

JERSEY / JUDGMENT

AG -v- Tantular [2014] JRC 251 (17 December 2014)

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judgment

the bailiff: 1. On 3 rd September, 2014, in circumstances which I shall describe shortly, I granted a saisie judiciaire ("saisie") ex parte in respect of the realisable property in Jersey of the sixth respondent ("Mr Tantular ") including in particular all the assets of the Jasmine Investment Trust ("the Trust") and its underlying companies of which the first respondent is the trustee ("the trustee"). The saisie was granted pursuant to Article 16(1) of the Proceeds of Crime (Jersey) Law as modified and included in the schedule to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 ("the modified Law"). It was specifically granted as an interim order until close of business on 17 th September or until further order. 2. On 17 th September, I heard argument from Crown Advocate Belhomme and from Advocate Hanson on behalf of the second to fifth respondents ("the beneficiaries") with the trustee taking a neutral position. At the conclusion of that hearing I reserved my decision and directed that the Attorney General and the beneficiaries should file written submissions dealing with certain points which had arisen during the hearing. That was subsequently done. I continued the saisie until further order in order to protect the position pending my decision, which is contained in this

judgment.

The factual background 3. The Trust is a discretionary trust governed by Jersey law. It was established by deed dated 17 th June, 2004, between Mr Tantular and the original trustee. The trustee is the present trustee of the Trust. The beneficiaries are Mr Tantular , his wife (the second respondent), his three children (the third to fifth respondents) and his wife's younger sister (the seventh respondent). 4. Mr Tantular was the president director of two companies which owned shares in an Indonesian Bank called PT Bank Century Tbk ("Bank Century"). In September 2009 he was convicted before the Central Jakarta District Court ("the District Court") of certain banking offences in relation to Bank Century and, following various appeals, was sentenced to 9 years' imprisonment. 5. There have been other criminal proceedings in Indonesia in relation to Bank Century, in particular some proceedings which, in common with the parties, we shall refer as the "399 proceedings". These were criminal proceedings brought against a Mr Rizfei and a Mr Al Warraq alleging corruption and money laundering. They were convicted by the District Court on 16 th December, 2010. The District Court ordered the confiscation of the assets of the Trust

even though Mr Tantular was not a defendant in those proceedings and therefore had no right of appeal. Nevertheless he filed an objection to the judgment on 11 th February, 2011, but his objection was denied on 26 th April, 2011, and the Supreme Court subsequently denied his request for cassation. 6. Mr Tantular has faced other criminal proceedings in Indonesia. In proceedings known as the '1631 proceedings', he was charged with fraud and money laundering offences in relation to his position as president of Bank Century. On 4 th February, 2010, in connection with those proceedings, the District Court issued a restraint order in respect of the assets of the Trust. The Ministry of Law and Human Rights of Indonesia in due course sought the assistance of the Attorney General to obtain a *saisie judiciaire* in Jersey. This was granted *ex parte* by me on 9 th August, 2013, ("the first *saisie* "). The first *saisie* was in normal form in that it was granted in respect of the realisable property of Mr Tantular situated in Jersey, but it was also expressed specifically to extend to the assets of the Trust. The application was brought at that stage on the basis that there were reasonable grounds for believing that an external confiscation order would be made in the 1631 proceedings. 7. When applying for the first *saisie* , the Attorney General asserted that the assets of the Trust were realisable property (as defined in Article 2 of the modified Law) on two grounds:- (i) As Mr Tantular was a beneficiary of the Trust, he was therefore 'beneficially entitled' to the assets of the Trust so that all the assets were realisable property. (ii) Alternatively, he contended that Mr Tantular had made certain gifts to the Trust after the date of the commencement of his alleged criminal conduct in the 1631 proceedings and the assets of the Trust were therefore realisable property to the extent of such gifts. 8. The beneficiaries challenged the first ground relied upon by the Attorney General and submitted that a beneficiary of a discretionary trust is not 'beneficially entitled' to the assets of the trust. On 10 th April, 2014, the Court announced that it had found in favour of the argument of the beneficiaries on this first ground and the reasons for that decision were given in a judgment dated 10 th June, 2014, *Tantular -v-AG*

