patagonian toothfish caught by Hout Bay in excess of quota had been transported to the US and then sold in that country by Mr Bengis and the other defendants through two companies called Icebrand, namely Icebrand Seafoods Inc., a New York company and Icebrands Seafoods Maine Inc., a company incorporated in the State of Maine. For the purposes of this judgment, we do not need to distinguish between them and will refer simply to "Icebrand". Mr Bengis was said to exercise control over the affairs of Icebrand.

12 The indictment asserted at paragraph 34 onwards that a forfeiture order equal to $11.5m should be made as representing the proceeds obtained as a result of the conspiracy under Count 1.

13 On 1 st March, 2004, Mr Bengis entered into a plea agreement with the prosecutor, namely the District Attorney for the Southern District of New York. He pleaded guilty to Count 1, namely the conspiracy to violate the Lacey Act and to commit smuggling and also to Counts 8, 19 and 21, which were specific charges of violating the Lacey Act. Count 8 related to the importation in July 2000 of South Coast and West Coast lobster, Count 19 related to importation of South Coast lobster, West Coast lobster and Patagonian toothfish in April 2001 and Count 21 was in similar terms in relation to an importation in June 2001. The allegation in Count 1 covered the period 1987–2001 but Counts 2–21 all referred to alleged importations in either 2000 or 2001, which was broadly consistent with the South African plea agreement which referred to over-harvesting during the period 1999–2001.

14 The plea agreement recorded that the defendant agreed, in full satisfaction of the forfeiture allegation in respect of Count 1, to forfeit a sum of money equal to or greater than $5m, the exact amount to be determined by the court if the parties could not agree it. In fact the parties did eventually agree and on 28 th May, 2004, the New York Court imposed a forfeiture order on Mr Bengis of US$5.9m. That sum was paid by way of a distribution for Mr Bengis' benefit out of the Rosebud Settlement referred to below. Mr Bengis was also sentenced to a term of 46 months imprisonment, which he served. The plea agreement was stated to be without prejudice to any restitution order that the court should make.

15 We should add at this stage by way of explanation that a forfeiture order in the United States is the equivalent of a confiscation order in this jurisdiction — i.e. it is intended to remove from the offender the benefit which he has obtained by reason of his offending; conversely a restitution order in the United States is the equivalent of a compensation order

in this jurisdiction — i.e. it is intended to compensate the victim of the offending for the loss which he has thereby sustained.

16 On 12 th September, 2007, Judge Kaplan in the New York Court ruled that there was no jurisdiction to order restitution in favour of South Africa on the basis that South Africa was not a “victim” of Mr Bengis' offences. However, on 4 th January, 2011, this decision was overturned on appeal, the Court of Appeals holding that South Africa had a property interest in the illegally harvested lobster and was therefore a victim under the relevant legislation. It remitted the matter back to the New York Court to calculate the amount of any restitution order.

17 At the time of the original restitution hearing in 2007, the New York Court had been presented with a report prepared by Ocean and Land Resource Assessment Consultants (“OLRAC”), a group of experts commissioned by the South African Department of Marine and Coastal Management. The OLRAC report set out some different methods for calculating restitution. Method 1 focussed on the cost of remediation, i.e. what it would cost South Africa to restore the lobster fishery to the level it would have been had Hout Bay not engaged in over-harvesting. Method 2 focussed on the market value of the over-harvested fish and was calculated by multiplying the quantity of over-harvested fish by the prevailing market price in South Africa. OLRAC estimated restitution using method 2 to be $61,932,630. This was however for all the South Coast and West Coast lobster over-harvested in South Africa. The Court of Appeals, when determining that a restitution order could be made, indicated that method 2 was the appropriate method of calculating the loss to South Africa.

18 On 14 th June, 2013, i.e. some 9 years after the original sentencing in 2004, Judge Kaplan made a restitution order in favour of South Africa in the sum of US$22,446,720. We have been provided with his judgment which explains the reasons for his decision. He proceeded in accordance with method 2 of the OLRAC report but noted that the figure, using this method, reached in the OLRAC report was by reference to all the over-harvested South Coast and West Coast lobster. Judge Kaplan held that only that lobster which had been exported to the US could be the subject of restitution in the US proceedings and furthermore that, although the indictment in the New York Court had alleged that ‘almost all’ of the over-harvested South Coast Lobster had also been imported into the US, no evidence had been identified to support that allegation. In relation to West Coast lobster, Judge Kaplan accepted the evidence of an investigating officer who said that he had interviewed two senior employees of Hout Bay who had stated that all of the over-harvested West Coast lobster had been shipped to the US. Neither of them had however mentioned anything about South Coast lobster.

19 Judge Kaplan therefore proceeded on the basis that all the over-harvested West Coast lobster referred to in the OLRAC report had been exported to the US. Using method 2, the loss to South Africa was therefore the amount of West Coast lobster which had been over-fished multiplied by the price referred to in the OLRAC report. As to South Coast lobster, the

judge held that there was no evidence that any of it had been exported to the US and therefore he declined to make any restitution order in respect of South Coast lobster. OLRAC had calculated the loss from the over-harvesting of West Coast lobster at $29,495,800, which Judge Kaplan accepted. He reduced this by the amount of restitution which had already been paid to South Africa by Hout Bay pursuant to the South African plea agreement. The resulting award was therefore $22,446,720. Subject to a point concerning the amount of the liability of David Bengis to make restitution, the restitution order was upheld by the Court of Appeals on 16 th April, 2015.

20 Mr Bengis did not pay in accordance with the restitution order. It appears that, under US law, where a defendant is in default in respect of a restitution order, he may be resentenced. On 6 th March, 2017, on the application of the District Attorney, Judge Kaplan held that Mr Bengis was in default in paying the restitution order and ordered that he be resentenced.

21 As part of that resentencing, a further hearing took place on 12 th July, 2017. It appears from the transcript of that hearing that South Africa, through its attorney, was pressing for the judge to impose a new forfeiture order which would be in the same (if not a greater) amount as the restitution order. It was made clear that it would be possible for the US government to pass any sum forfeited across to South Africa.

22 Counsel for the District Attorney made it clear that he was taking a neutral stance. The plea agreement had provided for a particular forfeiture amount. Although he accepted that the court had a discretion to order additional forfeiture, the prosecution was not seeking such a finding from the court because of the plea agreement.

23 At a further hearing on 19 th, July, 2017, the New York Court carried out the re-sentencing referred to above. It increased the sentence of imprisonment on Mr Bengis to one of 57 months (which he has not served as he does not live in the US) and also made an additional forfeiture order of $37,200,838.36. This figure was based on the overcatch of West Coast lobster as calculated by OLRAC for the 1999–2000 season multiplied by the average price of $20 per lb for West Coast lobster sold in the US in the course of 2000–2001. For the purposes of forfeiture, the court took the US price for West Coast lobster rather than the South African price which had been used when calculating the restitution order. This amount came to $26,312,000. The Court then increased this amount to reflect the time value of money by adding simple interest at 2.5%, making the total previously referred to of $37,200,838.36.

24 It is in relation to this forfeiture order (“the Forfeiture Order”) that the *saisie* was granted by the Commissioner on 28 th July, 2017.

Events in Jersey

25 The *saisie* was granted in respect of the realisable property of Mr Bengis and specifically included monies held by three companies with SG Hambros Bank (Channel Islands) Limited ("SG Hambros") in Jersey. The three companies were Pearl Investments Trading Limited ("Pearl"), Evolution Partners Limited ("Evolution") and Biema Holdings Limited ("Biema") (together "the Companies"). Pearl and Evolution are incorporated in the British Virgin Islands and Biema in Cyprus. Nominal amounts are held in the accounts of Evolution and Biema, but the sum of approximately US$23.3m is held in the account of Pearl.

26 There have been previous proceedings in relation to the amounts held at SG Hambros which gave rise to a judgment by the Royal Court (Commissioner Clyde-Smith) on 1st August, 2017, *Biema Holdings and Ors -v- SG Hambros* [2017] JRC 122 ("the Biema Judgment"). We take some of what follows from that judgment.

27 The Rosebud Settlement was established on 11th March, 1997. It was a discretionary settlement. The Representor ("First Trust"), a Liechtenstein company, was trustee of the Rosebud Settlement from 2001–2009 when it was replaced as trustee by InWealth Trustees SARL Limited ("InWealth"). The beneficiaries included Mr Bengis, his wife and his three children. It owned Pearl and Biema. It also owned Nashglobe Business SA ("Nashglobe"), which in turn owned Evolution.

28 In 2010, there was a restructuring of assets under the Rosebud Settlement. An Isle of Man company called Jaz Holdings Limited ("Jaz") was incorporated. It in turn incorporated a company in Belize called Balagan Limited ("Balagan"). On 26th May, 2010, Balagan acquired, inter alia, the shares in Pearl and Biema. Jaz appears to have directly owned Nashglobe which in turn owned Evolution.

