

JERSEY / JUDGMENT

Barclays Wealth Directors (Jersey) Ltd and Barclays Wealth Corporate -v- AG [2015] JRC 230 (16 November 2015)

[2015] JRC 230

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judgment

the commissioner: 1. Windward Trading Limited ("Windward") is the subject of money laundering charges under the Proceeds of Crime (Jersey) Law 1999 ("the Proceeds of Crime Law"). It reserved its plea on the 6 th October, 2015, and the case was adjourned to 7 th December, 2015, for a plea and directions hearing. 2. The corporate directors, namely Barclays Wealth Directors (Jersey) Limited and Barclays Wealth Corporate Officers (Jersey) Limited, now apply by way of representation, as Advocate Mackereth on their behalf put it, for the assistance of the Court in resolving the predicament they find themselves in. 3. Windward is beneficially owned by Mr Samuel Gichuru from Kenya, who from April 2010 the Jersey authorities have been attempting to have extradited for prosecution here, for money laundering offences arising out of the same alleged criminal conduct. Those extradition proceedings have progressed very slowly, to the point that the Attorney General can see no realistic prospects of a prosecution in Jersey of Mr Gichuru in the foreseeable future. 4. Whilst the extradition proceedings continue, the Attorney General has in the meantime started these criminal proceedings against Windward which has cash assets of some £3.4M. On 27 th October, 2008, these assets were made the subject of a saisie judiciaire imposed upon the property of Mr Gichuru in Jersey. Windward has no other assets. 5. The allegation is that Mr Gichuru used his position as chief executive officer of the Kenya Power and Lighting Company to obtain bribes, which were paid firstly into an account in Jersey and then into an account in the name of Windward, which was formed in August 1986. Quoting from paragraphs 1 and 2 of the case summary:- "1 [Windward] received, held and transferred the proceeds of criminal conduct perpetrated by its controlling mind and beneficial owner, Samuel Kimuchu Gichuru. For nearly two decades the company knowingly enabled Gichuru to obtain bribes paid to him while he held public office. The disguise, receipt, safeguarding and delivery of these corrupt payments were Windward's only activities and its raison d'être. The company played the vital role without which corruption on a grand scale is impossible: money laundering. In doing so Windward became as much a criminal as its principal. Companies can only act by human agency. They are fixed with the acts and state of mind of those who control the company with respect to those acts. Gichuru's knowledge is attributed to Windward by law because Gichuru directed it. More particularly Gichuru controlled the activity which constituted criminal

offences: the receipt, possession and distribution of the proceeds of crime." 6. Windward was administered by the in-house trust company of Deloitte, namely Walbrook Trustees (Jersey) Limited ("Walbrook"). It filed a suspicious activity report in May 2002, from which point Windward's funds were effectively frozen until the *saisie judiciaire* was imposed. 7. Walbrook was acquired by Barclays Bank plc ("Barclays") in May 2007. Its business was then incorporated into the Barclays Wealth division. It is reasonable for us to presume that, as part of its due diligence before purchase, Barclays would have been aware of the suspicious activities report filed in respect of Windward. 8. The current employees within the Barclays Group had no involvement in these alleged criminal activities which took place before their time and the corporate directors need lawyers to review the 25 bundles served upon Windward by the Attorney General and to advise the corporate directors how Windward should plead and conduct itself generally in these criminal proceedings. 9. To date, Barclays Trust Company (Jersey) Limited ("Barclays Trust") has made funds available to the corporate directors as a temporary measure to ensure that the court process was not derailed and that the corporate directors had access to legal representation (including Queen's Counsel) for the initial hearing and for the purpose of this application. We are told that no further funding has been agreed by Barclays Trust. In particular, no funding has been made available to Windward for the purposes of conducting a review of the prosecution evidence. 10. The Solicitor General accepts that Windward is entitled to a fair trial under Article 6 of the ECHR, which guarantees the following minimum rights *inter alia*:- "Everyone charged with a criminal offence has the following minimum rights:- (a) ... (b) ... (c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." 11. It is well established, we understand, that such rights extend, in a criminal case, to a company (see *Yukos v Russia* ECHR 2012). The Solicitor General, therefore, conceded that Windward could not have a fair trial without legal representation, which as a consequence of the *saisie judiciaire*, it has no means of securing. 12. The corporate directors seek not only funding for Windward for legal advice, but also for the cost of administering Windward throughout these proceedings. Advocate Mackereth based this upon Article 6(3)(b) of the Convention which is in these terms:- "(b) to have adequate time and facilities for the preparation of his defence;" The corporate directors will need, he said, to consider the advice of any appointed legal adviser and give instructions as to the conduct of the case. 13. There are two possible means put forward by Advocate Mackereth by which legal advice for Windward can be secured:- (i) Through the Legal Aid Scheme and/or the use of the Legal Aid Vote administered by the Judicial Greffier. (ii) By access to the funds subject to the *saisie judiciaire*, which are suspected to be the proceeds of crime. 14. Advocate Mackereth submitted that there was no prospect of legal aid being granted. He pointed to the Legal Aid Guidelines, which state in clear terms that Legal Aid will not be granted to a company, but the Guidelines cannot in our view detract from the overriding discretion of the *Bâtonnier* to appoint a lawyer on legal aid where the interests of justice require it, and in the context of companies now having the same rights as individuals to a fair trial, we would suggest (we have not heard argument on the matter) that the *Bâtonnier's* discretion might extend to appointing a lawyer to represent a company in a criminal trial. There has been no formal approach made to the *Bâtonnier* and the Solicitor General submits that this should at least be done before any other