[2014] JRC 128 ("the June judgment"). The Court gave directions for resolution of the issue as to which gifts to the Trust would be caught as realisable property having regard to the date of the criminal conduct which was the subject of the 1631 proceedings. Although there had been some inconsistency on the part of the Indonesian authorities as to the date of the commencement of the relevant criminal conduct, it was agreed by the date of the hearing that the relevant date was 1 st November, 2007. 9. In the meantime, the 1631 proceedings had been concluded on 16 th April, 2014, when the District Court found Mr Tantular guilty of fraud and money laundering offences and, according to the Indonesian authorities, made a confiscation order against him in respect of his assets, including specifically the assets of the Trust, as well as adding a year to his prison sentence. 10. The beneficiaries applied to discharge the first *saisie* on the grounds that the six transfers to the Trust (or companies owned by the Trust) made after 1 st November, 2007, were not in fact gifts but were either repayments of loans or were transfers by persons other than Mr Tantular . There was a subsidiary point raised by the beneficiaries to the effect that no confiscation order had been made in the 1631 proceedings and that accordingly, because they had been concluded, there were no longer any reasonable grounds for believing that an external

confiscation order would be made in the 1631 proceedings. 11. The Court sat on 21 st August, 2014, to hear these arguments. The Court announced its decision at the conclusion of the hearing on that day, which was to the effect that there was sufficient evidence of the making a confiscation order in the 1631 proceedings to justify the retention of the saisie and that only four of the six transfers which post-dated 1 st November, 2007, were gifts. All gifts before 1 st December, 2007, to the Trust were of course not realisable property. The Court therefore reduced the first saisie to cover only assets to the extent of US\$1.7m and authorised the Viscount to release any surplus provided he retained assets to that value. 12. This was a significant decision for the beneficiaries for the following reason. The Trust essentially has three categories of assets, all owned by companies which are in turn owned by the Trust. The first is a property in Singapore, the second is another property in Singapore which is and has been for many years the home of Mr Tantular's family i.e. the beneficiaries; and thirdly there are certain cash balances and insurance policies. The Court has on an earlier occasion agreed to a variation of the first saisie so as to permit the sale of the first property with the net proceeds of sale after discharge of the mortgage remaining subject to the saisie . The consequence of the decision of 21 st August by the Court was that those sale proceeds together with the insurance policies and other assets owned by the Trust (with possibly a modest contribution by the beneficiaries) exceeded US\$1.7m. This meant that the family home (or more correctly the company which owns the family home) could be released from the saisie as a consequence of the 21 st August decision. That had been very much the purpose of the various applications made by the beneficiaries as they have been keen to maintain the family home for their occupation. The second saisie 13. On 1 st September, 2014, the Attorney General caused to be delivered to the Bailiff's chambers an application dated 28 th August, 2014, (wrongly described as 2013 in the application) for a further saisie . This was based on a further set of criminal proceedings against Mr Tantular taking place in Indonesia ("the 210 proceedings") of which the Court had not previously been aware. 14. In the light of the fact that the Court had heard detailed argument in relation to the Trust as recently as 21 st August and that no mention had been made during that hearing of this further set of criminal proceedings, I declined to grant an ex parte saisie and directed that an early date be fixed for an inter partes hearing. It did not prove possible for this hearing to be until 17 th September and accordingly on 3 rd September I granted a saisie ex parte but on an interim basis only until close of business on 17 th September, 2014, or until further order. It was that application which came before me on 17 th September and upon which I now rule. The background to the application for the second saisie 15. The Court has received a second affirmation from Mr Cahyo Rahadian Muzhar , the director for International Law and Central Authority, Ministry of Law and Human Rights, Indonesia. In that affirmation, he has explained the circumstances in which the application for the second saisie came to be made. 16. The proceedings referred to as the 210 proceedings (the number being the relevant court reference) were commenced against Mr Tantular before the District Court on 18 th December, 2012, with the trial beginning on 5 th March, 2013. 17. Mr Muzhar states that he and his staff were not aware of the 210 proceedings until towards the end of December