29 On 13th January, 2012, David Bengis settled a nominal $100 on three discretionary trusts in similar terms governed by the law of Nevis, namely the Gamma Trust, the Lambda Trust and the Delta One Trust (together "the Nevis Trusts"). The trustee of each Nevis Trust was another InWealth associated company, namely InWealth Trustees Nevis Limited ("In Wealth Nevis"). On 22nd February, 2012, each Nevis Trust acquired from Jaz one third of Balagan which, as just stated, held beneath it Pearl and Biema. The Delta One Trust also acquired Evolution from Nashglobe. Thus all three Companies, having previously lain under the Rosebud Settlement, are now ultimately owned by the Nevis Trusts.

30 Mr Bengis was named as protector of the Nevis Trusts. The protector has extremely wide powers as described at paragraphs 37 and 38 of the *Biema* judgment, including the power to appoint and remove trustees, to exclude and add beneficiaries, to change the proper law and forum of administration and to veto distributions and investments. As executed, the trust deeds specified various members of Mr Bengis' family as beneficiaries of each trust but, on the same day that the trust deeds were executed, Mr Bengis wrote a letter to InWealth Nevis asking that certain changes be made. Deeds to that effect were executed the same day. The result is that David Bengis and his son are the only beneficiaries of the Delta One

and Gamma Trusts, and one of Mr Bengis' daughters and her four children are the beneficiaries of the Lambda Trust.

31 No explanation has been provided as to why the Nevis Trusts were established in January 2012 or why the Companies were transferred from the Rosebud Settlement to the Nevis Trusts, but the *Biema* Judgment points out that, although the restitution order made by the New York Court was not imposed until 14 th June, 2013, the possibility of a restitution order would have been clear from the time of the decision of the Court of Appeals on 4 th January, 2011, which held that South Africa was a victim and entitled to restitution.

32 On 11 th March, 2013, the US Government moved to restrain Mr Bengis, David Bengis and another defendant in the US proceedings from transferring the assets held in the accounts of Pearl, Biema and Evolution with SG Hambros. On 22 nd March, 2013, three days before an interim order to that effect was imposed by the New York Court:–

(i) Mr Bengis retired as protector of the Nevis Trusts and the family's South African lawyer Mr De Sousa was appointed in his place; and

(ii) Mr Bengis wrote to InWealth asking for David Bengis to be removed as a beneficiary of the Delta One Trust and the Gamma Trust, which was effected by deeds the same day.

33 It follows that Mr De Sousa is now the protector of the Nevis Trusts. Although Mr Bengis is not currently (and has not been) a beneficiary of those Trusts, it would appear to be open to the trustees or to Mr De Sousa at some point in the future to appoint Mr Bengis as a beneficiary and to make distributions to him.

34 Finally, on 22 nd September, 2014, following an apparent breakdown in relations between the Bengis family and InWealth Nevis, Mr De Sousa as protector removed InWealth Nevis as trustee of the Nevis Trusts and appointed First Trust as trustee in its place.

35 On 10 th June, 2013, instructions were given to transfer the balance of the accounts of the Companies with SG Hambros to an account in Switzerland. After some delay, that instruction was complied with save to the extent of the balance of US$23.3m in the account of Pearl and the minor sums in the accounts of Evolution and Biema. The reason that the instruction was not fully complied with was that SG Hambros was concerned that, if it complied with the instruction in respect of these retained amounts, it might be at risk of being found in contempt of the restraint order referred to above and a deposit order made by the New York Court. The latter order was made by the New York Court on 17 th October, 2013, and was made in support of the restitution order. The relevant part of the order provided that:–

"1. Defendants and all persons in active concert or participation with any

of them, who get actual notice of this Order, through personal service or otherwise, forthwith shall transfer all funds that are the property of any defendant or in which any defendant has a legal, beneficial or other interest (up to the aggregate sum of $22,446,720) to the Clerk of Court.

2. Defendants and all persons in active concert or participation with any of them who get actual notice of this Order through personal service or otherwise, be and hereby are enjoined from encumbering or transferring to anyone other than the Clerk of Court any property of any defendant in which any defendant has a legal, beneficial, or other interest (up to the aggregate sum of US$22,446,720).”

36 The issue considered by the Court in the *Biema* Judgment was whether Mr Bengis (and the other defendants) had any legal, beneficial or other interest in the sums standing in the accounts of the Companies with SG Hambros. The Court held on well-established principles that, as the monies in the accounts belonged to the Companies which in turn were owned by discretionary trusts, Mr Bengis could not have any legal, beneficial or other interest in the accounts even if he were a beneficiary of the Nevis Trusts, which in fact he was not. It also held that the restraint order did not have extraterritorial effect and that accordingly, neither the restraint order nor the deposit order prevented SG Hambros from complying with the instructions to transfer the balances to Switzerland. However, by the time of the Court's judgment, the *saisie* had been granted.

37 In August 2016, the US authorities sent a letter of request to the Attorney General seeking a *saisie* to assist in enforcement of the restitution order. However, that request could not be progressed, no doubt because there is no statute in Jersey dealing with enforcement of foreign compensation orders (as opposed to foreign confiscation orders). It was, no doubt, following that discovery that the US authorities brought the question of re-sentencing before the New York Court with the consequence that, as described earlier, a new forfeiture order has now been made. A further letter of request from the US authorities dated 21 st July, 2017, was sent to the Attorney General. It sought assistance in enforcing the Forfeiture Order and it was pursuant to that letter of request that the Attorney General applied for and was granted the saisie on 28 th July, 2017.

The statutory provisions

38 The Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 (“the Enforcement Regulations”) modified the Proceeds of Crime (Jersey) Law 1999 (“the 1999 Law”) in its application to confiscation orders made outside Jersey. The 1999 Law as modified (“the Modified Law”) is set out in the schedule to the Enforcement Regulations. The relevant provisions are as follows.

39 Article 1(1) defines an ‘external confiscation order’ as:–

"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 property so obtained; or

(c) for the purpose of depriving a person of a pecuniary advantage so obtained."

40 'Criminal conduct' is defined as "conduct corresponding to an offence specified in Schedule 1". Schedule 1 is headed ***'Offences relevant to criminal conduct'*** and provides:–

"Any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years…." .

41 An external confiscation order can only have effect in relation to ***'realisable property'***. This is defined in Article 2(1) of the Modified Law in the following terms:–

"(1) In this Law, "realisable property" means:–

(a) in relation to an external confiscation order in respect of specified property, the property that is specified in the order;

(b) in any other case:–

(i) any property held by the defendant,

(ii) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law; and

(iii) any property to which the defendant is beneficially entitled."

42 Article 2(9) and (10) explains the expression 'gift caught by this Law' in the following terms:–

"(9) A gift (including a gift made before the commencement of the Enforcement Regulations) is caught by this Law if:–

a) it was made by the defendant at any time after the conduct to which the external confiscation order relates; and

(b) he Court considers it appropriate in all the circumstances to take the gift into account

(10) For the purposes of this Law:–

(a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a value that is significantly less than the value provided by the defendants…."

43 Article 39 deals with registration of external confiscation orders in the following terms:–

"(1) On the application of the Attorney General, the Court may register an external confiscation order if:–

(a) the Court is satisfied that at the time of registration the order is in force and is not subject to appeal;

(b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that the person received notice of the proceedings in sufficient time to enable the person to defend them; and

(c) it is of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice."

44 Articles 15 and 16 deal with *saisies* in the following terms:–

"15 Cases in which saisies judiciaires may be made

(1) The powers conferred on the Court by Article 16 are exercisable where:–

(a) proceedings have been instituted in a country or territory outside Jersey and have not been concluded, and:

(i) an external confiscation order has been made in the proceedings, or

(ii) it appears to the Court that there are reasonable grounds for believing that such an order would be made in the proceedings…."

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 on behalf of the government of a country or territory outside Jersey .

…

(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….”

The grant of the *saisie*

45 In his ex parte application for a *saisie* over the accounts of the Companies, the Attorney General relied upon two grounds for submitting that the accounts constituted realisable property. First, he submitted that there were reasonable grounds for believing that a further forfeiture order would be made by the New York Court specifying the monies in the accounts so as to fall within Article 2(1)(a) of the Modified Law as set out above. This was on the basis that there were reasonable grounds for believing that the monies in the accounts represented the proceeds of the conspiracy to which Mr Bengis had pleaded guilty.

46 The second basis relied upon by the Attorney General was that the monies in the accounts were property held by a person to whom Mr Bengis had directly or indirectly made a gift caught by the Modified Law, so as to fall within Article 2(1)(b)(ii) of the Modified Law.

47 As already described, on the basis of the information contained in the Attorney General's application, the Commissioner granted a saisie over the money in the accounts.

