

JERSEY / JUDGMENT

AG v Arthur [2019] JRC 113 (18 June 2019)

[2019] JRC 113

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JUDGMENT

THE commissioner: 1. The central issue in this case is whether the saisie judiciaire granted by the Royal Court on 20 th May, 2015, over the realisable property of the defendant, Richard David Arthur ("Mr Arthur"), should be lifted as a consequence of the Attorney General's failure to seek a postponement of the confiscation proceedings before the lapse of six months from the date of Mr Arthur's conviction. 2. Mr Arthur was convicted of fraud offences on 25 th April, 2018. At the sentencing hearing on 2 nd July, 2018, compensation and confiscation proceedings were postponed by consent to a date to be fixed. 3. Under Article 3(4) of the Proceeds of Crime (Jersey) Law 1999 ("the Proceeds of Crime Law"), the Court is required to make a confiscation order before sentencing or otherwise dealing with a defendant in respect of the offences concerned, but it can postpone doing so under the provisions of Article 6 if it requires further information. No such postponement can exceed six months from the date of conviction, unless there are exceptional circumstances. The relevant parts of Article 6 are as follows:- 6. Postponed determinations (1) Where the Court is acting under Article 3 but considers that it requires further information before - (a) determining whether the defendant has benefited from any relevant criminal conduct; or (b) determining the amount to be recovered in the defendant's case by virtue of Article 3, It may, for the purposes of enabling that information to be obtained, postpone the making of the determination for such period as it may specify. (2) More than one postponement may be made under paragraph (1) in relation to the same case. (3) Unless it is satisfied that there are exceptional circumstances, the Court shall not specify a period that - (a) by itself; or (b) where there have been one or more previous postponements under paragraph (1)...., when taken together with the earlier specified period or periods, exceeds 6 months beginning with the date of conviction." 4. On 22 nd June, 2018, Mr Arthur's mother, Pamela June Arthur, obtained a judgment against Mr Arthur in the sum of £146,150.86p, being sums which she had lent him between December 2009 and 13 th May 2016. 5. On the same date, Mr Arthur's mother-in-law, Maureen Patricia Brunker obtained judgment against Mr Arthur in the sum of £472,495.80p, being sums she had loaned to him between 19 th April, 2011 and 31 st December, 2015. 6. Mrs Arthur and Mrs Brunker (who we will refer to together as "the representors") have been unable to enforce their judgments against the assets of Mr Arthur because they are the subject of the saisie judiciaire imposed by the Court. 7. The period of six months from the date of Mr Arthur's conviction expired on 25 th October, 2018, but no application has been made by the Attorney General for a further postponement. Accordingly, on 13 th March, 2019, the

representors brought a representation before the Court, seeking the lifting or variation of the *saisie judiciaire* to enable them to enforce their judgments. 8. Their representation came before Clyde-Smith, Commissioner, on 3rd April, 2019, when Crown Advocate Hopwood asked for it to be adjourned for a date-fix so that it could be heard at the same time as the Attorney General's application for a confiscation order which would take place at some unspecified time thereafter. The Commissioner declined to adjourn the application in that way, and ordered that a date should be fixed for the hearing of their representation, stating that the Attorney General would need to attend the same hearing, in order to make an application for a postponement, for which he would need to demonstrate exceptional circumstances. 9. Thus, both matters came before the Court on 20th May, 2019, when Crown Advocate Hopwood asked for a postponement of the application for a confiscation order to 1st Jul, 2019, when the Attorney General would be ready to proceed. That was the next available sentencing date before the Superior Number. Advocate Nicholls, on behalf of the representors, resisted that application, seeking either a variation of the *saisie judiciaire* so that they could enforce their judgments or its discharge altogether, on account of the Attorney General's failure to comply with the requirements of Article 6 of the Proceeds of Crime Law. 10. The Viscount is holding, pursuant to the *saisie judiciaire*, approximately £705,000 in cash, being the proceeds of sale of Mr Arthur's home, a collection of wine thought to be worth approximately £8,500 and a collection of works of art, thought to be worth approximately £8,500. 11. There are three victims of Mr Arthur's frauds, namely Faircliff Limited, defrauded of some £1.7 million, Library Place Investments Limited, which was defrauded of £69,000 and a local resident, who was defrauded of £90,000. Library Place Investments Limited has been repaid in full by Mr Arthur's co-accused (since acquitted), and Faircliff Limited has entered into a full and final mediated settlement with Mr Arthur in which it received £1.265 million. 12.