2013. By that time the Indonesian authorities had of course obtained the first saisie on the strength of the 1631 proceedings and the beneficiaries had issued a summons seeking to challenge the first saisie . That challenge had been listed for hearing on 3rd January, 2014. He says that he was aware that the challenge was based on the argument that Mr Tantular's interest as a beneficiary of the Trust was insufficient to maintain a saisie over all of the assets of the Trust and that the question of gifts into the Trust would therefore possibly become relevant. He and other Indonesian officials travelled to Jersey to be present at that hearing. He says that it became clear to him at that stage that the date range of the criminal conduct relevant to the 1631 proceedings was very important. It also became clear to him that the first saisie was likely to be restricted to tainted gifts made to the Trust after the beginning of the criminal conduct alleged in the 1631 proceedings. 18. A decision was therefore taken to meet with the prosecutors in the 210 proceedings to find out more about that case, with a view to seeing whether that case could potentially be used to assist the process of restraining assets in Jersey. He was aware that on 10th April, the Court had announced its decision that Mr Tantular's interest as a beneficiary was insufficient to allow a saisie to be retained over all the Trust assets and that accordingly the Indonesian authorities would have to rely upon assets gifted to the Trust by Mr Tantular . It was subsequently decided that, because of the more extended date range of criminality in the 210 proceedings (as compared with the 1631 proceedings), the 210 proceedings could potentially be of assistance in relation to the proceedings in Jersey. 19. It has to be said, however, that nothing seems to have been done in relation to that matter. Mr Muzhar , accompanied by other Indonesian officials, came to Jersey on the afternoon of Wednesday 20th August, 2014, i.e. the day before the hearing of 21st August. They met that afternoon with Crown Advocate Belhomme and at that meeting disclosed to him for the first time the existence of the 210 proceedings. A discussion took place as to whether an adjournment of the following day's hearing should be applied for in order to give the Indonesian authorities more time to decide whether to issue a supplementary request for assistance to the Jersey authorities. However, given the time constraints, the need to obtain further information about the 210 proceedings, the absence of a supplementary request and the need for permission to be obtained from the Minister of Law and Human Rights and the Attorney General of Indonesia before a request could be issued, it was decided to press ahead on the basis of the 1631 proceedings. 20. Immediately following the conclusion of the hearing on 21st August, (at which time it was appreciated that, because of the Court's decision, the saisie would not now cover all of the assets of the Trust) there was a further discussion about the nature of the 210 proceedings. In particular it was necessary to find out (by getting a copy of the charges) what the date range of criminality relevant to those proceedings was. It has to be said that it is somewhat surprising that this had not been done earlier. 21. This clarification seems to have been obtained overnight and there was also a telephone discussion with the Indonesian Attorney General during the early hours of Friday 22nd August during which he indicated his consent to the making of a supplementary request. That supplementary request was signed the same day by one of the senior Indonesian officials who was in Jersey and is dated 22nd August. It

describes briefly the nature of the 210 proceedings, namely that Mr Tantular is charged with embezzlement and fraud in connection with certain matters, that the trial began on 5th March, 2013, and that it was expected to take a further eight weeks. It went on to state that, if Mr Tantular were to be convicted, any judgment would include a confiscation order against his assets including those of the Trust. It was stated that the period of offending in the 210 proceedings was from 2003 to November 2008. 22. It was in those circumstances that, as described in paragraph 13 above, the Attorney General applied for the second saisie on 1st September. He submitted in his application that the requirements of the modified Law were met in that there were proceedings against Mr Tantular in Indonesia for offences of fraud and embezzlement, that the proceedings had not been concluded and that there were reasonable grounds for believing that an external confiscation order would be made in those proceedings. It was asserted that Mr Tantular had gifted property into the Trust after 1st January, 2003, and that such gifts were therefore realisable property for the purposes of a saisie. The contentions of the beneficiaries 23. Advocate Hanson does not dispute that, subject to possible argument about the date of commencement of the criminal conduct relied on in the 210 proceedings, the criteria for granting a saisie as described in the preceding paragraph would appear on the face of it to be met in the present case. 24. However, he submits that the circumstances in which this application was brought amount to an abuse of process and that accordingly the Court should not grant (or more accurately, continue) the second saisie. The rival contentions 25. Advocate Hanson submits that these are civil proceedings. There is no crime or sentencing for a crime in Jersey. The Court is merely assisting a freezing action in support of a confiscation order expected to be made by a foreign court following a crime committed in that court's jurisdiction. 26. If these are civil proceedings, then, he contends, the principle of Henderson estoppel (derived from *Henderson v Henderson*