This application

48 First Trust, as trustee of the Nevis Trusts, now applies for the saisie to be lifted. On the face of it, we would have expected the application to be brought by Pearl, Evolution and Biema as the Companies whose assets have been restrained by the *saisie*. The money in the accounts does not belong to the Nevis Trusts. However, the Companies are owned by the Nevis Trusts and no point has been taken on the standing of First Trust to bring this application. Accordingly, we say no more about it.

49 At the hearing, Advocate Sharp based his application on four grounds:–

(i) The Forfeiture Order was in reality compensatory in nature and therefore did not fall within the definition of an external confiscation order for the purposes of the Modified Law.

(ii) Mr Bengis' conduct in the US was not criminal conduct for the purposes of the Modified Law as there was no corresponding offence under Jersey law.

(iii) There were no reasonable grounds for believing that a further forfeiture order, which specified the property in the accounts of the Companies, would be made by the New York Court.

(iv) The gift provisions of the Modified Law were not engaged on the facts.

We shall consider each of these in turn.

(i) Is the Forfeiture Order an external confiscation order?

50 In his skeleton argument, Advocate Sharp submitted that although the Forfeiture Order was referred to as such, it was in reality compensatory in nature and therefore should not be enforced in this jurisdiction as there was no power to register and enforce external compensation orders.

51 In support of this submission, he referred to the fact that the Forfeiture Order was only made when the restitution order made by the New York Court was not complied with; to the fact that it was the attorney for South Africa who made all the running at the hearings in July 2017 which led to the New York Court making the Forfeiture Order; and to the fact that it was clearly anticipated that the US Government would pay over any monies recovered pursuant to the Forfeiture Order to South Africa. The underlying purpose was therefore to ensure that South Africa recovered what it should have recovered under the restitution order.

52 When it came to making his oral submissions, whilst Advocate Sharp alluded to these various matters, he did not press the point that the Court should not treat the Forfeiture Order as an external confiscation order under the Modified Law. In our judgment he was right not to do so. We would summarise our reasons for so concluding as follows:–

(i) The order is on its face expressed to be a Forfeiture Order, not an order for restitution.

(ii) There is clearly power under Title 18 United States Code 3613A(a)(i) to re-sentence a defendant who has failed to pay restitution and such re-sentencing may include any sentence which might originally have been imposed. That is the exercise which the New York Court undertook on this occasion and it imposed the Forfeiture Order as part of that re-sentencing.

(iii) It is perfectly apparent that the New York Court was fully aware of the difference between forfeiture and restitution and was intending to make a forfeiture order. Thus at page 79 of the transcript of the hearing on 19 th July, 2017, Judge Kaplan said this:–

> ***"There is a distinction between the legal standard that governs forfeiture and the legal standard that governs restitution, and everybody should understand I have that firmly in mind.*** What I say

today on forfeiture does not necessarily determine what I will do on restitution, if anything. And any amounts may wind up being different .

Forfeiture is intended to obtain from the defendant ill-gotten gains. Restitution is intended to restore to a victim losses. I basically have not accepted for forfeiture purposes a lot of the argument South Africa has made for a variety of reasons. …" .

(iv) We accept that it appears from the transcript of the hearings in July 2017 that it is likely that, if the US recovers any monies under the Forfeiture Order, it will pay these across to South Africa. But that does not alter the nature of the order made. It is quite common for countries to agree that monies recovered under a forfeiture/confiscation order are then shared with the country where the offending took place. It does not alter the fact that this was an order made to recover (and calculated by reference to) the benefit obtained by Mr Bengis rather than the losses suffered by South Africa. In law, any amounts recovered under the Forfeiture Order will go to the United States Government and it is up to those authorities as to what they do with any monies so recovered.

(v) As stated above, an external confiscation order means an order made by a court in a country outside Jersey for the purpose of recovering property obtained as a result of or in connection with criminal conduct or for the purposes of depriving a person of a pecuniary advantage so obtained. The Forfeiture Order is on its face just such an order. Whilst in some cases it might be appropriate for this Court to look behind the order of an overseas court in order to ascertain its true nature, we do not consider that there are any grounds for doing so in the present case.

53 We should add that Advocate Sharp was critical of the Forfeiture Order in certain other respects. He referred to the question of delay and the fact that some 13 years after the original sentencing, an 80 year old man now faces an increased prison sentence and a vastly increased forfeiture order. He referred also to the fact that the judgment of the New York Court does not deal with the argument that it is wrong to go back on the plea agreement reached in 2004, which was the basis upon which Mr Bengis agreed to plead guilty. The indictment had only alleged (at paragraph 35) proceeds from Count 1 of $11.5m and the prosecution had accepted, following the plea agreement, that the appropriate amount which should be forfeited was $5.9m. He also submitted that the sum ordered by way of forfeiture was far too large because the weight of West Coast lobster sold in the US was taken from the OLRAC report which measured such lobster by the weight of the whole lobster, whereas it was in fact only the tails of West Coast lobsters which were sold in the US. On the basis that the weight of the tail was approximately one third of the weight of the whole lobster, this meant that the benefit obtained by Mr Bengis and his co-conspirators pursuant to the conspiracy in count 1 was only one third of that calculated by the New York Court. He suggested that this brought the sum much closer to the sums referred in the indictment and the plea agreement.

54 However, as Advocate Sharp accepted during the course of the hearing, these are matters

which should be raised in the forthcoming appeal by Mr Bengis to the New York Court of Appeals against the Forfeiture Order but are not for determination in this jurisdiction when considering whether to maintain a *saisie*.

55 For these reasons, we reject the first ground of attack on the Forfeiture Order.

56 Before turning to consider the remaining points raised by Advocate Sharp, we would make one general observation. This is not an application to register an external confiscation order. At that time the Court must determine definitely what constitutes a defendant's realisable property because, once registered, the external confiscation order takes effect against all such property. But at this stage, we are only concerned with the granting of a saisie pending the anticipated registration of an external confiscation order. A *saisie* is, rather like a Mareva injunction, a measure designed to preserve property pending the final outcome of the proceedings; in the context of a *saisie*, the final outcome is the registration (or refusal of the registration) of an external confiscation order. A *saisie* is designed simply to ensure that property which is likely to become subject to an external confiscation order does not disappear in the meantime.

57 It follows that, at the stage of considering a *saisie*, there may well be some doubt over what will ultimately be found to constitute realisable property. To take a simple example, there may be some doubt at that stage over whether particular property will be caught by the gift provisions established by the Modified Law. In such circumstances, the Court does not have to establish definitively whether property is realisable property when considering whether to grant a *saisie*. It must hold the balance between the interests of the overseas jurisdiction in recovering the proceeds of crime and the interests of persons holding property not to have such property frozen without good cause. The Court must therefore be satisfied that there are sufficient prospects of an external confiscation order ultimately being registered which will cover the property in question to justify granting a *saisie* so as to prevent disposal of the property in the meantime.

(ii) Is there criminal conduct?

58 As set out above, an external confiscation order must relate to property obtained as a result of or in connection with ‘criminal conduct’. By a combination of Article 1 and Schedule 1, ‘criminal conduct’ is conduct corresponding to any offence in Jersey for which a person is liable to imprisonment for one or more years. Advocate Sharp submits that the conduct which resulted in the Forfeiture Order in this case is not criminal conduct for the purposes of the Modified Law because it does not correspond to any Jersey offence falling within Schedule 1. The submission has a number of different strands.

59 First, it is necessary to consider what is notionally transposed to Jersey in order to see if it would amount to a Schedule 1 offence (i.e. an offence liable to a sentence of at least 1 year's imprisonment) if it occurred in Jersey.

60 In the field of extradition, it is clear that it is the conduct in the requesting state which is relevant rather than the elements of the overseas offence. Thus in *Norris v Government of The United States of America* [2008] 1 AC 920, the House of Lords said this at paragraph 65:–

> ***"Before turning, as will be necessary, to a brief history of English extradition law prior to the Extradition Act 2003, particularly with regard to the so-called double criminality rule, it is useful to stand back from the detail and recognise the essential choice that the legislature makes in deciding just what the double criminality principle requires.*** It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found."

61 The House of Lords concluded that the conduct test (rather than the offence test) was to be adopted. It went on to hold that what was to be transposed was the essence of the conduct in the requesting state, not the adventitious circumstances. Thus, in *Re Collins (No 3)* (1905) 10 CCC 80, the United States sought extradition on a charge of perjury alleged to have been committed in California before a Californian tribunal. When extradition was sought in Canada, it was suggested that it was not an offence in Canada to give a false deposition before a Californian tribunal. That argument was rejected. It was an offence in Canada to give false evidence on oath before an officer who was authorised to administer the oath and that was sufficient, i.e., the essence of the conduct in California was the giving of false evidence on oath before a tribunal. That was the conduct which had to be transposed to Canada rather than the fact that it happened to be before a Californian tribunal.

