

JERSEY / JUDGMENT

AG -v- Ljungman [2013]

JRC 131A (26 June 2013)

[2013] JRC 131A

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judgment

the commissioner: 1. On 31 st May, 2013, the Court granted the Attorney General's application to register an external confiscation order in respect of the realisable property of the respondent ("Mr Ljungman"). The application was opposed by Mr Ljungman, who is currently serving a term of imprisonment imposed upon him by the District Court of Lyngby in Denmark and who attended the hearing via video link. 2. The application was made pursuant to Article 39 of the Proceeds of Crime (Jersey) Law 1999 as amended and applied by the Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations, 2008 ("the modified 1999 Law").

Background

3. On 12 th June, 2009, Mr Stein Bagger ("Mr Bagger"), a Danish national, was convicted of fraud and forgery of documents committed whilst he was the Managing Director of a Danish software company IT Factory A/S. The fraud was perpetrated against a number of Danish and foreign financial institutions. Mr Bagger was sentenced to 7 years' imprisonment. 4. Mr Ljungman was charged with aiding and abetting a number of the fraud offences committed by Mr Bagger and on 26 th March, 2010, he was convicted by the District Court of Lyngby ("the District Court") on nine counts of fraud of a particularly aggravated nature, contrary to section 286(2), cf. section 279 of the Danish Criminal Code . Mr Ljungman was sentenced to 6 years' imprisonment and the Court ordered the confiscation of DKK 50,000,000 (corresponding to approximately £6,000,000) from Mr Ljungman and his company Dragon Phoenix (China) Ltd. 5. Following an appeal by Mr Ljungman against the sentence and the confiscation order the 13th Division of the Eastern Danish High Court ("the High Court") delivered a final judgment on 17 th November, 2010, in which Mr Ljungman's sentence of imprisonment was increased to 7 years and the confiscation order was upheld. 6. The confiscation order remains unsatisfied in the full amount of DKK50,000,000. No interest is accruing on the principal sum. 7. On 11 th November, 2010, the Attorney General received a request for assistance dated 29 th October, 2010, from the State Prosecutor for Serious Economic Crime, Copenhagen (issued via the Ministry of Justice, Copenhagen) seeking a saisie judiciaire in respect of the realisable property of Mr Ljungman situate in Jersey (comprising accounts held by Ljungman at HSBC Bank International Limited ("HSBC")). 8.

Accordingly, on 8 th February, 2011, an application to the Court was made by the Attorney General for a saisie judiciaire in respect of the realisable property of Mr Ljungman in the Island which was granted on 9 th February, 2011. 9. In accordance with the Court's order the Viscount notified Mr Ljungman and HSBC and took possession of the sums of US\$ 117,503.06, £24,199.58 and €24.34, being the sums held in the accounts. The law 10. Article 39 of the modified 1999 Law gives the Court a discretion whether or not to register an external confiscation order, but three tests have to be met:- "39 Registration of external confiscation orders (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." 11. Advocate Harrison, for Mr Ljungman, accepted that the first two tests were met. The order was in force and was not the subject of an appeal and Mr Ljungman did appear in the proceedings. The issue was whether the third test had been met, namely whether the Court was of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice. 12. Mr Ljungman argued that it was not in the interests of justice for the order to be registered on the basis that:- (i) Insofar as the confiscation order was concerned, he did not receive a fair trial; (ii) There were errors in the calculation of his proceeds of crime which were obvious on the face of the judgments produced by the Danish courts; (iii) There were, in fact, no proceeds of crime; (iv) In any event, according to the Danish authorities, they may already have seized an amount greater than the amount calculated to have been his proceeds of crime. 13. Advocate Belhomme submitted that as this was the Attorney General's application, the starting point was that the burden of proof under Article 39 lay with him. However, he maintained that because Mr Ljungman was challenging the registration of the order under the third test, a cross burden arose under which it was for him to show why it would not be in the interests of justice for the order to be enforced in the Island. 14. There was no authority to support that proposition. Mr Ljungman having been served with notice of the Attorney General's application and was entitled to argue that the third test had not been met. We were not clear why the exercise of that right shifted the burden of proof upon him. 15. Advocate Belhomme's alternative submission was that as these were public law proceedings, the Court should not approach the matter by applying conventional notions of burdens of proof. He referred us to In the matter of the representation of Kaplan

