Neutral Citation Number: [2023] EWHC 521 (Comm)

Case No: CL-2018-000105

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2023

Before :
DAME CLARE MOULDER DBE
Sitting as a Judge of the High Court
- -

Between :
The Official Receiver of the Bangkok of Commerce Public Company Limited — **Claimant**
- and -
1) Rakesh Saxena
2) Orn-Anong Theppakum
3) The Estate of Krirk-Kiat Jalichandra — **Defendants**

- -
- -

Andrew Scott KC (instructed by **Baker & McKenzie LLP**) for the **Claimant**
The First Defendant in person

Hearing dates: 27 & 28 February 2023
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DAME CLARE MOULDER DBE

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 14 March 2023 at 10:00am.

Dame Clare Moulder DBE:

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Introduction

1. This is the judgment on the application by the Claimant (the "Claimant" or the "OR") to enforce the judgment of a Thai court against Mr Saxena, the First Defendant for the sum (the "Judgment Sum") of 1.132 billion Thai Baht ("THB") (approximately £27.3 million). Judgment in default has been entered against the Second and Third Defendants.

2. This reserved judgment is being handed down following a hearing on 27 and 28 February 2023. The hearing was held remotely given that Mr Saxena is currently in prison in Thailand and was representing himself. The Claimant's expert is also located in Thailand and therefore permission had been given for him to appear remotely. The OR is and was represented by leading counsel, Mr Scott KC.

3. This judgment has not been circulated in draft in advance of handdown given the difficulties in sending a draft judgment to Mr Saxena. A copy of this judgment will be sent to the parties after this handdown as well as being published in the usual way.

Background

4. By way of background, in November 2009 the Thai Public Prosecutor brought proceedings against Mr Saxena in respect of his part in the fraud on the Bangkok of Commerce Public Company Limited (formerly known as the "Bangkok Bank of Commerce Public Company Limited")("BBC").

5. The proceedings were instituted by a complaint (the "Complaint") dated 23 November 2009 to the South Bangkok Criminal Court ("SBCC").

6. Mr Saxena was extradited from Canada to Thailand on 30 October 2009 and was present throughout the proceedings before the SBCC.

7. In its judgment dated 8 June 2012 the SBCC found Mr Saxena guilty of offences under the Thai Securities and Exchange Act and the Thai Penal Code of essentially assisting a director of dishonest conversion of property. The SBCC sentenced Mr Saxena to a period of imprisonment of 10 years, imposed a fine of THB 1 million and ordered him to make a payment of the Judgment Sum to the BBC as the "aggrieved party" (the "repayment order"). The repayment order was in a sum less than the amount sought by the Thai Public Prosecutor (the court finding that repayments had been made which reduced the principal outstanding).

8. Mr Saxena unsuccessfully pursued appeals to the Thai Court of Appeal and the Supreme Court. The Supreme Court dismissed his appeal on 17 August 2016.

9. The OR is the official receiver of the BBC. It seeks to enforce the repayment order against Mr Saxena on the basis that the common law requirements for the recognition and enforcement of judgments are satisfied.

10. In summary Mr Saxena resists the order primarily on the basis that it is subject to the exclusionary rule that the English courts will not enforce a foreign penal order. Mr Saxena's case is that the judgment of the SBCC is a criminal judgment disclosing a cause of action of conversion, rendered by a criminal court in Thailand, pursuant to a trial conducted by the Thai Public Prosecutor for offences against the securities laws of the Thai State. Accordingly Mr Saxena's primary defence is that the judgment is of a penal nature which cannot be entertained by the English court.

11. The Claimant's case is that the exclusionary rule is engaged where the claim amounts to an attempt by a foreign state to exercise its sovereign authority in England but that this case is a claim to enforce in substance a claim for damages which in England might have been brought in a civil case. The Claimant also relies on the Thai law context in support of their case and submits that the repayment order, although pursued in the criminal case, was separate and distinct from it and fell to be determined in accordance with Thai civil law.

12. Mr Saxena's response is that there is no evidence that a civil claim was brought by the Claimant.

13. I deal with these submissions in more detail below.

Expert evidence

14. Permission had been given for both parties to rely on evidence from a Thai law expert in relation to the nature of the underlying Thai proceedings and the enforceability of the SBCC judgment. The Claimant adduced expert evidence in the form of a report from Mr Praphan Subsaeng, a full time judge in Thailand from 1973 to 2017 including as a Presiding Justice of the Supreme Court from 2007-2017.

15. Mr Saxena did not adduce any expert evidence. Mr Saxena did however serve a written question on Mr Subsaeng pursuant to CPR 35.6 (Written questions to experts) and at the hearing, cross examined Mr Subsaeng.

16. The written question served in July 2022 was whether Mr Subsaeng had seen proof of a case under section 40 of the Thai Criminal Procedure Code being filed by the Claimant. Mr Subsaeng served a written response in which he stated that he had seen the Complaint and that the judgment of the SBCC was in two parts, a judgment in the criminal case that ruled that Mr Saxena was guilty and a judgment in the civil case which ordered Mr Saxena to pay restitution for the crime. Mr Subsaeng noted that section 40 was a procedural law which gives the Criminal court the power to try both criminal and civil elements of the case but that since the parties did not dispute the jurisdiction of the SBCC there was no need for the SBCC to include explicit reference to section 40 in the judgment.