62 In *Bhojwani v Attorney General* [2010] JLR 78 the Court of Appeal held that the approach in *Norris* also applies in the context of the Proceeds of Crime (Jersey) Law 1999 when considering what is criminal conduct for the purpose of that Law. The Court should transpose the essence of the conduct in the foreign jurisdiction but not the adventitious circumstances associated with them. The Court of Appeal accepted that it might sometimes be difficult to decide what was essential and what was adventitious but that this was a task which had to be undertaken.

63 A further complication can arise where not all the conduct takes place in a single overseas jurisdiction, as is the case here. That was considered by the House of Lords in *R (Al-Fawwaz) v Brixton Prison Governor* [2002] 1 AC 556, again in the extradition context. At 585, having referred to the decision of *R v Governor of Pentonville Prison, Ex p Osman* [1990] 1 WLR 277, Lord Hutton said this:–

> ***"76…. Lloyd LJ referred to the difficulty in relation to transposition which he described as follows, at p 290:–***
>
> > ***"However, a difficulty arises when the act or omissions constituting the offence take place in two or more countries.*** Does one assume that all the acts or omissions constituting the offence took place within the United Kingdom? Or only those which in fact took place within the territorial limits of the requesting country?"
>
> ***He then stated that in the light of the authorities only the acts or omissions which took place in the requesting state are to be treated as having taken place in England.*** All else remains as it in fact happened….."

64 Lord Millett also referred to Lloyd LJ's statement and then went on to say at 109:–

> ***"For my own part, and subject to one point which I will mention in a moment, I think that this is the correct way to effect the transposition.*** The principle at work is mutatis mutandis. Given that the court is concerned with an extradition case, the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary."

Lord Millett's statement was approved by the House of Lords in *Norris*.

65 It follows that, for the purposes of the present case, one must transpose to Jersey all the conduct of Mr Bengis which took place in the United States but not what occurred in South Africa. That remains conduct which took place in South Africa.

66 Applying that test, Advocate Sharp submits that there is no criminal conduct in the present case. The essence of the conduct in the United States is the importation of lobster which had been caught illegally in a foreign state i.e. South Africa. There is no equivalent to the Lacey Act in Jersey. It is not an offence in Jersey to import fish which has been illegally harvested in a foreign jurisdiction. Furthermore, he submits that there is no other offence which would cover the conduct carried out in the United States.

67 A preliminary point arises as to the time at which there needs to be correspondence between the conduct in the overseas jurisdiction and an offence under Jersey law. That arises because a number of the Jersey offences relied upon by the Attorney General as corresponding to the conduct of Mr Bengis were created after 2001, which was the latest date of the conduct alleged in the U.S. indictment.

68 In *Attorney General v Rosenlund* [2015] (2) JLR 29, Commissioner Clyde-Smith held that, when determining whether overseas conduct constituted 'criminal conduct' for the purposes of the Modified Law, Jersey law was to be applied to the transposed overseas conduct as that law existed at the time of the Attorney General's application to the Royal Court to register the external confiscation order, not as it existed at the time the conduct occurred.

69 Advocate Sharp submits that *Rosenlund* was wrongly decided and should be departed from. I would summarise very briefly his arguments in support as follows:–

(i) The Court in *Rosenlund* accepted that the statutory language was ambiguous and therefore capable of more than one interpretation in respect of how to consider transposed conduct when enforcing an external confiscation order. However it was led into error by the submissions of the Attorney General, who advanced a purposive construction of the statutory provisions on the basis that the date of application interpretation was necessary in order to avoid artificiality in the law or anomalous results. Advocate Sharp submitted that there was nothing artificial or anomalous about a construction of the Modified Law that required the criminal conduct to correspond to a Jersey offence that existed at the time the overseas conduct occurred. Indeed, he said, many jurisdictions had adopted such an approach, see *Saccoccia v Austria* [2010] 50 EHRR 11 and Section 447 of the UK Proceeds of Crime Act 2002.

(ii) The rule of statutory interpretation that a person should not be penalised except under clear law was relevant and pointed in favour of the date of conduct interpretation.

(iii) The States could not have intended as a matter of policy, when it passed the Enforcement Regulations, that assets located in Jersey could be confiscated at the instance of another jurisdiction even if the relevant overseas conduct did not constitute a criminal offence known to Jersey law at the time the conduct incurred. This would create uncertainty. A person might place assets in Jersey when what he had done overseas was not a crime under Jersey law but then find, possibly many years later that as a result of a change in Jersey law, his assets in Jersey were now liable to confiscation pursuant to an external confiscation order. The States could not realistically be taken to have had such an intention.

(iv) In extradition cases, it had been authoritatively held in England in *R v Bow Street Metropolitan Stipenduary Magistrate Ex p Pinochet (No 3)* [2000] 1 AC 147 that, in the extradition context, the conduct had to be criminal under English law at the time of the overseas conduct.

(v) There is express wording in Article 1(1) of the 1999 Law to make it clear that it applies to property obtained from criminal conduct that occurred before the 1999 Law came into force. The absence of similar explicit wording in respect of the definition of criminal conduct in the Modified Law pointed in favour of his construction.

70 The approach in this jurisdiction is that one division of the Royal Court should normally follow a decision of another division on a point of law unless convinced that the earlier judgment is wrong — see *AG v Hall* [1995] JLR 102 at 107–108. Suffice it to say that we are by no means convinced that *Rosenlund* was wrongly decided.

71 In deference to Advocate Sharp's submissions we would comment very briefly on the points which he has made:–

(i) A close reading of the judgment of Commissioner Clyde-Smith does not suggest that he thought the alternative instruction led to artificiality or produced anomalous results. He was simply applying a purposive approach having regard to the purpose of the statutory provisions, which was something he was entitled to do.

(ii) and (iii) The intention of the States must be derived from the words which it used in the Enforcement Regulations but we see nothing unreasonable or unfair about the position which results from the interpretation in *Rosenlund*. The fact is that a person must have committed a crime under the law of the overseas state and has then placed proceeds derived from that crime in Jersey. He knows therefore that he is dealing with the proceeds of crime. It is not in our judgment unreasonable to hold that, even if such proceeds could not be enforced against in Jersey initially (because the overseas conduct did not constitute a crime under Jersey law), they may be confiscated later when Jersey law also recognises such conduct as a crime.

(iv) We do not see that the considerations in relation to extradition are necessarily equally applicable in the case of enforcement of external confiscation orders.

(v) The absence of explicit wording to the effect that an external confiscation order can be enforced even if the conduct was not an offence under Jersey law at the time of the conduct is not in our judgment decisive. The Court still has to interpret the words actually used in the Modified Law.

72 For these reasons, we are not convinced that *Rosenlund* was wrongly decided. We propose therefore to follow it and we think the appropriate course is for Advocate Sharp to pursue the matter before the Court of Appeal should he wish to maintain that it was wrongly decided.

73 We turn to consider the offences which the Attorney General relies upon. In this connection, Advocate Sharp submitted (correctly) on a number of occasions that there was no equivalent in Jersey law of the Lacey Act i.e. there is no specific offence of importing or selling fish illegally caught in an overseas jurisdiction. However, that is to apply the offence

test rather than the conduct test (as described in the passage cited from *Norris* at paragraph 59 above). Rather than look at the elements of the offence charged in the US, the Court must look at the conduct of Mr Bengis in the US and determine whether, if that conduct had been committed in Jersey, it would or would not amount to an offence under Jersey law.

74 One must therefore identify the conduct in question. As the House of Lords stated in *Norris*, if the conduct test is applied, that conduct must be identified from the relevant documents provided by the overseas jurisdiction. In the present case the Court has been shown the indictment and the plea agreement. The plea agreement says little other than to admit Mr Bengis's guilt in relation to Count 1 and Counts 8, 19 and 21, the latter being specific charges of violating the Lacey Act. As already mentioned, Count 1 was a conspiracy to violate the Lacey Act and to commit smuggling and covered the period 1987–2001. We therefore have to look at the indictment in order to identify the relevant conduct.

75 The indictment is a lengthy document in somewhat discursive form. Much of it is devoted to showing that the relevant fish (by which we mean both types of lobster and Patagonian toothfish) were illegally caught under South African law and that the conduct in South Africa included provision of false documents in connection with landings and exports and also bribery of fishery control officers. As already mentioned, for the purposes of transposition, we proceed on the basis that that conduct was carried out in South Africa.

76 As to conduct in the U.S., what is alleged can perhaps be summarised as follows:–

> (i) the five defendants (including Mr Bengis) conspired to import illegally caught fish into the United States. Such importation would amount to a breach of the Lacey Act and would also amount to smuggling because it would be importing and selling through Icebrand merchandise ‘contrary to law’ (presumably because it was contrary to the Lacey Act);
>
> (ii) they submitted false documentation to U.S. customs authorities concealing their efforts to import illegally caught fish into the U.S. (see paragraph 13 (vi) and paragraph 27 (i) and (j) of the indictment); and
>
> (iii) they processed illegally imported fish in the U.S. employing South African nationals who did not have proper authorisation to work in the U.S. (see paragraph 13 (vii) and 27 (l)).