Notwithstanding the settlement with Faircliff Limited, Crown Advocate Hopwood informed the Court that the Attorney General intended seeking compensation orders under the provisions of Criminal Justice (Compensation Orders) (Jersey) Law 1994 for the losses suffered by Faircliff Limited over and above the full and final settlement it received, together with compensation for the local resident. These compensation orders, if granted, would absorb most of the assets held by the Viscount under the *saisie judiciaire* and it was likely, therefore, that the Attorney General would only seek a nominal confiscation order, thus enabling him to seek a variation should Mr Arthur come into receipt of further assets in the future, and this pursuant to Article 19 of the Proceeds of Crime Law. To the extent that compensation orders are not made then substantive confiscation orders would be sought in lieu. 13. Prior to the House of Lords decision in *R v Soneji*

[2005] UKHL 49, it might have been contended that the Court had no jurisdiction to postpone the confiscation proceedings because of the Attorney General's failure to comply with the arguably mandatory requirements of Article 6. The House of Lords found that the previous rigid mandatory and directory distinction had outlived its purpose. Instead, the emphasis ought to be on the consequences of non compliance and posing the question of whether the legislature could fairly be taken to have intended total invalidity. In that case, confiscation orders which had been made some two years after conviction were found to be valid, notwithstanding that no postponement had been ordered. It was held:- "H7.

Applying this test to the construction of s. 72A of the 1998 Act, it was not necessary that, given the criminal law context, a strict approach to the construction of the statute should be adopted. The House was not dealing with the definition of crimes, but with the process of making confiscation orders. The argument that a broad interpretation would render wholly ineffective the Parliamentary intent of providing for a specific time limit was not persuasive. Courts could, when necessary, vindicate the scheme adopted by Parliament by the abuse of process jurisdiction and perhaps in other ways. The alleged injustice to the offenders was overstated. The offenders had not been significantly prejudiced, and the injustice to them was decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process. An objective appraisal of the intent which must be imputed to Parliament pointed against total invalidity..... So far as the interpretation of 'exceptional circumstances' was concerned, such an expression must take its colour from the setting in which it appeared and did not require a very strict approach." 14. *R v Soneji* was followed in *Attorney General v De Silva*

[2008] JRC 033 , where the Court made a confiscation order, notwithstanding that six months had passed without a postponement being ordered, albeit only by a matter of days. Variation of *Saisie Judiciaire* 15. The representors sought a variation of the *saisie judiciaire*, so that sufficient sums could be released into the hands of the Viscount, to enable the representors to enforce their respective judgments. Leaving aside claims for interest and costs, that would leave approximately £86,000 cash, subject to the *saisie judiciaire* and to meet the compensation/confiscation orders. 16. Looking to English laws for guidance in terms of its equivalent legislation, in the case of *Re W* , The Times November th 1990, the Queen's bench Division declined to meet such a variation to permit the payment of a bona fide

judgment.

Whilst the judgment creditor was entitled as a "person affected" by the order within the meaning of section 77(7) of the Criminal Justice Act 1988 (the equivalent of Article 16(7) of the Proceeds of Crime Law), to bring the application, it was clear from section 82 of the 1988 Act (which has no direct equivalent in the Proceeds of Crime Law), that the purpose of a Restraint Order was to make available the value of realisable property to satisfy a confiscation order which had or might be made. 17. In *Re X*

[2005] QB 133 , the Queen's Bench took a more flexible view, holding that such a third party creditor could be paid, notwithstanding that such payment might result in less funds being available to satisfy a confiscation order. Everything would depend on the facts and the Court had a discretion. On the facts of that case the creditor's application was dismissed. 18. The cases decided under the Proceeds of Crime Act 2002 are of no assistance, in that a creditor can only take priority if it has a proprietary claim over the property (see *SFO V Lexi*