17. Mr Saxena made an application dated 10 October 2022 to exclude the expert evidence on the basis that Mr Subsaeng had failed to answer the question. However at the hearing Mr Saxena cross examined Mr Subsaeng and had the opportunity to put his question orally to Mr Subsaeng.

18. Mr Subsaeng's oral evidence was that under Thai law there can be a civil case "*in connection with the criminal case*".

Mr Subsaeng's evidence was as follows:

> "*For example, for the offence of theft , when you steal something from someone, the person who is injured has a civil claim against you to claim back the property. That is a civil claim in connection with a criminal case. When this kind of case happens the injured party has the following rights. Number one, they can claim at the criminal court and put in the civil claim in the criminal court to claim back a property or they can separately claim in the civil court as well. So the injured party has the option to choose whether they would concede the claim at a criminal court with a civil claim. That is the case. The matter of this case is an offence of misappropriation committed against the injured party, which is the bank. <u>For this case to proceed the public prosecutor can file a criminal charge against the offender and also put in a civil claim to claim back the money from the offender. That is a civil case in connection with criminal case. And the claim for the return of the property is made on behalf of the injured party</u>. Naturally, in a case like this, as you can see in the complaint there will be two requests. Request number 1 is the request to charge against the offender for the criminal offences committed. The second request will be a civil request to return the misappropriated asset or property.*" [emphasis added]

19. Mr Saxena appeared to accept that in light of the exchange in cross examination it was not necessary to pursue his application. Mr Saxena observed:

> "*There is no civil process. There is no civil case as such. No witnesses coming in, no competent court making a determination. That is the distinction. I think I got your point. I got his point. He's talking about a claim which a court orders. A court order is different, very different from a proceeding which goes from the bottom.*"

20. In light of how the cross examination unfolded, Mr Scott KC for the OR did not address the Court on the application to exclude the expert evidence and it is not necessary in my view for the Court to rule on this issue.

21. In his oral closing submissions Mr Saxena submitted that the Thai Court had not engaged in a civil process and there was no evidence to support the Claimant's case in this regard other than the evidence of Mr Subsaeng. Mr Saxena asserted that he had not argued this with Mr Subsaeng because he would not give an honest answer.

22. It is clear from the transcript [Day 1 p38 line 23] that Mr Saxena did put his case to Mr Subsaeng in cross examination and as is evident from the extracts reproduced above, Mr Subsaeng answered the question. Further Mr Subsaeng was a judge of the Thai courts for many years including 10 years as Presiding Justice of the Thai Supreme Court. In my view there is nothing to support the attack by Mr Saxena in closing on the honesty of Mr Subsaeng and the attack on his character in closing submissions was wholly unwarranted and should not have been made.

23. I find that there is no evidence that Mr Subsaeng was not credible or competent to give evidence of Thai law and I accept his evidence. The relevance and the weight to be given to the Thai law context is discussed below.

Evidence of Mr Lyons

24. Mr Lyons, a partner at Baker and McKenzie LLP, solicitors for the Claimant, was called to give evidence and be cross examined.

25. In closing submissions Mr Saxena asserted that the witness statement filed by Mr Lyons in the ex parte application by the Claimant for permission for service out contained deliberate inaccuracies. This is not the forum for a challenge on the service out order and it is thus irrelevant to the current issue before the Court. However Mr Saxena may not as a litigant in person appreciate the seriousness of such an accusation made in open court against a solicitor. Accordingly it is necessary in my view for the Court to address this assertion. Mr Saxena's attack on Mr Lyons appeared to centre on the fact that as stated in that witness statement, Mr Lyons relied at that time on advice as to Thai law from the Bangkok office of Baker and McKenzie. In my view there was nothing unusual or improper in so doing. Further the witness statement contained a section setting out the possible defences which Mr Saxena might raise and thus addressing the Claimant's duty of full and frank disclosure. Whilst acknowledging that Mr Saxena is a litigant in person and emotionally involved in the outcome of these proceedings, there is no evidence presented to this Court of any inaccuracies in that witness statement and *a fortiori* no evidence of any deliberate inaccuracies. I find that there was no basis for such an accusation being made in the course of these proceedings.

Hearing bundle

26. An issue arose during the hearing as to whether all relevant documents were before the Court. I acknowledge the difficulty Mr Saxena had both as a litigant in person and more significantly being in custody in presenting his own defence. I understood from Mr Saxena that some of his documents were held in storage and if needed had to be retrieved from storage.

27. In particular in the course of cross examination Mr Saxena complained that exhibits to Mr Lyons' witness statements were not included in the bundle for the hearing. Mr Saxena appeared to wish to retrieve further documents from storage which would in

effect have necessitated an adjournment of the hearing since he indicated that retrieval would take until the following afternoon.

28. I was not prepared to adjourn the hearing for the following reasons:

    (1) These were witness statements which had been served with the exhibits on Mr Saxena some time ago. In my view Mr Saxena had ample time to consider the witness statements and the exhibits in preparing for the hearing, whether or not they were in the hearing bundle. Mr Saxena has demonstrated that he is fully abreast of the documents and the issues in the case.

    (2) the hearing bundle was sent to Mr Saxena for approval in advance of the hearing and the *inter partes* correspondence shows that no objection was raised on the part of Mr Saxena as to its contents.