avenue is explored. 15. As to the funds subject to the saisie judiciaire , the Court has in the past set its face against these being used by a defendant. In *Re O'Brien*

[2003] JLR 1 , Bailhache, Bailiff, declined to follow the approach of the English courts, which was to equate a restraint order (the English law equivalent to a saisie judiciaire) to that of a Mareva injunction. He quoted this passage from *The law on the Misuse of Drugs and Drug Trafficking Offences*, 2nd edition , (paragraph 12 of the judgment):- "In *Re Peters*, [1988] 3 All ER 46, a strongly constituted Court of Appeal (Civil Division) held that the jurisdiction to make or to vary a restraint order under the D. T. O. A. was analogous to that under the Mareva jurisdiction; its 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. In other words, the primary objective of the order is to prevent an accused rendering any confiscation order nugatory by disposing of his assets before conviction, but the defendant is entitled to maintain himself and his family, within reasonable limits, from the resources available to him. In striking a balance between the interests of the Court and the defendant, the Court will have regard to all the circumstances of the case. In *Re Peters* (supra), the Court of appeal said that the anticipatory discharge of liabilities which could be expected to arise only after he had been acquitted or convicted was wholly contrary to section 13(2) and the underlying purpose of the protective provisions of the Act. By 'anticipatory discharge of liabilities', the Court seems to have had in mind expenditure which a defendant would wish to make at some time in the future but which would go beyond his reasonable requirements. This would, therefore, include items of expenditure on luxury goods, the provision of a holiday and so on. Mann LJ said (at 52): 'In my experience a restraint order does not, and properly does not, prevent the meeting of ordinary and reasonable expenditure.'" 16. In rejecting this approach, Bailhache, Bailiff said this at paragraphs 19 and 20:- "19 In my judgment, there should be no automatic expectation that either legal expenses or a living allowance will be made available to a defendant whose property is subject to a saisie judiciaire. When a saisie judiciaire has been ordered, a judge has been satisfied that there is reasonable cause to believe that a defendant has benefited from drug trafficking. Drug trafficking is a serious offence causing great damage to the fabric of society. It seems to me that the intention of the legislature was that the suspected proceeds of drug trafficking should not be available to the defendant. Instead, they should be held by the officer of the court pending a determination as to their origin. Property that is subject to a saisie judiciaire is no longer the property of the defendant; it has vested in the Viscount. In so stating, I do not intend to imply that they can never be made available, because the court has a discretion under art. 9(6) which should not be fettered. That discretion is to be exercised on a case by case basis, having regard to the particular facts. To allow legal expenses to be paid out of seized assets should, however, be rare. In this jurisdiction, there is a legal obligation on advocates, subject to the tour de role, to defend a person without the means to pay for his own representation. Counsel for the defendant in this case told me that one of his associates had been directed by the Bâtonnier to represent the