- [2008] EWCA Crim 1443). 19. Care needs to be taken when having regard to English decisions in respect of Restraint Orders, which Sir Philip Bailhache, then Bailiff, noted in *Re O'Brien*
- [2003] JLR 1 at paragraph 12 are analogous to the Mareva jurisdiction, the purpose being to strike a balance before trial between preserving a defendant's assets to satisfy a possible confiscation order, if he were convicted, and meeting his reasonable requirements meanwhile. Under a *saisie judiciaire*, in contrast, all of the realisable property of the defendant vests in the Viscount (Article 16(4)). Quoting from paragraph 15
- 18 of the judgment:- "15 The court therefore has a discretion as to whether to vary the *saisie judiciaire*. The legislature has made no expression, as is the case in England, for the payment of legal fees or for living expenses from property subject to a *saisie judiciaire*. The primary purpose of the legislation as expressed in the long title is to make provision for the recovery of the proceeds of drug trafficking. Until the Drug Trafficking Offences Law was passed, no statutory provision had been made for the confiscation of the proceeds of crime. A defendant would be punished for his crime whether by imprisonment or otherwise but would then be free, having served his sentence, to enjoy his ill-gotten gains. It was that injustice that the Drug Trafficking Offences Law was designed to remedy, at least in relation to the proceeds of drug trafficking. For my part, I am not persuaded that, in this jurisdiction, the analogy with a Mareva injunction is necessarily apt. A Mareva is granted in civil proceedings, essentially to preserve the status quo pending adjudication of a dispute between two or more parties. A *saisie judiciaire* is granted because the court has been persuaded by the Attorney General that there is reasonable cause to believe that a defendant has benefited from drug trafficking. The order is made against the background of alleged serious criminality, which does not necessarily exist in relation to a Mareva. The *saisie judiciaire* is a provisional order but, unlike the restraint order made under equivalent English legislation, vests the realisable property of the defendant in the Viscount. Some might think that this is a draconian process. It is certainly a strong thing to divest a defendant of all his property in the jurisdiction on an *ex parte* application in private. It seems to me that the legislature has justified this extreme measure on two bases. First, the *saisie judiciaire* may only be obtained by the Attorney General. The Attorney General is the principal law officer of the Crown, and one is entitled to expect that an application will only be made after the matter has been examined with great care. One is also entitled to expect that the matter will be kept under continuous review, so as to ensure that no injustice is being perpetrated. One is entitled to expect all this because the Attorney General is no ordinary applicant for injunctive relief but is, for these purposes, a Minister of Justice. Secondly, the Drug Trafficking Offences Law provides that the *saisie judiciaire* may, at any time, be discharged or varied in relation to any property on the application of the defendant or any other interested party. If there is an analogy to be drawn with any other judicial process, it seems to me that the proper analogy is with a declaration en *désastre* where, on the making of the declaration, all the bankrupt's property also vests in the Viscount, in this instance, for the benefit of the creditors. Here, too, the application is made *ex parte* but the debtor has the right to apply to the court to set the declaration aside." *O'Brien* was concerned

with an application for the payment of legal fees out of property subject to a *saisie judiciaire* in the context of the Drug Trafficking Offences (Jersey) Law as amended. 20. We decline to vary the *saisie judiciaire* in this case for the following reasons:- (i) It would frustrate the making of confiscation orders under Part 2 of the Proceeds of Crime Law and there was a strong public interest in confiscation orders being made. (ii) It would be inequitable to give priority to these two judgment creditors over the claims of the victims of Mr Arthur's crimes. Discharge of *saisie judiciaire* 21. The representors have a much stronger argument for the lifting of the *saisie judiciaire* altogether on account of the failure of the Attorney General to seek postponement beyond the first six months from conviction and because there were arguably no exceptional circumstances today justifying a further postponement to 10 th July, 2019. 22. Crown Advocate Hopwood submitted that more time is needed by the Attorney General to resolve the issues over a Mr Carlston and to assess the position of Faircliff Limited, as a potential recipient of a confiscation order. There were exceptional circumstances, he said, justifying a postponement for the following reasons:- (i) This case has involved more documents than any prosecution in Jersey before or since, and has led to a disclosure exercise of an unprecedented scale. (ii) It has involved so many persons with losses arising from such involved conduct that there have been, so far, no less than thirteen separate reported judgments involving Mr Arthur, most of which, we would interpose to note, pre-date his conviction. (iii) That complexity affected all of the work subsequent to the conviction on 25 th April, 2018, including the trial of his co-accused, the sentencing and his appeal against sentence. (iv) It should be recalled that, principally because of the volume and complexity of the evidence in this case, caused in turn by the duration of Mr Arthur's dishonest conduct, longer than eight years were required to proceed from initial complaint to conviction. It would be surprising if preparation for compensation and confiscation were expected to take less than six months or indeed any period resembling that of an ordinary criminal case. (v) He submitted that this is precisely the kind of case that the " exceptional circumstances" wording was introduced to protect. (vi) There have been complicated financial transactions involving Mr Carlston, in particular over his property. Little of this was directly relevant to the issues at trial and therefore did not form a primary part of the preparation for trial, and much of the collation of evidence and analysis of the payments between Mr Carlston and Mr Arthur and third parties and negotiations with Mr Carlston had taken place post-conviction, in preparation for the adjourned financial sentencing orders. (vii) There were numerous other tasks that had to be undertaken since conviction, which he said were demonstrated by a chronology filed with the Court. 23. Crown Advocate Hopwood submitted that the circumstances of this case were far more exceptional than either those of Soneji or De Silva , and he referred the Court to Mohammed Akhtar Tahir v The Queen