77 Against that factual background, we therefore consider in turn the various Jersey offences which the Attorney General submits correspond to the above conduct.

(a) Article 30 of the 1999 Law

78 Article 30 (which came into force on 14 th August, 2014,) provides as follows:–

"A person who:–

(a) acquires criminal property;

(b) uses criminal property; or

(c) has possession or control of criminal property,

is guilty of an offence."

79 Under Article 30(4), the maximum penalty is fo14 years' imprisonment.

80 Article 29 provides that property is 'criminal property' if:–

(a) it constitutes proceeds of criminal conduct or represents such proceeds, whether in whole or in part and whether directly or indirectly; and

(b) the alleged offender knows or suspects that it constitutes or represents such proceeds.

81 Article 1 provides:–

"'Proceeds of criminal conduct', in relation to any person who has benefited from criminal conduct, means that benefit."

82 ***'Criminal conduct'*** is defined in Article 1 by reference to Schedule 1 (liable to imprisonment for one year or more) and includes conduct which, if it occurs outside Jersey, would have constituted a Schedule 1 offence if occurring in Jersey.

83 Mere fishing in excess of quota is not criminal conduct for the purposes of the 1999 Law because the maximum sentence under the relevant Jersey legislation is a fine. However, the conduct in South Africa (included in the U.S. indictment) includes bribery of fishery control officers and making false statements to fishery control officers and to South African customs. Articles 5–9 of the Corruption (Jersey) Law 2006 make it an offence to give, promise or offer any person any advantage as an inducement to or reward for any officer or employee of a public body doing or not doing anything in respect to any matter or transaction with which that public body is concerned. Such an offence attracts a sentence of ten years. Under Article 23 of the Sea Fisheries (Jersey) Law 1994, the making of a false statement when providing information under the Law attracts a sentence of up to 1 year's imprisonment.

84 For the purposes of the 1999 Law, the transposed facts would be that the defendants over-harvested fish product in South Africa, bribed fishery control officers in South Africa to turn a blind eye to such over-harvesting, made false declarations to South African fishery control officers, made false declarations to South African customs in connection with export to

Jersey, imported such over-harvested fish product into Jersey, (possibly) made false statements to Jersey customs and then sold such fish product in Jersey through a Jersey company.

85 The question then is whether such transposed conduct would give rise to an offence under Article 30 of the 1999 Law. Would the defendants, through the Jersey company, have acquired, used or had possession or control of criminal property in Jersey?

86 ' ***Property'*** is widely defined in the 1999 Law and there is no doubt that fish constitute property for these purposes. Furthermore, it is clear that, on the transposed facts, Mr Bengis would have acquired, or used or had in his possession or control such property in Jersey. The real question therefore is whether such fish would be criminal property as defined in Article 29 i.e. it constitutes proceeds of criminal conduct or represents such proceeds, whether in whole or in part and whether directly or indirectly.

87 As stated above, overfishing is not a Schedule 1 offence because the maximum penalty for such offending in Jersey would be a fine. It is not therefore criminal conduct for the purposes of the 1999 Law. Bribing a fishery control officer would amount to the offence of corruption contrary to Article 5 of the Corruption (Jersey) Law 2006 if committed in Jersey and would therefore be a Schedule 1 offence. Similarly, as Article 23 of the Sea Fisheries (Jersey) Law 1994 creates an offence of making a false statement in providing any information required under that Law or pursuant to Regulations made thereunder which attracts a prison sentence of up to one year, making false statements to fishery control officers would also amount to a Schedule 1 offence if committed in Jersey. Thus, both the bribing of the South African fishery control officers and the false declarations made in South Africa would amount to criminal conduct for the purposes of the 1999 Law.

88 Advocate Sharp argues that one must look at the essence of the conduct. The fish is derived from the over-harvesting and that is not criminal conduct for the reasons set out earlier. Crown Advocate Belhomme, on the other hand, submits that the fish also represents the proceeds, whether in whole or in part and whether directly or indirectly, of the offences of corruption (bribing of the South African fishery control officers), false statements in connection with fisheries matters (false statements to the South African fishery control officers), and fraud (false statements to the South African fishery control officers and customs).

89 We have not found this an easy point to resolve. We see the force of Advocate Sharp's point that the fish result essentially from the over-harvesting, not from any ancillary offending such as bribery or making false statements. If there had been no over-harvesting, there would have been no fish to import into Jersey. But, having regard to the terms of Article 1 (referred to at paragraph 81 above) the question is whether Mr Bengis benefitted from the bribery and false declaration offences in South Africa. In our judgment he did. They both formed an essential part of the overfishing. It is reasonable to infer that, had the fishery control officers not been bribed and had false declarations not been made, the fish could

not have been successfully landed and subsequently exported to (on this hypothesis) Jersey so as to come into the possession or control of Mr Bengis in Jersey. He has therefore benefited from the bribery and false declaration offences and that benefit is the over-harvested fish. The fact that that fish is also the proceeds of overfishing does not, in our judgment, mean that such fish is not the proceeds (benefit) from the bribery and false declaration offences. They were an integral part of the conduct in South Africa.

90 This approach is also consistent with Article 1(2)(a) of the Modified Law which is in the following terms:–

> ***"(2) For the purposes of this Law:–***
>
> > ***(a) references to property obtained, or to a pecuniary advantage derived, in connection with criminal conduct 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);…."***

It seems to us that the property obtained (i.e. the fish) was obtained both in connection with the bribery and false declaration offences and in connection with the over-harvesting.

91 Accordingly, on balance, we conclude that, on these transposed facts, the fish would amount to criminal property for the purposes of the 1999 Law because they constitute the proceeds from the criminal conduct of bribery and false declaration offences and accordingly Mr Bengis would, on such transposed facts, be guilty of the offence of dealing with criminal property contrary to Article 30 of the 1999 Law by using or being in possession or control of such property in Jersey.

92 It follows therefore that the conduct in this case is criminal conduct for the purposes of the Modified Law.

(b) Crime (Transnational Organised Crime) (Jersey) Law 2008 ("the 2008 Law").

93 The second corresponding offence upon which Advocate Belhomme relies is Article 2 of the 2008 Law. As its title suggests, like Article 30 of the 1999 Law, this legislation was enacted after the conduct in question but, in accordance with *Rosenlund*, can be considered for the purposes of deciding whether there is correspondence between the misconduct and the law of Jersey.

94 Article 2 of the 2008 Law provides, so far as relevant, as follows:–

> ***"2. Participating in criminal organisation***

(1) A person commits an offence if he or she:–

> ***(a) participates in a criminal organisation, knowing that it is a criminal organisation; and***
>
> ***(b) knows, or is reckless as to whether, his or her participation contributes, or may contribute, to the occurrence of a serious offence against the law of a State*** .

(2) A person who commits an offence against paragraph (1) shall be liable to imprisonment for a term of 5 years and to a fine .

(3) A person shall be taken to participate in a criminal organisation for the purposes of paragraph (1) if he or she is a member, an associate member, or a prospective member of the organisation .

(4) For the purposes of this Article, a criminal organisation is a group of 3 or more persons who have as their objective, or one of their objectives, obtaining, directly or indirectly, a material benefit from the committal of a serious offence against a law of a State by the organisation, or a member, an associate member, or a prospective member, of the organisation, that does not include a group that is randomly formed for the immediate commission of a single offence .

(5) For the purposes of this Article, a group of 3 or more persons may be a criminal organisation whether or not:–

> ***(a) some of them are subordinates or employees of other members of the group or other persons;***
>
> ***(b) only some of the people involved in the group at a particular time are involved in the planning, arrangement, or execution at that time, of any particular action, activity or transaction;***
>
> ***(c)…..***
>
> ***(d) the persons are present in Jersey;***
>
> ***(e) a serious offence against a law of a State was committed by the organisation…..***and whether a serious offence against a law of a State was, or was intended to be, committed within or outside Jersey by the organisation, or a member, an associate member, or a prospective member of the organisation;

(f) …..

(7) In this Article, 'serious offence against a law of a State' means:–

(a) … .

(b) an offence against the law of a State other than Jersey that, if it had been committed in Jersey, would be a serious offence within the meaning of Article 3 of the Police Procedures and Criminal Evidence (Jersey) Law 2003;

……

8. Territorial Application

(1) Proceedings for an offence against a provision of this Law… by a person may be brought although some or all of the acts alleged to constitute the offence occurred outside Jersey, if the person:–

(a) is ordinarily resident in Jersey;

(b) has been found in Jersey and has not been extradited;

(c) is a body corporate incorporated under a law of Jersey…..