[2009] JLR 88 . That case was concerned with an application to discharge a saisie judiciaire under Article 16(6) of the modified 1999 Law. It was held, quoting from the headnote:- "(1) On an application seeking an exercise of the court's discretion in public law proceedings of this kind, it was inappropriate to consider whether the burden of proving that the saisie judiciaire should be discharged or maintained fell on the representor or the Attorney General. The court should instead consider whether, having regard to the policy objects of

the Proceeds of Crime (Jersey) Law 1999, i.e. to deprive criminals of the proceeds of criminal conduct, it was fair, reasonable and proportionate to maintain the order in force. All relevant considerations should be weighed in the balance." Advocate Belhomme invited the Court to adopt the same approach by analogy with the position in relation to an application to discharge a *saisie judiciaire*. 16. Advocate Harrison did not accept that the burden of proof under this third test had shifted to his client; in his view, the burden lay with the Attorney General, whose application it was. 17. We prefer the approach of the Court in *Kaplan*. The language used in the first two tests of Article 39 is consistent with there being a burden of proof on the Attorney General; it is for him to satisfy the Court that the order is still in force and not subject to appeal and that the person appeared in the proceedings or received proper notice of them. 18. The language used in the third test is different. The Court may register an order if "it is of the opinion" that it would not be contrary to the interests of justice. That language is not consistent with any party having a burden of proof but with the Court coming to its own opinion, having weighed all relevant considerations in the balance. That was the approach we adopted. 19. It was not in dispute that although confiscation proceedings form part of the criminal sentencing process, the standard of proof in relation to these enforcement proceedings is that applicable to civil proceedings, namely a balance of probabilities. (See *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* at paragraph xii.028). 20. The third test requires the Court to determine whether enforcing the order would not be contrary to the interests of justice, wording which employs the use of a double negative. Advocate Belhomme submitted, and Advocate Harrison agreed, that this results in a lower test than if the registration had required the Court to be of the opinion that enforcement is in the interests of justice. 21. Part of Advocate Belhomme's submission was concerned with the possibility that Mr Ljungman was seeking to re-litigate the matters decided by the Danish courts. As it transpired, Advocate Harrison made it clear that Mr Ljungman was not seeking to do so. The position in this respect was made clear by Bailhache, Deputy Bailiff in the case of *In the matter of Johnson*.

[2010] JRC 206A at paragraph 13:- "13. The requirement in Article 39(1)(c) to form a view as to whether enforcing the order in Jersey would be contrary to the interests of justice should not in our judgment generally lead to re-litigating the matters which have been decided by the Court in which the external confiscation order was made. It is clear that that Court was seized of the issues which led to the making of the order, and it is before that Court that all the evidence would have been produced. It would, other than in exceptional circumstances, be inappropriate to anticipate the same evidence having to be produced again in the Royal Court. The rationale of these provisions is to enable the Courts of one jurisdiction to give assistance to the Courts of the original jurisdiction in order to prevent criminals benefiting from the worldwide financial system and being able to hide their proceeds of crime for their benefit. One cannot of course anticipate all factual circumstances which might arise in any hypothetical case, and it therefore would be unhelpful to go further than saying that in our view the risks of re-litigation seem to us to

be small. Article 39(1)(c) requires the Court to consider the interests of justice and the starting point to argument to the contrary would be that justice had been done at the time the external confiscation order was made in the court exercising that jurisdiction." Mr Ljungman's contentions Fair trial 22. Mr Ljungman contended that he did not receive a fair trial in Denmark insofar as the confiscation order was concerned. His complaint was that the lawyer who represented him both before the District Court and the High Court was incompetent when it came to numbers. Quoting from his affidavit:- "11. My lawyer had a serious lack of understanding of bookkeeping, balance sheets and valuation of goods and services, all necessary and important facts to understand in order to build a proper defence and to evaluate and calculate the confiscation order. He was not a trial lawyer for civil cases and in my opinion has not even the basic economic and accounting skills. 12. Moreover, because of his lack of knowledge I could not discuss with him any of the facts and figures from the different summing ups made by the prosecutor and the liquidator other than to provide him with facts and figures on sheets. He did not fully understand these sheets and therefore could not evaluate them properly. 13. The sheets were provided to the court. I tried to explain the relevance to the Court so far as the criminal case, the civil case and the confiscation order were concerned. However, the judge said that every oral representation had to go through my lawyer. As he did not understand them I was prohibited from defending myself properly." Error in the calculation of proceeds of crime 23. Mr Ljungman referred us to a calculation of the proceeds of crime by which he had benefitted put forward by the prosecution in the District Court, which starts with the loss claimed by the trustee (in bankruptcy) of the IT Factory A/S of DKK 232,000,000, and which after a number of deductions resulted in a confiscation figure of DKK 50,000,000 as against Mr Ljungman. However, he says that the District Court only allowed the trustee's claim in the lower sum of DKK 200,000,000, which, together with certain other errors in the deductions as set out in his affidavit and following the same calculation, would have reduced the confiscation amount to DKK 22,000,000. Furthermore, he says, there was evidence before the High Court supporting his argument that he did not gain as much as DKK 50,000,000. There were no documents to show with certainty where such large amounts ended up. To register a confiscation order that contained such flagrant calculation errors and blatant mistakes would, he said, be contrary to the interests of justice. No proceeds of crime 24. In his affidavit Mr Ljungman sets out detailed arguments to show that the assets held in the accounts in Jersey did not represent the proceeds of crime, but had been acquired in a lawful way. For reasons set out below there is no need for us to set out those arguments in this judgment. Greater assets already seized 25. Mr Ljungman contended that the Danish authorities may have already seized assets greater than the total proceeds of crime. This contention appears to be based upon comments in the media (which were not shown to us) that the Danish authorities had confiscated the main part of the DKK 220,000,000 from accounts held by Mr Ljungman in the USA, which would be shortly transferred to Denmark. If this statement was true, he said, then the Danish authorities had already seized more than the confiscation order allows. Decision 26. As submitted by Advocate Belhomme, there was no