(1843) 3 Hare 100 which was summarised by Wigram V-C at 114 - 115 as follows) applies:- "... I believe I state the rule ... correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Applying that principle, he submits that it was not open to the Indonesian authorities now to rely on the 210 proceedings when they had chosen so far to rely only on the 1631 proceedings. They had known (or ought to have known) about the 210 proceedings for a considerable period and it would be contrary to the above principle to allow them to introduce this wholly new

point at this stage. 27. Even if the proceedings are not classified as civil - so that the Henderson principle does not strictly apply - the Court has an inherent jurisdiction to prevent abuse of its process on broad grounds. In this connection, Advocate Hanson referred to the observation of Lord Devlin in *Connelly v DPP*

[1964] ACC 1254 at 1347:- "My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power, (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that 'are founded on the same facts, or form or are part of a series of offences of the same or similar character' ...; and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first. ... I propose to put under three heads the reasoning which, in my opinion, supports this conclusion. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law, and I shall illustrate this with special references to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained there would be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law." 28. By analogy, submitted Advocate Hanson, there was an abuse of process in this case. The Indonesian authorities had allowed the matter to proceed purely on the basis of the 1631 proceedings. When the result went against them on 21 st August, they suddenly sought to rely on the 210 proceedings. This was akin to the conduct, envisaged by Lord Devlin, of prosecutors bringing a second indictment on very similar material having failed on the first indictment. 29. Whether the proceedings were classified as civil or criminal, Advocate Hanson also relied on a broader head of abuse of process, in particular that related to delay. He referred to the case of *R (on the application of Flaherty) v City of Westminster Magistrate's Court* [2008] EWHC 2589 (Admin) where the High Court held that a delay of over two years (immediately following another delay of some seven years which had not been the fault of the prosecution) in enforcing a confiscation order was oppressive and constituted an abuse of process. This was despite the fact that the defendant had a continuing liability to satisfy the confiscation order and the passage of time had not prejudiced him. 30. Advocate Hanson submitted that there had been considerable delay in this case. The 210 proceedings had been in existence since March 2013. Furthermore the Jersey proceedings in relation to the first saisie had been in existence in Jersey since August 2013. There had therefore been unreasonable and unacceptable delay in the Attorney General now seeking to rely on the 210 proceedings. 31. He further submitted that, under whichever head the question of abuse was considered, there had been considerable prejudice to the beneficiaries. The criminal conduct relied upon in the 1631 proceedings commenced after 1 st November, 2007, with the result that only gifts to the Trust after that date were caught as realisable property and were therefore subject to

being restrained by a *saisie*. The beneficiaries had therefore spent considerable sums (£150,000 in Jersey alone) in litigating with a view to saving their family home. They had succeeded in that objective following the Court's decision of 21 st August, 2014. However, the Indonesian authorities then immediately sought to move the goal posts so as to try and catch earlier gifts to the Trust. If this approach had been adopted from the outset, much of the litigation would not have been necessary. The beneficiaries would not have incurred unnecessary expenditure and they would not have suffered the stress of believing, for the whole of the period since August 2013, that they might be able to save their home. Finally, Advocate Hanson sought to rely on a failure by the Attorney General to make full and frank disclosure, having obtained the first *saisie ex parte* and having never disclosed until after 21 st August, 2014, that there was a possibility of a new application being launched based upon the 210 proceedings. 32. In summary, Advocate Hanson submitted that, whichever way the matter was classified, this was a clear case of an abuse of process and the Court should prevent such abuse by declining to grant the *saisie*. 33. Crown Advocate Belhomme, for the Attorney General on behalf of the Indonesian authorities, accepted that the Court has an inherent jurisdiction to prevent abuse of its process. However, he did not accept that the Henderson principle was applicable because the present proceedings were not civil. They were a form of hybrid proceedings because, although the civil standard of proof was applied, confiscation proceedings formed part of the criminal sentencing process. He referred to an observation of the Court in *Re Johnson*

[2010] JRC 206A where the Court said in passing at paragraph 11:- "... furthermore, it is well established that confiscation orders are part of the criminal process." This was in the context of consideration as to whether notice should be given to a person when the Attorney General sought to register an external confiscation order. Similarly in *AG v Ljungman*

[2013] JRC 131A the Court said this at paragraph 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." 34. As to the Court's approach to abuse of process in the context of confiscation proceedings, useful guidance could be obtained from the English decision of *R v Paulet*