(2) Proceedings for an offence against a provision of this Law….by a person may be brought although some or all of the acts alleged to constitute the offence occurred outside Jersey, if a person in relation to whom the offence is alleged to have been committed:–

(a) is ordinarily resident in Jersey; or

(b) has been found in Jersey."

95 As can be seen, unlike in the Modified Law and the 1999 Law itself, ***'serious offence'*** is not defined by reference to Schedule 1. It is defined by reference to Article 3 of the Police Procedures and Criminal Evidence (Jersey) Law 2003. That Article provides that an offence is serious if it has led to any of the consequences specified in paragraph (6) of the Article or is intended or is likely to lead to any of those consequences. Those consequences include 'substantial financial gain to any person'. Thus the definition of serious offence against a law of a State for the purposes of the 2008 Law does not require that the offence be liable to a prison sentence of at least one year; it is sufficient if it has led or is intended or is likely to lead to substantial financial gain.

96 Advocate Belhomme argues that, on the transposed facts, an offence under Article 2 would be committed. The defendants (who exceed three in number) were engaged in a scheme to over-harvest the fish in South Africa, bribe fishery officers and make false declarations in South Africa and then exporting the fish to Jersey where they would be processed and then sold. There would thus be a group of three or more persons who had as their objective, or one of their objectives, obtaining a material benefit from the committal of a serious offence against a law of a state by the organisation. That is because one of the objectives was to over-harvest fish in South Africa. This gained enormous profits (as described earlier) and therefore amounted to a ***'serious offence'***. It would be an offence under Jersey law because, on the transposed facts, the defendants would be in Jersey (rather than in the US).

97 Advocate Sharp, on the other hand, submitted that it was absurd to argue that a legitimate fishing business which happened to commit a crime as part of its business was a criminal organisation. The 2008 Law was intended to give effect to the UN Convention against Transnational Organised Crime ("the Palermo Convention") and that was mainly concerned with human trafficking etc. Furthermore, he submitted, there were no proceeds of mere membership of a criminal organisation.

98 We see the argument that, at first sight, an enterprise which has a legitimate business but also engages in overfishing does not fit the typical idea of a criminal organisation. However, the Palermo Convention is not concerned only with matters such as people trafficking. On the contrary, Article 5 deals with the topic of criminalising participation in an organised criminal group, which is defined as meaning a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes. ***'Serious crime'*** is defined in the Palermo Convention as being an offence punishable by at least four years' imprisonment. The States has chosen in the 2008 Law to adopt a much lower threshold when defining a serious offence.

99 In any event, regardless of what is in the Palermo Convention, the law which we must apply is that set out in the 2008 Law. We agree with Advocate Belhomme that, on the transposed facts of this case, an offence under Article 2 of the 2008 Law would be committed. On the transposed basis, three or more people (including the defendant) would have engaged in a scheme whereby they (through Hout Bay) over-harvested fish in South Africa and then (with the assistance of bribery and false declarations in South Africa) exported that over-harvested fish to Jersey where it would be sold through the Jersey equivalent of Icebrand. In our judgment, that would amount to a group of three or more persons having as their objective, or one of their objectives, the committal of a serious offence against the law of South Africa by members of the organisation. The transposed facts would fall within the territorial application set out in Article 8(1) of the 2008 Law.

100 As to Advocate Sharp's point concerning there being no proceeds, this is, in our view, to misapply the test. The proceeds are those of the actual criminal conduct as carried out in the US and South Africa. The sole purpose of transposition is to establish whether, if what

was done in the US was done in Jersey, there would be an offence under Jersey law. If that test is satisfied, then there is criminal conduct and one reverts to consider the question of proceeds of the criminal conduct that was actually carried out.

101 For these reasons, we hold that the conduct in the present case would correspond to an offence under Article 2 of the 2008 Law and therefore amounts to criminal conduct for the purposes of the Modified Law.

(c) Other offences

102 In the light of our decision in relation to the 1999 Law and the 2008 Law, we do not think it necessary to address the various other offences which, on the basis of the transposed facts, Advocate Belhomme submits would also be committed e.g. an offence under the Corruption (Jersey) Law 2006 (by reference to the bribery of South African fishery control officers) and fraud (by reference to the false statements made to US customs). If we are correct in our decision in relation to the 1999 Law and the 2008 Law, the additional offences are unnecessary. If we are wrong, then we think that the Attorney General may well be in similar difficulties in relation to these additional offences.

103 However, for the sake of completeness, we shall comment very briefly on some of the other suggested corresponding offences:–

(i) It is suggested that the offence of 'smuggling' referred to in the US indictment (importing merchandise contrary to law) corresponds with Article 61 of the Customs and Excise (Jersey) Law 1999 ("the Customs Law") concerning the fraudulent evasion of a prohibition with respect to goods. However, this is to mistake the offence for the conduct. The conduct alleged in the US is the importation of fish caught illegally overseas. That is 'contrary to law' in the US because such importation is prohibited by the Lacey Act. However, as already stated, it would not be contrary to any prohibition in Jersey and accordingly we do not think that there is any corresponding offence under Article 61.

(ii) The conduct alleged in the United States includes making false statements to the US customs. Article 59 of the Customs Law makes it an offence punishable with 2 years' imprisonment to knowingly or recklessly make an untrue declaration on an assigned matter. We have not been given any information as to what constitutes an 'assigned matter'. Whilst on the face of it, one would expect a corresponding offence to exist in this case, we are not clear that we have been given sufficient information to reach a final conclusion. Paragraph 27(j) of the US indictment refers simply to causing *'fraudulent documentation pertaining to the seafood shipments to be sent to and from New York'*. It is not clear in what respect the documentation was fraudulent. Similarly paragraph 27(i) of the indictment refers to the presentation to the US authorities of DCD forms (this is presumably some form of standard document required for customs purposes) that did not correspond to the particular shipment of Patagonian tooth fish being imported. Whilst it may be the case that the execution of

these documents would, if carried out in Jersey, constitute an offence of common law fraud or of an offence under Article 59 of the Customs Law, we think we would require further information as to the nature of the alleged lack of correspondence with the true position concerning the particular shipment in order to reach a definitive conclusion.

(iii) The combination of Articles 5 and 8 of the Corruption (Jersey) Law 2006 provide that it is an offence for a national of the UK resident in Jersey or a Jersey company to pay a bribe to an employee of a public body outside the jurisdiction of Jersey. It is therefore argued that, on the basis that the transposition exercise involves the assumption that the relevant bribery in South Africa was carried out by British citizens resident in Jersey and that the Icebrand companies were Jersey companies, offences under Article 5 (coupled with Article 8) would be committed. This seems correct but would raise the same issue concerning the identification of the proceeds of such offending as is discussed at paragraphs 89 and 90 above.

104 If we had found that the transposed conduct did not amount to a corresponding offence under Jersey law and that there was therefore no criminal conduct for the purposes of the Modified Law that would have been the end of the matter and the *saisie* would have had to be discharged. However, given our decision that the conduct in this case would, if transposed, amount to a corresponding offence and therefore amounts to criminal conduct for the purposes of the Modified Law, we turn to consider the third and fourth points raised by Advocate Sharp.

(iii) Are there reasonable prospects of a specified property external confiscation order being made

105 In the 1999 Law itself, a confiscation order may not take effect so as to exceed the amount of the defendant's realisable property. ‘Realisable property’ is defined as:–

(a) any property held by the defendant;

(b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by the Law; and

(c) any property to which the defendant is beneficially entitled.

106 In respect of an external confiscation order, the Modified Law extends the definition of realisable property so as to include, in addition to the three categories mentioned in the preceding paragraph, any property that is specified in the external confiscation order (see Article 2(1)(a) of the Modified Law as set out at paragraph 41 above).

107 As the Court said at paragraphs 44–47 of *Re Tantular* [2014] JR 243, this has the potential for injustice. If A is the criminal but an external confiscation order is made in respect of property held by X, the property of X, if specified, is nevertheless realisable property within Article (1)(a) and could therefore be seized if such an external confiscation

order is registered. If the property in question is not held by A, A is not beneficially entitled to it and A has not made a gift to X which is caught by the Modified Law, it would clearly be strongly arguable that to confiscate any such property of X would be contrary to the interests of justice and such an external confiscation order should not therefore be registered pursuant to Article 39(1)(c) of the Modified Law, which provides in effect that the Court may decline to register an external confiscation order if enforcing the order in Jersey would be contrary to the interests of justice.

108 However, in some circumstances it may well be in the interests of justice to enforce such an order. One example might be if the property in the hands of X could be shown to be the proceeds of the crime committed by A, even if it did not fall within the three usual limbs of the definition of realisable property.