    (3) the Claimant confirmed that the documents (other than certain irrelevant documents) were included elsewhere in the bundle and subsequent to the first day of the hearing the Claimant's solicitors, as directed by the Court, prepared a document showing the location of the documents.

    (4) Mr Saxena objected in particular that documents relating to the restraint proceedings and the Swiss proceedings (both relating to the assets said to be in England and over which enforcement may be sought) were not in the bundle. For the reasons set out below in my view these documents which related to the assets over which enforcement of any judgment may be sought were not relevant to the issue now before this Court.

29. I therefore concluded that there was no prejudice to Mr Saxena arising out of the hearing bundle and an adjournment in the circumstances would not be in furtherance of the Overriding Objective.

Preliminary issues

30. Turning to the legal issues before this court, there are three preliminary matters which it is convenient to dispose of at the outset:

    (1) capacity of the OR to bring these proceedings;

    (2) Human Rights;

    (3) English assets.

Capacity of the OR to bring these proceedings

31. Mr Saxena challenged the capacity of the OR to bring the proceedings before the English courts.

32. This issue can be dealt with shortly. The BBC was declared insolvent in 2003. The evidence of Mr Subsaeng is that the OR has the sole power to receive and manage the BBC's property and is eligible to institute an action against Mr Saxena in the UK (Subsaeng 40).

33. I accept that evidence and find that the OR has capacity to bring these proceedings.

Human rights

34. In oral submissions Mr Saxena appeared to raise a new defence that if there had been a civil action against him, it had taken place in breach of his right to have notice of the charge and to defend himself. The OR objected that this had not previously been pleaded by Mr Saxena and that had it been raised, the OR might have wished to adduce further evidence such as a transcript of the Thai court proceedings. Whilst I agree that there was no apparent justification for this to be raised only during the hearing, in my view it can be disposed of shortly.

35. It is clear from the judgments of the SBCC and the Thai appeal courts that Mr Saxena was fully engaged in the process before the courts and there is no basis for any suggestion that the civil part of the process was unfair or in breach of natural justice. Although no express reference is made to a civil proceeding in the Complaint, in my view Mr Saxena had notice of the substance of the civil charge in that the Complaint set out the facts of what was alleged to have taken place and contained the request to the SBCC to order Mr Saxena to pay THB 1.657m to the "Injured Party" (defined as BBC). The judgment of the SBCC states that Mr Saxena adduced evidence in support of his argument that the aggrieved party suffered no damage as money was used to settle the company's debts. The judgment sets out the evidence of what happened over several pages and concluded that the Defendant's claim was "groundless" and without supporting evidence although as referred to above the repayment order was in a sum less than the amount sought by the Thai Public Prosecutor as the court found some repayment had been made. In my view Mr Saxena had an opportunity to defend himself and advance both argument and evidence before the Thai courts.

English assets

36. On the evidence of Mr Lyons before the Court, the objective of the OR in pursuing the claim is to enforce against assets in the jurisdiction held in a Court Funds office account which are said to be assets in which Mr Saxena is beneficially interested together with the two other defendants.

37. Mr Saxena sought to challenge whether there were any assets in the UK against which an order can be enforced.

38. I accept the submission for the OR that this is not relevant to the issue currently before this court and will only arise for determination when the OR seeks to enforce any judgment entered against Mr Saxena following this hearing.

Legal principles for enforcement of judgment

39. Turning then to the legal principles for enforcement of a judgment, *Dicey, Morris and Collins on The Conflict of Laws* (16th ed) sets out the principles for enforcement of an amount due under a foreign judgment at Rule 46. In summary a foreign judgment *in personam* given by the court of a foreign country may be enforced for the amount due if the judgment is (a) for a debt or definite sum of money and (b) final and conclusive. There is a qualification to paragraph (a) that the sum of money must not be payable in

respect of taxes or other charges of a like nature or in respect of a fine or other penalty. Since this overlaps with the exclusionary rule I will address this qualification below.

40. Subject to that qualification, in my view paragraphs (a) and (b) are satisfied and Mr Saxena did not seek to submit otherwise. The judgment of the SBCC was appealed to the Supreme Court and dismissed. Mr Subsaeng's evidence to the Court is that when the Supreme Court upheld the judgment of the Court of Appeal, Mr Saxena became bound by the judgment and obliged to comply (Subsaeng 39).

41. *Dicey* states that the foreign judgment must be given by a court of a foreign country which had jurisdiction to give that judgment in accordance with the principles set out in Rule 47 and 48. Rule 47 sets out four cases in which a court of a foreign country has jurisdiction to give a judgment *in personam* of which two are relied upon by the Claimant: if the person was at the time the proceedings were instituted physically present in the country; and if the person against whom judgment was given submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings.

42. I propose to deal with the issue of whether Mr Saxena submitted to the jurisdiction of the Thai court.

43. *Dicey* states (at 14-073) that where a defendant appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. It is clear that there is also a voluntary submission where a claimant appeals on the merits: *JSC BTA Bank, BTA Securities JSC v Turkiye Vakiflar Bankasi T.A.O.* [2018] EWHC 835 (Comm) at [78]-[80]. In the present case Mr Saxena brought an appeal on the merits first to the Thai Court of Appeal and then to the Thai Supreme Court. As Lord Denning said in *S.A. Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] 1 QB 279 , at 299:

> "*By inviting the Appeal Court to decide in its favour on the merits, it must be taken to have submitted to the jurisdiction of the original court. If the Appeal Court decided in its favour, it would have accepted the decision. So also if it decided against it, thus upholding the original court, it must accept the decision.*"

44. In *Certain Underwriters at Lloyd's v Syrian Arab Republic* [2018] EWHC 385 (Comm), Andrew Henshaw QC then sitting as a High Court Judge stated that *S.A. Consortium* remained good authority for the proposition that an appellate filing not reserving the appellant's position as to jurisdiction can amount to a submission to the foreign court (paragraphs [57-58]).