[2009] EWCA Crim 288 where Lord Judge CJ said as follows at paragraphs 22 and 23:- "22. The issue of confiscation proceedings, the circumstances in which they may be oppressive and constitute an abuse of process is one which is becoming increasingly difficult. A number of problems arise with the exercise of this jurisdiction up and down the country. It seems to us (and we canvassed this with counsel when the case was called on) that confusion and difficulty would be reduced if the Director of Public Prosecutions felt able to issue guidance to prosecutors of the policy and factual issues that they should bear in mind when faced with the decision whether confiscation proceedings should be taken, and indeed identifying the kind of circumstances in which such proceedings would normally

be appropriate or inappropriate. We believe that such guidance, if he chose to give it, would fall within his powers under section 10 of the Prosecution of Offences Act 1985. If given, we would hope, first, that the guidance would establish consistency of approach by prosecutors throughout the country to this question; and second, the possibility of what on any realistic view would be rank injustice, and orders for confiscation which are utterly disproportionate to the offender's criminal activity, or his benefits from crime, would be avoided. Absent bad faith (a term which we use in the broadest sense) the decision by the prosecutor to take confiscation proceedings would not, in our view, be susceptible to judicial review, but the jurisdiction of the court to deal with any possible abuse of its process would remain undiminished.

23. The abuse of process jurisdiction is one which needs to be exercised with great circumspection. The jurisdiction cannot be converted on a case by case basis into a structure which involves, on proper analysis, something like wholesale undermining of the statutory provisions. It is not easy to conclude that it is an abuse of process for those responsible for enforcing legislation to see that it is indeed properly enforced. That warning is important and we also believe that the risks of rank injustice make it the more compelling for the Director at least to give close attention to our request that guidance should now be issued." 35. Lord Judge had earlier at paragraph 20 given some examples of where it might be oppressive to seek a confiscation order and these had included where the confiscation proceedings had not been brought within a reasonable time. That observation was of course consistent with the decision in the case of *Flaherty* . 36. Crown Advocate Belhomme further argued that, if he was wrong in his categorisation of the proceedings and the Court was of the view that the Henderson principle applied because these were civil proceedings, there was nevertheless no breach of that principle and the facts did not amount to an abuse. In that context the Court should take into account the fact that these were public law proceedings and there was a strong public interest in ensuring that those who committed criminal offences (whether in Jersey or elsewhere) were stripped of the proceeds of such offending. The fact was that the 210 proceedings had been on foot for some time and Mr Tantular would have been aware of them. If it was felt that the failure to rely earlier on them had led to unnecessary costs being incurred, this could always be dealt with by an appropriate costs order. The application for the second *saisie* fell within the terms of the statute and the case came nowhere near being an abuse of the process of the Court. Furthermore, a *saisie* (and an application to vary a *saisie*) was a form of interlocutory application in that it was simply to preserve the position pending the eventual registration of an external confiscation order. The English courts had held that the Henderson principle should be applied less strictly in relation to successive interlocutory applications than in relation to a final decision of the Court (see the observations of Brooke LJ in *Woodhouse v Consignia PLC*

[2002] EWCA Civ 275 at paragraphs 55 - 58). Discussion (i) The nature of the proceedings 37. I understand Crown Advocate Belhomme's submission that the proceedings in this case have an element of both criminal and civil and should therefore be regarded as a form of hybrid proceedings. In the domestic context, confiscation orders are part of the sentencing process in a criminal trial and they are considered as criminal proceedings for the purposes of appeal to the Court of Appeal. However, I do not agree that this Court can recognise a category of proceedings called hybrid proceedings. Legal proceedings are either civil or criminal. In my judgment the present proceedings are not criminal proceedings. There is no charge and no sentence to be imposed and any appeal against my decision could not be brought under Part 3 of the Court of Appeal (Jersey) Law 1961 , which relates to appeals in criminal matters; it would have to be brought under Part 2, which relates to appeals in civil causes and matters. That accords with the reality of the position. A decision as to whether to restrain property in Jersey pending an application on behalf of a foreign jurisdiction to confiscate those assets is a civil matter, not a criminal matter, even though the application to confiscate those assets may (and indeed will) be brought as a consequence of criminal proceedings taken in the foreign jurisdiction. 38. I find therefore that these are civil proceedings and that accordingly the Henderson principle is capable of application. 39. That principle has recently been the subject of authoritative restatement by Lord Bingham in *Johnson v Gore Wood & Co*

[2002] 2 AC 1 at 30:- "It may very well be ... that what is now taken to be the rule in *Henderson v Henderson* has diverged from the rule which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise

before it the issue which could have been raised before ." [emphasis added] 40. I accept that the principle is applicable to public as well as private law cases. This was decided in *Conodyba v Royal Borough of Kensington and Chelsea*