109 What is said in this case is that there are reasonable prospects of the New York Court making a further forfeiture order which specifically identifies the monies in the accounts of the Companies on the basis that they represent the traceable proceeds of the offences committed by Mr Bengis in the US; and that accordingly the Court has power to grant a *saisie* pursuant to Article 15(1)(a)(ii) of the Modified Law.

110 In its letter of request of 25 th July, 2017, the Department of Justice stated that the prosecution intended to apply to the New York Court for a further forfeiture order specifying the accounts of the Companies with SG Hambros on the basis that the monies in those accounts were the proceeds of Mr Bengis' offences in the US.

111 That intention was elaborated in an affidavit dated 11 th October, 2017, sworn by Kiersten Fletcher of the District Attorney's office. She confirmed that, following the issuing of the Forfeiture Order, the US Government had commenced an investigation into the movement of the proceeds of Mr Bengis' offences through various legal entities in an effort to show that the funds were comingled with the funds in the accounts of the Companies. The Government was going to endeavour to trace the proceeds of the crimes to those accounts, although this would be a very time-intensive task as it would require the Government to sift through substantial quantities of financial records that were many years old and identify whether any additional records were needed. The records being investigated included records previously received from Switzerland in connection with a tax investigation. She said that the Government had begun this task and was hopeful that it would be successful but did not anticipate completing its review and preparing its analysis for some time, particularly if additional information were needed from Switzerland or elsewhere. She said that once the analysis was complete, the Government hoped to be in a position to present Judge Kaplan with an application to amend the Forfeiture Order so as to forfeit the specific assets held in the accounts at SG Hambros.

112 Advocate Sharp submitted that there were no reasonable prospects of the New York Court making a specified property order. We would summarise his submissions as follows:–

(i) The affidavit of Miss Fletcher suggested merely that she was *'hopeful'* that a specified property forfeiture order would be made in due course. This was insufficient to amount to 'reasonable grounds' for believing such an order would be made as required by Article 15(1)(a)(ii). The US Government had had many years to investigate the matter (including obtaining records from Switzerland) yet they could do no better than say that they were 'hopeful'.

(ii) Ms Fletcher's affidavit referred to the US Government's wishing to show that funds from Mr Bengis' offences in the US were *'commingled'* with the funds in the accounts of the companies. This suggested that even the US Government did not expect to show that all the monies in the accounts were the proceeds of offending.

(iii) This was consistent with the fact that, even if could be shown that monies came from Icebrand, that company carried on a substantial legitimate business as well as an illegitimate one. Thus it was clear that Hout Bay had a quota for South Coast lobster and that therefore much of its catch of South Coast lobster was legitimate. To the extent that any such lobster was exported to the US, that was perfectly legitimate business on the part of Icebrand. Where there was both legitimate and illegitimate business, it would be impossible to trace the proceeds of the illegitimate business, as the one could not easily be distinguished from the other in terms of proceeds.

(iv) There was simply no evidence at present that the monies in the accounts had come from Mr Bengis or Icebrand. There was evidence that the original $8m paid in December 2002 had come from Nashglobe and it also appeared that some monies had come from a European business of Mr Bengis in respect of which no criminal allegations had been made.

113 We accept that the evidence is incomplete at present. As Commissioner Clyde-Smith said at paragraph 46 of the *Biema* Judgment, there has been a wholesale lack of accounting information in relation to the Companies and the trusts which own them. Nevertheless, substantially for the reasons put forward by Advocate Belhomme, we are of the opinion that there are reasonable prospects of a specified property forfeiture order in relation to the accounts of the Companies being obtained on the basis that the proceeds of Mr Bengis' offending in the US can be traced through to the accounts of the Companies. We would summarise our reasons for so concluding as follows:–

(i) SG Hambros' first involvement with the Bengis family was in February 2002, when it was introduced to Mr Bengis and David Bengis by Mr Kevin Gold, a partner in Mishcon de Reya. Its file note of 19 th February, 2002, records that it was Mr Bengis who *'has the asset worth'*and went on to say that Mr Bengis was looking for someone who would look after the family connections, including himself and his son. The note went on to say "deep down, I believe [Mr Bengis] will find it very difficult to pass total control of his investments to a third party….."

(ii) Accounts were opened for Pearl and another company called Armine Investments Limited ("Armine"). A letter of introduction from Mishcon de Reya of 13 th March, 2002,

in relation to these two accounts confirmed that the beneficial owner had been known to them for fifteen years. It is clear that the beneficial owner being referred to was Mr Bengis and indeed an internal memo of SG Hambros dated 13 th March, 2002, refers specifically to Mr Bengis as being the beneficial owner of Pearl. That memo refers to the expected initial transfer of $8m to the account.

(iii) On 23 rd April, 2002, Mishcon de Reya wrote in connection with the source of funds for the accounts and exhibited a letter from the trustee of the Rosebud Settlement referring to the sum of US$ 8m and stating:–

> "We confirm that these funds were accumulated by investments and income from the ownership of Icebrand Seafood Inc. which imports and distributes fish products."

(iv) A KYC profile of SG Hambros states in relation to Pearl ' *Account introduced by Kevin Gold, Managing Partner of Mishcon de Reya (A1 status). Kevin is also a very close friend and looks after Arnie personally.* Arnie Bengis, the beneficial owner, is South African and acquired his wealth via the export of fish (lobster) initially from South Africa and thereafter in/from America and Portugal. Each operation trades under different names, in American = Icebrand and in Europe/Africa = Hou[t] Bay Fishing'.

(v) The original $8m paid into Pearl's account in December 2002 appears to have come from a client account of Mishcon de Reya. That firm acted for Mr Bengis at the time but it is said that it also acted for First Trust as trustee of the Rosebud Settlement. According to the affidavit sworn by Mr Ackerman of First Trust, the sum was paid to Mishcon de Reya by Nashglobe from Switzerland and was held by Mishcon de Reya in a client account for First Trust as trustee of the Rosebud Settlement, not in a client account for Mr Bengis personally. However, there is no documentary evidence to support this.

(vi) Subsequently additional funding was paid into the Pearl accounts as a result of directions given by Mr Bengis and David Bengis.

(vii) Mr Bengis was authorised to make investment decisions on behalf of Pearl. He was also on 20 th August, 2002, given authority to draw funds from the Pearl account up to $1m from time to time, although it does not appear that he has actually done so save for one occasion in August 2003.

(viii) In short, although the records are not complete, the internal records and KYC documentation held by SG Hambros would indicate that Mr Bengis was the source of funds and that these came from Icebrand, albeit that the documentation only relates specifically to the original $8m. Despite the litigation which gave rise to the *Biema* Judgment and the further fact that a *saisie* has now been granted, no evidence has been produced on the part of the Companies or the Nevis Trusts to show that the monies in the accounts came from elsewhere and are not the proceeds of any criminal offending (and this in circumstances where First Trust was trustee of the Rosebud Settlement from 2001 to 2009 and therefore might be expected to have

records for that period and where it is now trustee of the Nevis Trusts). As set out at paragraph 44 of the judgment of the Supreme Court in *Prest v Prest* [2013] 2 AC 415 and at paragraphs 42–44 of the judgment of the Court of Appeal in *Durant International Corporation v Federal Republic of Brazil* [2013] (1) JLR 273, it is open to a court to draw inferences where there is a prima facie case raised but where a party fails to produce any evidence to rebut such *prima facie* case where one might have expected that.

(ix) Advocate Sharp suggested that Icebrand had a substantial legitimate business and accordingly it would not be possible to distinguish the proceeds of offending from the proceeds of legitimate business by Icebrand. It is true that some of the South Coast lobster was caught lawfully as falling within the quota allocated to Hout Bay, and it is also true that the US indictment alleges the importation of South Coast lobster. However, at the hearing when the restitution order was made in 2013, the New York Court held specifically that, despite the terms of the indictment, no evidence had been identified to support the allegation that any South Coast lobster had been imported to the US. Accordingly, the New York Court made the restitution order based solely on the importation of West Coast lobster, where it was acknowledged that all West Coast lobster had been caught illegally. Similarly, in relation to the Forfeiture Order, the New York Court proceeded solely on the basis of West Coast lobster having been imported. If it is correct that Icebrand imported only West Coast lobster (and not South Coast lobster), it follows that there was no legitimate business in this connection. Accordingly, on the present state of the evidence before us, we do not think that this point avails Advocate Sharp.

(x) As to Advocate Sharp's point concerning the fact that the US Government can only say that it is ***'hopeful'*** of obtaining a specified property order and that it has had plenty of time in which to carry out the investigations, we accept Advocate Belhomme's point that it is only since the Forfeiture Order was made in July 2017 that it has been relevant to carry out a tracing exercise, which has only just begun and which will be extremely complicated. As to the use of the word ***'hopeful'***, we accept that this is not a strong word but on the other hand we have regard to the evidence described above and we consider that there are reasonable prospects of the US Government succeeding in establishing the necessary link between the money in the accounts of the Companies and the proceeds of the offending received by Icebrand.