merit in any of these contentions. 27. In terms of a fair trial, Mr Ljungman had the same lawyer before both the District Court and the High Court and in his cross-examination before us, he accepted that at no stage did he seek to dismiss him. He told us that his main complaint related to the proceedings before the High Court, but there is nothing in the judgment of either the District Court or the High Court that would enable us to conclude that Mr Ljungman's lawyer was incompetent when it came to figures. If there was a complaint over the competence of his lawyer, then that was a matter for Mr Ljungman to pursue before the Danish Courts. An application by Mr Ljungman to the Appeals Commission Board for leave to appeal part of the judgment of the High Court (not that part in relation to the confiscation order) had been dismissed. 28. Under the section of the judgment of the District Court headed "Confiscation" it does set out the prosecution's calculations in the manner described above and it then records that Mr Ljungman had provided statements and supplementary statements "on an ongoing basis". When it comes to its reasons the District Court does not explain how it arrived at the figure of DKK 50,000,000 but it clearly determined that he had benefited to the extent of DKK 50,000,000 and we can see no error on the face of the judgment of the District Court. The fact that the District Court ordered Mr Ljungman to pay IT Factory A/S the sum of DKK 200,000,000 (less than the loss claimed by the trustee) would not prevent the District Court from deciding that he had still benefitted by the sum of DKK 50,000,000. 29. As for the High Court, its judgement records that Mr Ljungman filed new documentary evidence and gave evidence himself (along with other witnesses). The judgment sets out at length the arguments put forward on Mr Ljungman's behalf, all of which appear to be addressed to the issue of his guilt and not to the alleged errors of the kind he is drawing to our attention. The High Court gives reasons for upholding the finding of guilt but when it comes to the confiscation, it simply affirms the ruling of the District Court. Again, we can see nothing on the face of the judgment of the High Court showing that there had been an error in the calculation of the proceeds of crime. 30. Turning to the assertion that the funds held in the accounts in Jersey did not represent the proceeds of crime, the Court received an affidavit and heard evidence from Michael Ejlerskov, senior prosecutor with the State Prosecutor for Serious Economic and International Crime in Denmark. He stated that on the basis of the cash-flows that had been investigated, the accounts in Jersey may fully or partly be the proceeds of crime, but in any event, as Advocate Belhomme says, it is an elementary error of law to contend that funds available for confiscation must be directly linked to the proceeds of crime. Quoting from the judgment of Birt, Bailiff, in the case of AG v Smale

[2003] JRC 099A , at paragraph 5:- "5. We have to say that that sentence and the Attorney General's statement generally discloses elementary error. The whole regime of confiscation orders under the 1988 Law does not depend on establishing any link between specific assets and the proceeds of drug trafficking. Under that regime the Court is not concerned with whether a particular asset was bought with drug trafficking proceeds or with entirely clean money. The Court is concerned only with establishing two things: on

the one hand what is the benefit which the defendant has received from drug trafficking; and on the other, what are his realisable assets. 6. The Court then makes a confiscation order in the amount of the benefit from drug trafficking. There is no requirement for any direct connection between the two." 31. As to the final contention that, based on unseen media reports, the Danish authorities had already seized sums in excess of the confiscation order, Mr Ejlerskov informed us that on the basis of an international request for legal assistance, the authorities in Hong Kong had confiscated deposits amounting to DKK 3,301,872.68, but the Danish confiscation order, although recognised by the authorities in Hong Kong, had not yet been enforced. Apart from the funds in Jersey and in Hong Kong, the Danish authorities had not found any additional assets belonging to Mr Ljungman. Attempts had been made to trace assets in the USA without success. 32. This was a somewhat curious argument for Mr Ljungman to run in that if had assets in the USA or elsewhere that had been seized by the Danish authorities, then he would know about it and could provide evidence of it; perhaps not surprisingly he did not do so. In any event, we had no reason to doubt the evidence of Mr Ejlerskov in this respect. 33. In conclusion, bearing in mind the rationale of these provisions is to enable the courts of one jurisdiction to give assistance to the courts of the original jurisdiction in order to prevent criminals benefiting from the worldwide financial system and being able to hide their proceeds of crime for their benefit, we were of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice and accordingly, we ordered its registration and gave certain ancillary directions to the Viscount. Authorities Proceeds of Crime (Jersey) Law 1999. Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations, 2008. Section 286(2), cf. section 279 of the Danish Criminal Code. In the matter of the representation of Kaplan

[2009] JLR 88 . Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime. In the matter of Johnson

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