defendant. He conceded, candidly and very properly, that if the saisie judiciaire were not varied to allow for the costs of legal representation the defendant would not be prejudiced in any way." 17. As can be seen from this extract, O'Brien was legally represented on legal aid, and therefore no issue as to a fair trial arose. Advocate Mackereth submitted that O'Brien was wrongly decided. There is a presumption of innocence and until a conviction, an allegation that funds subject to a saisie judiciaire are the proceeds of crime is not yet proved. In his view, the Court had no grounds to state that it was the intention of the legislature that funds, which are suspected of being the proceeds of crime but not yet proved to be so, should not be available to the defendant, in the same way that they can be made available in the English jurisdiction. 18. It is not necessary for us, certainly at this stage, to consider whether O'Brien was correctly decided because it concedes that the Court has a discretion (albeit to be exercised rarely) to make funding available to a defendant for legal expenses. If Legal Aid is not granted to Windward in this case and in the absence of any other source of funding, the Solicitor General accepted that in order for the trial to proceed, funds from those subject to this saisie judiciaire might have to be utilised, though under careful management. 19. There is of course another source of funding and that is Barclays and we have to say that we find the position of Barclays on this matter surprising and deeply unattractive. Companies within the Barclays group are both the directors of Windward and its shareholders (as nominees for Mr Gichuru and his family). Windward's potential involvement in criminal activities must, we think, have been known to Barclays when it acquired the business of Walbrook and it was therefore a business risk Barclays took on; yet rather than take responsibility for a company that it legally owns and controls, it seeks to have the costs that now have to be incurred in obtaining legal advice paid either through the provision of legal aid given by the legal profession, in the main for no charge, or from the legal aid vote or from assets which are suspected to be the proceeds of crime. Indeed, Barclays also seek to be paid for administering Windward. 20. Advocate Mackereth had put forward an alternative method of dealing with the funds subject to the saisie judiciaire and ensuring their rightful place. In view of the fact that the saisie judiciaire was imposed on the basis of proceedings being issued against Mr Gichuru (which may not now commence in the foreseeable future) and in view of the very considerable delay, he submitted that the saisie judiciaire should now be lifted, to allow Barclays to deal with the funds on the basis that it may be a constructive trustee as per *Lloyds Trust Co (CI) Ltd-v-Fragoso*, *Hoy*, *Government of Mozambique* and *HM Attorney General*

[2013] JRC 211 . He also submitted that there were difficulties in a second saisie judiciaire being imposed in respect of the prosecution against Windward. 21. The Solicitor General questioned the locus of the corporate directors to apply for a lifting of the saisie judiciaire imposed upon the property of Mr Gichuru and, if they had the locus , if it was appropriate for them to do so. Advocate Mackereth founded locus on the basis that as corporate directors they are each a "person affected" by the saisie judiciaire , pursuant to Article 16(7) of the Proceeds of Crime Law. 22. These are all matters, however, of which the Solicitor

General had little notice (the case ordinarily being handled on behalf of the Crown by Advocate Sharp QC who was out of the Island) and he asked that they be adjourned so that they can be given proper consideration. We make the observation that if the corporate directors do not come within Article 16(7) as persons affected, then an issue arises as to the jurisdiction of the Court to entertain an application by directors of a company for assistance. 23. For the moment, we are going to adjourn the representation until 7th December, 2015, on the basis that the corporate directors will make a formal approach to the Batonnier for a lawyer to be appointed on legal aid to represent Windward and to the Judicial Greffier for the funding of legal advice out of the legal aid vote. In the meantime, Barclays may wish to consider whether it should fund the legal advice Windward requires, rather than such advice being given on legal aid or paid for out of public funds or from funds that are suspected to be the proceeds of crime. Authorities Proceeds of Crime (Jersey) Law 1999. European Convention of Human Rights. Yukos v Russia ECHR 2012. Re O'Brien

[2003] JLR 1 . The Law on the Misuse of Drugs and Drug Trafficking Offences, 2nd edition. Lloyds Trust Co (CI) Ltd-v-Fragoso, Hoy, Government of Mozambique and HM Attorney General

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