(xi) As to the suggestion that some of the money may have come from the European business, it would have been easy for the applicants, with the help of Mr Bengis or his son, to produce evidence to this effect if that was the case. On the basis of the evidence currently before us we think there are reasonable prospects of the US Government showing the necessary link, even if monies may have been passed through an account in Switzerland before coming to Jersey.

114 We should add that the information which we have summarised in the preceding paragraph is taken either from the *Biema* Judgment or from documents to which we have been specifically referred in the bundles produced for the hearing.

(iv) The tainted gift provisions

115 In view of our decision on the third ground relied upon by Advocate Sharp, it is not strictly necessary for us to decide whether the *saisie* should also be maintained on the ground that there are reasonable prospects of the US showing that the monies in the accounts of the Companies are realisable property because of the tainted gift provisions set out at paragraph 42 above. However, in case we are wrong on ground (iii), we propose to deal with the matter, albeit fairly briefly.

116 Advocate Belhomme submits that there is sufficient evidence of indirect gifts by Mr Bengis to Pearl to support the maintenance of a saisie at this stage. In support, he refers to the following:–

(i) He repeats the evidence which we have summarised above in relation to ground (iii). There is therefore evidence that the initial $8m originated from Icebrand, which was the vehicle which received the proceeds of the offending in the US.

(ii) It is reasonable to infer that subsequent transfers to Pearl directed by Mr Bengis (as set out in the *Biema* judgment) also originated from the profits of Icebrand.

(iii) Even if any such transfers were not direct from Icebrand to Pearl but went via other companies owned by the Rosebud Settlement, that would still amount to an indirect gift.

(iv) Whilst it may be necessary when an external confiscation order is registered for the US Government to have undertaken a detailed exercise to show the exact movement of monies through the bank accounts in order to satisfy the Court that the monies in the accounts of the Companies are caught by the tainted gift provisions, it is only necessary at this stage for the Court to be satisfied that there are sufficient prospects of this being established in due course as to justify the retention of the *saisie*.

(v) The Court should bear in mind the wise words of Toulson LJ in *R v Richards* [2008] EWCA Crim 1841 where he said this at paragraph 21:–

> ***"21. The underlying purpose of the tainted gift provisions of the Act is plain. No self-respecting organised criminal would expect to be caught with high-value property in his own name readily identifiable, particularly since the enactment of legislation which is designed to strip such criminals of their profits. As a matter of standard practice he is likelyto have taken steps to transfer high-value assets to nominee companies, offshore trusts or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed or he has served any sentence of imprisonment which he may have had the misfortune to have imposed upon him. Parliament has sought to address that mischief in various ways, including the tainted gift provisions presently under***

consideration….. But, dependent on the circumstances, a court may readily infer that the recipient is a nominee or in any event likely to bereceptive to the transferor's wishes and can be expected to value the defendant's interests accordingly….”

117 We would summarise Advocate Sharp's submissions in response as follows:–

(i) The available evidence suggested that the original $8m came from Nashglobe via the Mishcon de Reya client account. Nashglobe was a company owned by the Rosebud Settlement.

(ii) The evidence also suggested that most of that original $8m had been used to pay the original forfeiture order of $5.9m and associated legal expenses.

(iii) The evidence also suggested that the sum of $23m currently in the account of Pearl had come essentially from transfers to Pearl since 2007. There was no evidence that such sums had come from Icebrand. Even if they had originally done so, it seemed likely that they had spent several years in the ownership of another company or entity before being transferred to Pearl.

(iv) The case of *AG v Rosenlund* [2016] 1 JLR 37 was clear authority (following *Re Tantular* [2014] (2) JLR 25) that once assets were placed by a donor in a trust (or, Advocate Sharp added, in a company under a trust), the person donating the assets no longer had any beneficial interest in them. When assets were subsequently transferred out of the trust or company to another recipient, that was a gift by the trustee or the company to the recipient, not by the original donor to the recipient.

(v) It followed that, even if the monies in Pearl had originally many years earlier been assets of Icebrand (as to which there was no evidence), the fact that they had in the meantime been owned by Nashglobe or some other company under the Rosebud Settlement (or the Nevis Trusts) meant that the transfer by Nashglobe (or such other company) to Pearl could not amount to a gift by Mr Bengis.

(vi) It followed, said Advocate Sharp, that the tainted gift provision simply could not be applied to the facts of this case.

118 We accept that, as submitted by Advocate Sharp, the Attorney General may well face considerable difficulty in establishing that Mr Bengis has made a gift (whether direct or indirect) to Pearl so as to constitute property in Pearl's hands realisable property pursuant to Article 2(1)(b)(ii) of the Modified Law.

119 But the issue before us is whether there are sufficient prospects of the Attorney General doing so to justify maintaining the *saisie*. We have come to the conclusion that there are for the following reasons:–

(i) Although there is no direct evidence of a gift by Mr Bengis (or Icebrand) to Pearl, there are substantial grounds for suspicion that this is the case. In the first place, there

is the evidence referred to earlier to the effect that SG Hambros were informed that the original sum of $8m to be paid to Pearl originated from Icebrand. Although it is said that that payment came via Nashglobe, no documentary evidence has been produced to substantiate this. Secondly, it is clear that substantial profits from Mr Bengis' criminality were made by Icebrand and similarly substantial amounts have been acquired by Pearl since Mr Bengis' offending. Thirdly, despite the civil proceedings leading to the *Biema* judgment and the importance (presumably) to Pearl of the present proceedings, no evidence has been produced to show where the $23m in Pearl's account came from. If it has not come directly or indirectly from Icebrand (as the Attorney General submits), why has no evidence been produced to show that this is the case?

(ii) While acknowledging the force of the observations of the Court in *AG v Rosenlund*, it is of note that Article 2(1)(b)(ii) of the Modified Law refers to property held by a person to whom the defendant has 'directly or indirectly' made a gift. The concept of an indirect gift must add something to that of a direct gift. Thus, if after having committed a crime, A gives property to B, this is a direct gift. Similarly, if he gives legal title of the property to B but retains the entire beneficial interest so that B is merely acting as a bare nominee, A will make a direct gift to C if he subsequently transfers the beneficial interest in the property to C (whether or not B at the same time transfers legal title to C).

(iii) But if A transfers property to B subject to an understanding (without imposing any legal obligation) that, when requested, B will transfer the property to C and B subsequently does so when requested by A, could this not amount to an indirect gift from A to C? It is certainly arguable that this is the case even if B has held the legal and beneficial interests in the property between receiving it from A and passing it on to C.

(iv) Whether the Attorney General will be able to succeed in showing an indirect gift in the present case from Mr Bengis (or Icebrand) to Pearl is questionable because of the lack of current information as to any route whereby monies moved from Icebrand to Pearl and the basis upon which any intermediate parties held the funds. Furthermore, as *AG v Rosenlund* makes clear, an alleged indirect gift via a trust raises special difficulties because the trustee (B in the above example) does not hold the property for himself; he holds it for the beneficiaries and has no beneficial interest himself.

(v) However, given the background circumstances and the strong suspicion that the proceeds of the criminality in the US have somehow found their way into the hands of Pearl, the Court does not consider the prospects of the Attorney General as being so weak that the *saisie* should be lifted. There is a strong public interest in depriving criminals of the proceeds of their offending and the Court should not insist on too high a standard of likelihood of success before granting a *saisie*. It is sufficient if there are reasonable prospects of success.

Summary

120 For these reasons, the Court dismisses the application of First Trust to lift the *saisie*.

121 However, it is clear that, if the Attorney General is to succeed in persuading the Court in due course either that it is in the interests of justice to register an external confiscation order which specifies the accounts of the Companies (because the proceeds of the criminal conduct in the US can be traced through to those accounts) or that the money in the accounts is realisable property because of the tainted gift provisions, much detailed work will need to be done in order to establish the movement of monies so as to satisfy the requirements of either of these grounds.

122 Article 15(2) clearly envisages that a saisie should not be maintained for an unreasonable length of time. Thus it provides that, where a court has granted a *saisie* on the basis that proceedings are to be instituted against a defendant in an overseas jurisdiction, the court shall discharge the *saisie* if proceedings have not been instituted within such time as the court considers reasonable.

123 In our judgment a similar approach should be adopted where proceedings have been instituted but there is unreasonable delay in progressing the matter in the overseas jurisdiction. In the present case, it is now nearly 18 years since Mr Bengis was originally sentenced and the original forfeiture order imposed. The sum currently in the Pearl account has been effectively frozen since at least 2013 albeit that the *saisie* was only granted in July 2017. In the circumstances, it behoves the US authorities to act with dispatch in carrying out the necessary investigations. It will be open to Pearl to make a further application should that not be the case. Whether the Court would accede to any such application would depend on the view which it formed as to the reasonableness and energy of the efforts being made to investigate the position.