[2012] EWCA Civ 982 where, having quoted from the judgment of Lord Bingham in *Gore Wood* cited above, Longmore LJ said this at para 16:- "I see no reason why this general approach should not apply as much in public as in private law with the possible qualification that a public body with statutory obligations to provide, for example, housing assistance or a home from, no doubt, scarce housing stock should not be over-protected from addressing points which are truly new, even if they arise on facts which have already been subject to a determination." The Court in that case did in fact go on to consider a new point albeit that it could have been raised in the earlier proceedings. 41. As Lord Bingham states in the emphasised passage referred to above, the Court must have specific regard to the public interests involved. In my judgment, there is a strong public interest in stripping criminals of the proceeds of crime, whether that is effected by way of a domestic confiscation order or by enforcement in due course of an external confiscation order. The Henderson principle has to be applied in the context of that public interest and the intention of the legislature, as manifested from the modified Law, that where the statutory criteria for making a *saisie* exist, the Court should be able to do so. 42. I accept that criticism can properly be made of the Indonesian authorities in relation to their late reliance upon the 210 proceedings. In particular, even accepting that Mr Muzhar did not personally become aware of the 210 proceedings until December 2013, it would seem that virtually nothing was done in the following eight months. Thus, even though he states that he appreciated in January 2014 that the date of the criminal conduct in the 1631 proceedings was important and that it would be useful to find out the relevant date of the criminal conduct in the 210 proceedings, it appears that this information had not been obtained by the time the delegation arrived in Jersey on 20 th August. Yet it was clearly not difficult to obtain because, once the outcome of the hearing on st August was known, Mr Muzhar was able to obtain the relevant information within 24 hours together with the charge sheet. 43. Nevertheless, I have concluded that it would not be an abuse of process to maintain the second *saisie* in reliance upon the 210 proceedings. I would summarise my reasons as follows:- (i) I place weight upon the important public interest of depriving criminals of the proceeds of their offending and the importance that the legislature and Island has placed on offering assistance in that respect in enforcing confiscation orders made in foreign jurisdictions. (ii) The fact is that the 210 proceedings have been in existence since March 2013. On the information presented to the Court by the Indonesian authorities, there are reasonable prospects of an external confiscation order being made in those proceedings and the statutory criteria for the making of a *saisie* are met. Furthermore, on the information presented to the Court by the Indonesian authorities, the criminal conduct in those proceedings began earlier than in the 1631 proceedings and therefore more (or indeed all) of the assets of the Trust may be caught as being gifts made after the commencement of that criminal conduct. Assuming that in due course a confiscation

order is made in those proceedings, it would on the face of it be a strong thing for this Court to have allowed assets to leave Jersey (and therefore not be available to meet a confiscation order) when, on the evidence currently available, Mr Tantular appears to have contributed assets to the Trust after the commencement of his alleged criminal conduct in the 210 proceedings so that such assets well properly be said to be the proceeds of crime. (iii) I am not convinced that the facts fall squarely within the Henderson principle. That principle is to deal with a situation where a litigant wishes to adduce additional arguments or rely on an additional cause of action arising out of the same essential facts as are dealt with in the first proceedings. That is not the situation here. What is relied upon in relation to the second saisie is the criminal conduct which underlies the 210 proceedings. That conduct is quite separate from the criminal conduct which underlies the 1631 proceedings. As Crown Advocate Belhomme submitted, it is not so much the Indonesian authorities attempting a second bite of the same cherry; it is a separate bite of a new cherry. (iv) I consider that there is an analogy between the present case and interlocutory decisions in civil cases where the English Court has held that the Henderson principle should be applied less strictly. The reason why this should be so emerges clearly from the observation of Brooke LJ in *Woodhouse* at para 58:- "To take an example; suppose that an application for summary judgment in a substantial multi-track case and a CPR r24 is dismissed, and the unsuccessful party then makes a second application based on material that was available at the time of the first application, but which through incompetence was not deployed at that time. The new material makes the case for summary judgment unanswerable on the merits. In so extreme a case, it could not be right to dismiss the second application solely because it was a second bite at the cherry. In those circumstances, the overriding objective of dealing with the cases justly, having regard to the various factors mentioned in CPR r1.1(2), would surely demand that the second application should succeed, and that the proceedings be disposed of summarily. In such a case, the failure to deploy the new material at the time of the first application can properly and proportionately be reflected by suitable orders for costs, and, if appropriate, interest. ..." (v) The grant of a saisie is simply an interlocutory step pending an application to register an external confiscation order. It is to preserve the position pending such an application and if that application is not brought within a reasonable delay, the saisie may be discharged. The obtaining of a saisie is not an end in itself. It seems to me therefore that the present situation is somewhat akin to a party seeking to amend its claim prior to the conclusion of the proceedings in order to add a new cause of action or new argument; this is usually permitted unless it is too late fairly to do so. It seems to me that the current situation is somewhat closer to that position than to the normal Henderson position where proceedings have been brought and concluded and a party then wishes to institute new proceedings relying on matters which could have been raised in the first proceedings. (vi) I take into account the delay in this case but I do not consider that that delay is so inordinate or excusable that it amounts to an abuse of process. (vii) An important aspect is the issue of prejudice to the beneficiaries. I accept that they have incurred considerable costs in litigating the issues in relation to the first saisie culminating in the hearing of 21 st