45. I am satisfied on the authorities that by bringing the appeals Mr Saxena submitted to the jurisdiction of the Thai courts.

46. In relation to the second basis for the foreign court having jurisdiction advanced by the Claimant, Mr Saxena was only in the jurisdiction by virtue of having been extradited from Canada. On the current state of the law there is no authority as to whether these circumstances would take this case outside the ambit of the rule. The Court of Appeal in *Adams v Cape Industries* [1990] Ch 433 (CA) makes some observations on the rationale for the requirement but does not address the issue directly. *GFH Capital Limited v Haigh* [2020] EWHC 1269 also raised the issue but did not have to decide it.

Given my findings on jurisdiction by virtue of the appeals I do not have to decide that issue.

Exclusionary rule

47. *Dicey* states at Rule 20:

> *English courts have no jurisdiction to entertain an action:*
>
> (1) *for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State;…*
>
> The rationale for the rule was said by the Court of Appeal in *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370 that the courts will not enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. Sir Anthony Clarke MR giving the judgment of the Court said at [41]:
>
> "*The assertion of such authority may take different forms. Claims to enforce penal or revenue laws are good examples of acts done by a sovereign by virtue of his sovereign authority ("jure imperii"). In each case it is necessary to see whether the relevant act is of a sovereign character. Penal and revenue laws are assumed to be of a sovereign character.*"

48. At [42] the Court in Mbasogo cited with approval an article by Dr Mann that*:*

> "*Where the foreign state pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the state's access to the courts is unrestricted. Thus a state whose property is in the defendant's possession can recover it by an action in detinue. A state which has a contractual claim against the defendant is at liberty to recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign state cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle.*" [emphasis added]

49. At [50] the Court concluded:

> "*…The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it…*"

50. In this case, both parties relied on *Huntington v Attrill* [1893] A.C. 150. In *Huntington* the Privy Council held that an action by the appellant in an Ontario court upon a

judgment of a New York court was not an action to enforce penal laws and further that it was the duty of the Ontario court to decide whether the statute in question was penal within the meaning of the international rule so as to oust its jurisdiction and the Court was not bound by the interpretation of the New York Courts. Lord Watson giving the judgment of the Court said:

> "*Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State…*" [emphasis added]

51. The Privy Council cited with approval the formulation of the US Supreme Court in *Wisconsin v the Pelican Insurance company*:

> "*The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.*"

52. Lord Watson continued:

> "*Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provision are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an actio popularis pursued, not in his individual interest, but in the interest of the whole community.*"

53. The Court of Appeal in *United States of America v Inkley* [1989] QB 255 reviewed the authorities starting with *Huntington* and the passage from *Wisconsin* cited in that case. The Court of Appeal also referred to the Court of Appeal decision in *Attorney General of New Zealand v Ortiz* where Ackner LJ said:

> "*Huntington's case makes it clear that the first part of Mr. Gray's definition of foreign penal law, namely that it must be part of the criminal code of a foreign country, is not sustainable. The right which it is sought to enforce may be a right which arises under legislation which is essentially designed to regulate commercial activities such as company legislation which may well contain a penal provision. I agree with the judge that it cannot be right simply to categorise the statute sought to be enforced as a whole. The court must pay regard to the particular provision of the foreign law which it is sought to enforce. ...*
>
> *In the instant submission, the claim is made by the Attorney-General on behalf of the state. It is not a claim by a private individual. Further, the cause of action does not concern a private right which demands reparation or compensation. It concerns a public right – the preservation of historic articles within New Zealand – which right the state seeks to vindicate.*" [emphasis added]

54. The Court of Appeal in *Inkley* then summarised the applicable principles as follows:

> *From these authorities the following propositions seem to emerge which are relevant to the present appeal:*
>
> *(1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law;*
>
> *(2) that regard will be had to the attitude adopted by the courts in the foreign jurisdiction which will always receive serious attention and may on occasions be decisive;*
>
> *(3) that the category of the right of action, i.e. whether public or private, will depend upon the party in whose favour it is created, upon the purpose of the law or enactment in the foreign state upon which it is based and upon the general context of the case as a whole;*
>
> *(4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained.*
>
> *(5) that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country.*

55. In *Iran v Barakat* [2007] EWCA Civ 1374 at [106] the Court of Appeal reiterated that it is for the English court to determine the substance of the right which is sought to be enforced:

> *Whether a foreign law, or a claim based on foreign law, is to be characterised as penal depends on English law. It does not depend on the label given to the law by the foreign system of law, nor on whether the claim is in form a private law claim. The English court has to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state: Huntington v Attrill [1893] AC 150 , at 155; Att-Gen of New Zealand v Ortiz [1984] AC 1 , at 32, per Ackner LJ.*

The substance of the right sought to be enforced

56. In relation to the substance of the right sought to be enforced, Mr Saxena relied on the following matters:

(1) a letter from the office of the Thai Attorney General to the Crown Prosecution Service in the UK stating (amongst other things) that the repayment order was "*criminal in nature*" and a letter to the Guernsey authorities in which the Thai Attorney General stated that the process was "*not a truly civil case*".