[2006] EWCA Crim 792 , where defence counsel submitted that a finding of exceptional circumstances could not be justified in circumstances where the prosecuting authorities had been investigating the case since at least 1997 or early 1998, there had been a very lengthy trial, and the relevant postponement would mean confiscation proceedings taking place some 3-4 years after the offence and about a year after conviction. The Court held at

paragraph 57:- "In our judgment there is no substance in those submissions. The statutory provision as to 'exceptional circumstances' should not be construed very strictly (see Soneji , paras 26 and 33). Nor should the judge's ruling be interpreted too strictly: although he picked out one particular factor, he was in our view looking at the circumstances of the case as a whole in reaching his decision that exceptional circumstances existed. Having regard to the nature and complexity of the case, it was open to him to reach the conclusion he did.." 24. Advocate Nicholls argued that none of the reasons put forward by Crown Advocate Hopwood constituted exceptional circumstances and the Attorney General had given no explanation for his failure to apply for a postponement, nor apologised for his failure to do so. The application should, he said, be supported by an affidavit from or on behalf of the Attorney General, explaining what had been done to date, and what further information was required that justified a further postponement now. The prejudice to the representors was plain and obvious, and in so far as other creditors were concerned, he said it was up to them to take action to protect their interests. 25. Advocate Mière, for Mr Arthur, agreed that none of the reasons put forward by Crown Advocate Hopwood amounted to exceptional circumstances, and that there should have been an affidavit in support of the application. There are good reasons, he said, for the legislature to lay down the timeframe, and it was not the role of the Court to bend to the Attorney General's needs, or to endorse this kind of inaction. 26. Advocate Mière took the Court through the chronology, which he said simply recited history and had "the padding of a timesheet" . Nothing had changed in the assets of Mr Arthur and the Attorney General had had the necessary information for some three to four years. There was an arrogant assumption, he said, on the part of the Attorney General, that he could come back to the Court whenever he was ready to proceed, and any errors in compliance with the provisions of Article 6 would be remedied by the Court. Perhaps not surprisingly, Mr Arthur had no objection to the saisie judiciaire being discharged (or varied) to allow the judgment debts of the representors to be paid. Decision 27. As R v Soneji states at paragraph 9, the provision for postponement has been introduced to avoid undesirable delays in sentencing and, in our assessment, this delay has not unduly prejudiced Mr Arthur. The lifting of the saisie judiciaire would enable debts to his family being discharged, a benefit to him both legally and morally, and it would frustrate, to a large extent, the possible making of confiscation

orders.

As in R v Soneji , injustice to Mr Arthur is decisively outweighed by the countervailing public interest in not allowing him to escape confiscation. 28. As to the interests of the representors, the continuation of the saisie judiciaire is prejudicial to their interests, but again, their interests are, in our view, outweighed by the countervailing public interest in not allowing Mr Arthur to escape confiscation; nor is it equitable that they should be given priority over the interests of the victims of Mr Arthur's fraud. 29. The authorities are clear that the interpretation of "exceptional circumstances" does not require a strict approach, and we accept that more time is needed by the

Attorney General to resolve the issues over Mr Carlston and to assess the position of Faircliff Limited, as a potential recipient of a confiscation order. 30. We are persuaded that there are exceptional circumstances justifying a relatively short further delay until 10 th July, 2019, and that the position has not been reached when the continuation of the confiscation proceedings can be described as an abuse of process. 31. We do not accept that there is a requirement for affidavit evidence to be provided by or on behalf of the Attorney General when applying for a postponement, but we do think there is something in the criticism that the Attorney General may too readily expect the Court to excuse any failure on his part to comply with Article 6. 32. The interests of the representors are being prejudiced by the continuation of the saisie judiciaire , but in our view the public interest in not allowing Mr Arthur to escape confiscation prevails, and we will, therefore, order a further postponement of the confiscation order until 10 th July, 2019. The representation of the representors will also be adjourned to that date. Authorities Proceeds of Crime (Jersey) Law 1999. Criminal Justice (Compensation Orders) (Jersey) Law 1994 R v Soneji

[2005] UKHL 49 Attorney General v De Silva

[2008] JRC 033 Re W, The Times November 15th 1990 Criminal Justice Act 1988 Re X

[2005] QB 133 SFO V Lexi

[2008] EWCA Crim 1443 Re O'Brien

[2003] JLR 1 Drug Trafficking Offences (Jersey) Law 1988 Mohammed Akhtar Tahir v The Queen

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