August. However, to the extent that any of these costs have been incurred unnecessarily by reason of the decision of the Indonesian authorities only now to rely on the 210 proceedings, the prejudice can be dealt with by an appropriate order for costs in the beneficiaries' favour. The remaining prejudice is confined to the stress and anxiety of not knowing whether they will be able to keep the family home. However, that would have been a factor in any litigation and I do not consider that it outweighs the factors in favour of maintaining the saisie which I have described above. (viii) As in any *ex parte* application, the Indonesian authorities (through the Attorney General) were under a duty to make full and frank disclosure when applying for the first saisie. I agree that they should have disclosed the existence of the 210 proceedings. However, their failure to do so did not make any difference as to whether the first saisie was granted. On the contrary, if they had disclosed the existence of the 210 proceedings, it is even more likely that the first saisie would have been granted because there would have been two sets of criminal proceedings to support it. 44. Ultimately, the decision for the Court is, as Lord Bingham states, to decide whether, having regard to the public and private interests involved and the facts of the case, a party is misusing or abusing the process of the Court by seeking to raise before it an issue which could have been raised before. An alternative way of putting the same test was given by Auld LJ in *Bradford and Bingley Building Society v Seddon*

[1999] 1 WLR 1482 at 30 (in a passage quoted by Lord Bingham):- "... the task of the court being to draw the balance between the competing claims of one party to put its case before the court and of the other not to be unjustly hounded given the early history of the matter ..."

45. I have some sympathy with the arguments of the beneficiaries and I shall consider carefully any application for costs which are said to have been unnecessarily incurred by reason of the failure of the Indonesian authorities to rely on the 210 proceedings until September 2014. Nevertheless, for the reasons which I have given, I do not consider that the conduct of the Indonesian authorities in not relying upon the 210 proceedings or bringing them to the Court's attention until 3rd September, 2014, constitutes an abuse of the process of this Court such that they should be deprived of a saisie to safeguard the assets pending the outcome of the 210 proceedings and the possible confiscation order which may follow in the event of a conviction in those proceedings. I therefore continue the second saisie until further order. 46. I should add that there appears once again to be some dispute between the Indonesian authorities on the one hand and Mr Tantular on the other as to the relevant date for the commencement of the criminal conduct alleged in the 210 proceedings. It would of course be open to the beneficiaries to bring an application to vary the saisie if they wish to contend that gifts which post-date the commencement of the alleged criminal conduct do not extend to the value of the assets of the Trust so that some of the assets of the Trust may be released from the saisie. In making these observations I am not offering any view on the prospects of success of such an application, merely stating that that remedy is available to them should they be so advised. Authorities *Proceeds of Crime (Jersey) Law 1999*. *Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008*. *Tantular -v-AG*

[2014] JRC 128 . Henderson v Henderson

(1843) 3 Hare 100 . Connelly v DPP [1964] ACC 1254. R (on the application of Flaherty) v City of Westminster Magistrate's Court [2008] EWHC 2589. In the matter of Johnson

[2010] JRC 206A . AG-v- Ljungman

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[2009] EWCA Crim 288. Woodhouse v Consignia PLC

[2002] EWCA Civ 275. Court of Appeal (Jersey) Law 1961. Johnson v Gore Wood & Co

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Prepared on 22 October 2026 · Esheria