(2) that the claim in this case is brought by the OR and the Complaint was brought by the Thai Public Prosecutor and not a private person;

(3) that the State is a major creditor of the BBC;

(4) the distinction to be drawn with the facts of *Raulin v Fisher* [1911] 2 KB 93, a case in a civil jurisdiction, where the private plaintiff intervened directly and there were, according to Mr Saxena two judgments.

57. It was submitted for the OR (paras 15-20 of its skeleton) that:

(1) the substance of the right sought to be enforced by this claim is BBC's right to redress as a victim of fraud and that enforcing that right does not involve any execution of foreign penal law (*Huntington*);

(2) It is nothing to the point that other aspects of the SBCC judgement are penal since the repayment order is separable and that separate aspect will be enforced by the English court (*Raulin*);

(3) the Thai law context illustrates the substance of the right sought to be enforced, the separable nature of the repayment order and why no significance attaches to the fact that it was the Thai public prosecutor which sought that order;

(4) the letter to the Crown Prosecution Service from the Thai office of the Attorney General does not reflect the correct categorisation for the purpose of the common law rule nor does it fully or accurately reflect Thai law;

(5) There is no requirement whereby to be enforceable a foreign judgment must result from a proceeding commenced by the judgment creditor;

(6) The fact that Thai state creditors would be among the ultimate beneficiaries of the recoveries does not alter the substance of the right namely the BBC's right to redress as a victim of fraud.

The letter from the Attorney General to the CPS and to the Guernsey authorities

58. Mr Saxena relied on a letter from the Thai Deputy Attorney General which was sent in May 2018 to the UK authorities. This letter was stated to be in response to a letter raising queries concerning the Thai authorities request for assistance from the UK to obtain a restraint order against the defendants in the UK.

59. In the letter the Thai Deputy Attorney General confirmed that the "*restitution order*" made by the Thai Supreme Court to repay the amount of THB 1.132 million was "*criminal in nature*". The letter then set out the reasons why such restitution order was considered to be criminal in nature. The letter stated that by virtue of section 44 of the Thai Criminal Procedure Code the claim for restitution could be attached with a Public Prosecutor's charge in a criminal case and the judgment for restitution of property was given as part of the judgment in the criminal case. The letter stated that this demonstrated that the Criminal Procedure Law in Thailand deems as part of the criminal judgment the restitution order made by the court exercising criminal jurisdiction over an offence and that therefore the restitution order is penal in character under the Thai Criminal Procedural Law.

60. It was further stated that the case was "*indisputably a criminal case*" in that the defendants dishonestly misappropriated and embezzled BBC's assets. The letter also stated that returning the assets to Thailand would mean that the assets would be returned to BBC of which the "majority creditor" is the Financial Institution Development Fund, part of the Central Bank of Thailand, It stated that during the BBC crisis the FIDF played vital roles in bailing out financial institutions during the financial crisis. It said that the restitution order works "*in effect and purpose like a confiscation order in a way that the requested assets will be returned to the state in a form of collection of debt to the FIDF*".

61. Mr Saxena also relied on a further letter that was sent to from the office of the Thai Attorney General to the Guernsey authorities on 19 April 2022. The relevant section of the letter stated:

> "*The sentences of the Court included periods of imprisonment, imposition of a fine, and an order that the defendants repay the proceeds of their crime to the injured party. In Thailand this process of seeking restitution for the victims of the fraud is referred to as a civil case connected to a criminal offence. Although it is referred to as a "civil" case, it is not a truly civil case as the amount the Public Prosecutor can request be subject to the restitution order is limited to the property lost. There can be no claim for interest or damages, and it is implicit in the Court's judgment that the amount ordered to be returned is the proceeds of crime. Essentially, these orders are made by the courts for the purpose of ensuring that rewards received in connection with criminal conduct can be recovered and returned to the victims of the crime.*"

Expert evidence

62. In his expert report Mr Subsaeng's evidence as to the nature of the process to claim civil reparation or restitution of property alongside a criminal case was as follows (paragraph 13-15):

> "*13. As a matter of Thai law, whilst a particular action may give rise to Thai criminal offences, they may also create a civil liability which the offender owes to the victim. In such cases, these actions may give the victim a right to claim civil reparation or restitution of property from the offender, alongside whatever criminal rights they may have. Therefore, Thai law allows victims to exercise the right to proceed with civil cases together with the right to proceed with criminal cases by filing the claims in one case. The case with this nature is called "civil case in connection with criminal case".*
>
> *14. The above mentioned principle appears in section 40 of the Criminal Procedure Code. Under this provision victims have the right to choose whether to exercise the right to file a civil case to claim civil reparation or restitution of property from the criminal offender by filing the civil case together with the criminal case in one complaint, or to file a civil case separately from the criminal case.*
>
> *15. Section 43 of the Criminal Procedure Code also provides authority for the Public Prosecutor to claim, on behalf of the victims, for civil reparation or restitution of the property the victims have been deprived of through the commission of crime by the offender. This can be done in the case that the victim is eligible to claim civil reparation or restitution for deprived property as a result of the offence, which also gives rise to criminal sanction. If this is the case, it would no longer be necessary for the victim to file a civil claim in a separate case.*
>
> *…*
>
> *17. Even though the law empowers the Public Prosecutor to apply for civil restitution of the property or the value of the property in the same case as the criminal case, the hearing is separated and can be divided into two parts, namely, the criminal part and the civil part. The hearing of the civil case must be in accordance with section 40 of the Criminal Procedure Code which states that the hearing of civil cases must be subject to the provisions under the Civil Procedure Code…*
>
> *…*
>
> *19. Under section 47 of the Criminal Procedure Code, when the court orders civil restitution of the property or the value of the property from the Defendant, this is separate from the criminal part of the judgment. The determination of the civil part is in accordance with the law on personal civil liability and it does not require the court to consider whether or not the defendant is found guilty on a criminal basis.*

> *20. In addition, section 50 of the Criminal Procedure Code stipulates that when the court orders civil restitution of the property or the value of the property, or reparation to the victim, the victim is deemed a judgement creditor of the offender…*" [emphasis added]

63. The evidence of Mr Subsaeng (as set out in his written response to the question whether he had seen proof of a case under section 40) is that the Complaint consisted of two separate parts and the second part of the Complaint that sought payment of THB 1.657m is where the Public Prosecutor relied on section 40 of the Criminal Procedure Code to request the court to order Mr Saxena to pay THB1.657m to the "crime victim" (BBC or the OR).

64. Mr Subsaeng stated that his opinion was supported by section 18 of the Thai Penal Code which prescribes the types of criminal penalties available under the Thai legal system and from which it can be seen that the request for payment to the injured is not one of the criminal penalties available. Mr Subsaeng therefore concluded that the Civil request was a civil complaint and "*thus the judgment in relation to this particular part of the Complaint should be considered as a judgment in the civil case*."

65. Mr Subsaeng further stated that the judgment of the SBCC is in two parts, the first part ruled that Mr Saxena was guilty and subject to imprisonment and a fine; the second part he described as

> "*a civil judgment which ordered Mr Saxena to pay restitution for the crime victim (BBC or the Claimant)*"

which he said was a "*judgment in the civil case and separate from the judgment in the criminal case*".

Discussion

66. This is an unusual case where an official of the Thai State has informed the UK authorities that the repayment order in question is penal in character under Thai law and before this Court the Official Receiver submits that this letter is inaccurate or incomplete as to Thai law and has adduced expert evidence to this effect.

67. I accept however the submission for the OR that the question of whether the exclusionary rule is engaged in a question for the English court to determine and that the English court is not bound by the characterisation applied by the foreign jurisdiction.

68. Nevertheless the case law indicates that this Court will have regard to the attitude adopted by the courts in the foreign jurisdiction. In this regard the OR seeks to rely on the evidence of Mr Subsaeng that the characterisation by the Thai Attorney General of the repayment order as a matter of Thai law as criminal in nature is inaccurate or incomplete.

69. Looking at the reasons given in the letter for concluding that the order is penal in nature, the Thai Attorney General relied on:

(1) section 44 and that the claim for restitution could be attached with a Public Prosecutor's charge in a criminal case and;

(2) the judgment for restitution of property was given as part of the judgment in the criminal case.

70. It seems to me having regard to the evidence of Mr Subsaeng that the fact that the Thai procedural law allows for the claim for repayment to be brought in the criminal courts and judgment given on both elements in the same judgment is not inconsistent with the analysis that in substance this is still a civil claim which could equally have been brought in the civil courts.

71. In relation to the letter to the Guernsey authorities it is in my view notable that the Attorney General describes the repayment order as a way of making restitution to the injured party and not as a means of the State recouping lost revenue. Further even though the letter says it is "*not a truly civil case*", the letter acknowledges that it is "*a civil case connected to a criminal offence*" and this would support an interpretation that it is in substance a civil claim on behalf of the injured party and not the enforcement of a penal order. Given that the process exists in connection with criminal cases it is not surprising or inconsistent with this conclusion that the property is said in the letter to be the proceeds of crime.

72. As to the beneficiary of any recoveries, Mr Saxena relies on the reference in the Attorney General's letter to FIDF as the "*majority creditor*" and disputes the statement of Mr Lyons (in his 8th witness statement para 27(d)) that there are 70 creditors of the BBC.

73. In his 8th witness statement Mr Lyons stated that he understood that 70 creditors have filed applications for debt repayment in respect of the BBC's insolvency and there are 44 creditors with no connection to the Thai State. The OR then served further evidence of the identity of the creditors by a 14th witness statement of Mr Lyons dated 24 February 2023.

74. Whilst Mr Saxena raised objections to the timing of this evidence in the 14th witness statement, it was served in response to a letter from Mr Saxena dated 21 February 2023 which stated that the OR should produce evidence of the control of the Thai State.

75. Mr Lyons obtained a list of the creditors from the OR and stated in the 14th witness statement that FIDF is a 53.5075% creditor in relation to a loan. The other major creditors are stated to be Krungthai Bank plc at 36.9% on a promissory note and Siam Arun Development Co Ltd at 3.35% for breach of contract, claim for damages.

76. It was submitted for the OR that when analysing whether this falls within the exclusionary rule there is no direct authority that the rule is engaged where the creditors include the foreign state and that Cayman Island authority would suggest that it would only be where the State is the sole beneficiary: In *Wahr-Hansen v Compass Trust* [2007 CILR 55] Henderson J held that in determining whether a claim was in substance an attempt to collect foreign tax it must be shown that all the proceeds of the litigation will go to the foreign revenue authority.

77. In oral submissions Mr Saxena questioned whether this evidence as set out in Mr Lyons 14th witness statement was correct, however there is no evidence to contradict it. The letter from the Thai Attorney General stated that the assets will be returned to the State but it only describes FIDF as the "majority creditor". In these circumstances the indirect involvement of the State as the ultimate beneficiary of part of any assets recovered does not in my view alter the substance of the right nor does it render the order penal in nature. Support for this conclusion can be found in the decision of the Court of Appeal in *SEC v Manterfield* [2009] EWCA Civ 27 at [19]-[24] and the discussion in the judgment of the *Robb Evans* case, a decision of the Court of Appeal of New South Wales.

Raulin v Fischer

78. Mr Saxena relied heavily on *Raulin v Fischer*. In *Raulin* the English court allowed the plaintiff to execute an award of damages for 15,000 francs at common law. The French judgment included a conviction for the offence of criminal negligence and a fine. The claim for damages was tried along with the criminal charge and upon conviction punishment for the offence and damages for the injury were awarded by the same judgment. In the English courts Hamilton J held that the judgment was severable and the portion of it awarding damages did not fall within the exclusionary rule.

79. Mr Saxena submitted (skeleton paras 6-7) that the circumstances under which the English court permitted the enforcement of 15,000 francs are in sharp contrast to sentencing in the Thai judgment. He submitted that:

    (1) the sum ordered by the Thai court does not emanate from any adversarial process whereas in *Raulin* the plaintiff's civil intervention was followed by a suit for damages;

    (2) the suit for damages did not involve the French state in any form whatsoever;

    (3) the suit for damages was distinct and separate from the criminal prosecution in France and;

    (4) the plaintiff as a private individual was entitled to all recovered funds.

80. Mr Scott for the OR submitted that:

    (1) *Raulin* was not purporting to lay down any new rules but is only a first instance decision and an example of an application of the principles laid down in *Huntington*;

    (2) the judgment in *Raulin* does not depend on the fact that the plaintiff intervened himself.

81. In the judgment Hamilton J stated that the rule which governed the question at issue was laid down in *Huntington*. Having referred to the principles Hamilton J then said:

> "*I have therefore to inquire first of all whether this judgment insofar as it concerns the present plaintiff is one for the satisfaction of a private wrong or for the punishment of an infraction of public law; and secondly whether, if it be*

> *as regards him only for the satisfaction of a private wrong, it is one which can be separated from the rest of the judgment, so that he may sue upon the judgment in spite of the fact that a considerable part of it relates to purely criminal proceedings. Certain French expert witnesses were called before me, and the effect of their evidence was this. In various respects the remedy in the form in which it was pursued differs from the form in which it might have been pursued. The result of M. Raulin having pursued his remedy for compensation by intervention in the prosecution instead of bringing a separate civil action was that he came before a Court especially assigned to criminal business. That Court decided both in the prosecution and in the civil intervention and to that extent the plaintiff obtained his judgment from a correctional tribunal. But in other respects it does not appear to me that his remedy differed in its character from the remedy which he might have pursued by a separate civil action. The prosecution abates with the death of the accused. The civil remedy does not. The liability to imprisonment in order to enforce payment of the damages is in law an incident both of the intervention in the action publique and of the separate civil action. The course of procedure differs because, instead of the whole conduct of the action on the intervenors side resting with the plaintiff as it would have done in civil proceedings, he has to adapt himself to the control of the proceedings by the Procurator of the Republic. But the issues remain unchanged.... It seems to me that there is no doubt that the public prosecution and private suit are two quite separate and distinct proceedings although they are for purposes of procedure combined in one. The judgment for the 15,000 francs is not in any respect a judgement in a proceeding "in favour of the State whose law has been infringed". It is a judgment in what is substantially a civil suit for the compensation of a person who has sustained a private wrong. The other question is whether it is practicable to distinguish the portion of the adjudication which was not part of the criminal suit from that portion of which it was.... In any case, according to the judgment of the Privy Council this is not a matter in which I am bound by the view of the French courts. It is one in which I must determine for myself whether the enforcement of the plantiff's rights would either directly or indirectly involved the execution of the penal law of another State. In my opinion it would not. Moreover here the decision awarding the final damages was not even pronounced at the same time as the decision inflicting the fine. It was given at a time where the only issue being contested with a private and civil character and one with which the state had nothing whatever to do…*"

82. In my view *Raulin* is merely an example of the application of the principles but to the extent it illustrates the approach of the English courts it is in my view supportive of the OR's case. In my view *Raulin* was similar to the present case in that the criminal and civil proceedings were both dealt with at the same time before a criminal tribunal but the remedy sought was in substance the remedy that the plaintiff could have pursued through a separate civil action. As set out above, in *Raulin* the judge found that:

> "*[the French criminal] Court decided both in the prosecution and in the civil intervention and to that extent the plaintiff obtained his judgment from a correctional tribunal. But in other respects it does not appear to me that his remedy differed in its character from the remedy which he might have pursued by a separate civil action.*"

83. The essential test applied by Hamilton J was:

> *whether the enforcement of the plantiff's rights would either directly or indirectly involved the execution of the penal law of another State*

84. Mr Saxena stressed that in *Raulin* there were two separate judgments. Mr Saxena further submitted that *Raulin* is authority for the proposition that there has to be an injured party complaint before you can sever the judgment.

85. It appears from the report that the assessment of damages in *Raulin* was delayed whilst an expert report was obtained on the extent of the plaintiff's injury. As set out above Hamilton J said that:

> "*the decision awarding the final damages was not even pronounced at the same time as the decision inflicting the fine*"

86. The issue as set out by Hamilton J was whether the civil judgment could be separated from the rest of the judgment.

87. In *Manterfield* at [24] the Court of Appeal stated:

> "*24. So far as severance is concerned it seems to me that one of the earlier authorities supports the view that, once a judgment has been obtained, the court will look to see what part is being sought to be enforced. If in reality that part of the judgment is, in substance, a claim for damages which in England might have been brought in a civil case, the fact that it is all part of a judgment in a criminal case will not bring it within rule 3: see Raulin v Fischer [1911] 2 KB 93 . Further support for the view that it is the substance of what is being sought to be enforced, which is important for the purposes of the rule, flows from the reasoning in the Robb Evans case 61 NSWLR 75 and indeed in the Barakat Galleries case [2009] QB 22 . The substance of what the SEC will seek to enforce (if they prevail in the action), and in relation to which they seek to preserve the assets, is the disgorgement of what they allege to be the proceeds of fraud. They also intend to seek orders, which will provide for the same to be returned to the investors. In my view the judge was right in his conclusion that such a judgment, if obtained, will not fall foul of rule 3...*"

It is therefore clear that the crux is not whether two separate judgments were given but the substance of what is being sought to be enforced. In my view in this case it is the civil claim for damages which resulted in the repayment order and which is separate from the criminal case. My conclusion is supported by the position under Thai law as set out in the evidence of Mr Subsaeng at paragraph 19 of his report that the order for civil restitution is separate from the criminal part of the judgment.

88. In my view the fact that in *Raulin* the plaintiff intervened directly was not determinative of the outcome.

89. As referred to above, Mr Subsaeng's evidence is that the complaint was made by the Public Prosecutor on behalf of the injured party (Subsaeng para 25 and 27):

> "*25. In the case of a criminal offence which also consists of a civil liability element, the victim (or the Public Prosecutor on behalf of the victim) can file a civil case in connection with criminal case to the court that will try the criminal case e.g. the Southern Bangkok Criminal Court to apply for restitution of the property or the value of the property from the offender or the Defendant or request reparation. The Plaintiff is not required to file a separate civil case to court with competence to try civil case. In addition, if the judgment in the civil case in connection with criminal case is final, the victim of crime is not entitled to file a new complaint against the defendant on the same legal basis.*
>
> *27. In filing a case against Mr Saxena in the case addressed above the Public Prosecutor applied, on behalf of the victim BBC for civil restitution of THB1,657,000,000 from Mr Saxena to BBC.*"

90. I also have regard to Mbasogo at [55] and [56]):

> "*55. Obviously, the mere fact that the claimants are the President and the Republic of Equatorial Guinea is not sufficient to make these claims non-justiciable. If the alleged coup had been successful and damage had been caused to buildings or other property owned by the claimants, a claim in tort to recover damages would have been justiciable in the courts of this country. In bringing such a claim, the claimants would not have been exercising or asserting sovereign authority or seeking relief to vindicate an act which may only be done by a sovereign in the capacity of sovereign. They would have been exercising the right of any person to bring private law proceedings to recover damages for loss suffered as a result of a civil wrong. Such a claim would have arisen solely from the fact that the claimants were owners of property that had been damaged by torts committed by the defendants. The claim would be a "patrimonial claim" (to use the language of Lord Keith in Government of India v Taylor [1955] AC 491 , 511).*
>
> *56. It is necessary to look at all the circumstances to see whether in substance the losses which are the subject of the claim have been suffered by virtue of an exercise of sovereign authority. If the losses have in truth been suffered as a result of the claimants' ownership of property, then the fact that the claimants are a foreign state and its president would not render their claims non-justiciable.*" [emphasis added]

Whether enforcement of the right would, either directly or indirectly, involve the execution of the penal law of another State/exercise of sovereignty?

91. In his closing oral submissions Mr Saxena submitted that the judgment in this case was a criminal judgment, that there was no civil cause of action submitted in the Complaint, that no civil process took place so none of the authorities apply.

92. In my view in this case the substance of the right sought to be enforced is a private law claim for pecuniary loss and not the exercise or assertion of sovereign authority involving the execution of the penal law of another State.

93. The OR is exercising the right on behalf of the victim to bring private law proceedings to recover damages for loss suffered as a result of a civil wrong. The OR brings the claim as receiver and manager of the BBC's property.

94. The claim arises from the fact the BBC was the victim of the tort committed by the defendants. It is not a suit in favour of the State whose law has been infringed. It is an order in favour of the BBC as the injured party. As stated above the fact that the State may ultimately and indirectly receive part of the proceeds of any recoveries does not alter the substance of the right nor does it amount to the exercise of a sovereign right.

95. This conclusion is supported by the Thai law evidence as to the analysis under Thai law as to which there was a civil law process resulting in a civil law judgment which is separate from the criminal part of the judgment.

Conclusion

96. For the reasons set out above the Claimant's case succeeds.

97. Judgment accordingly for the Claimant.