

JERSEY / JUDGMENT

Tantular-v -AG [2014]

JRC 128 (10 June 2014)

[2014] JRC 128

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Court of Appeal

[2013] 1 All ER 759, and that decision was upheld by the Supreme Court. As Lord Sumption said (at para 37) an "entitlement is a legal right in respect to the property in question". The court held that the husband was not beneficially entitled to the properties; on the contrary they belonged to the companies which were therefore beneficially entitled to them. The fact that it might be thought desirable for the Family Division of the High Court to have a wide power to achieve justice between divorcing parties did not entitle the court to depart from settled principles of property law. Lord Sumption said this at para 40:- "I do not doubt that the construction of s24 (1)(a) of the 1973 Act is informed by its purpose and its social context, as well as by its language. Nor do I doubt that the object is to achieve a proper division of the assets of the marriage. But it does not follow that the courts will stop at nothing in their pursuit of that end, and there are a number of principled reasons for declining to give the section the effect that the judge gave it. In the first place, it is axiomatic that general words in a statute are not to be read in a way which 'would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'" 42. In our judgment, the arguments put forward on behalf of the Attorney General in this case would require the Court to overthrow fundamental principles of the law relating to trusts and there is no indication whatsoever, let alone irresistible clearness, that this was the intention of the legislature. In this connection we would repeat the observation of Lord Bingham in *R v May* that the exercise of the jurisdiction to make confiscation orders involves no departure from familiar rules governing entitlement and ownership.

Conclusion

43. We hold therefore that a beneficiary of a discretionary trust is not 'beneficially entitled' for the purposes of Article 2(1)(b)(iii) of the modified 1999 Law to any of the assets of that trust. It follows that the Court may not grant a *saisie judiciaire* over the assets of a discretionary trust merely on the ground that the offender (or suspected offender) is a beneficiary of such a trust. 44. However, that is not to say that a *saisie* may never be made against the assets of a discretionary trust. It will often be the case that there is evidence that the offender has

contributed assets to the trust after the date upon which the alleged criminal conduct began. In those circumstances the trust assets are realisable property under Article 2 (1)(b)(ii) to the extent of any such gifts. It is not necessary that there be evidence that such gifts were the proceeds of the criminal conduct. That is to misunderstand the framework of the legislation which does not require there to be any link between the proceeds of crime and the realisable property. As Lord Walker and Sir Anthony Hughes said in *Waya* in relation to the equivalent legislation in England and Wales at para 27:- "Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation." This is equally the position in Jersey. Thus in *re Smale*

[2003] JRC 099A , the Court said at paragraph 5:- "The whole regime of confiscation orders under the Drug Trafficking Offences (Jersey) Law 1988 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." The fact that that observation was made in the context of drug trafficking whereas we are here dealing with the proceeds of other criminal conduct makes no difference to the validity of the observation. 45. It follows that, if on an application for a *saisie judiciaire* in support of an anticipated application to register an external confiscation order, there is evidence of gifts to a trust after the date upon which the criminal conduct in question began, it may well be appropriate to grant a *saisie judiciaire* in respect of the trust. In deciding whether to do so at that stage and, if so, the extent of the trust property to be covered by such a *saisie* , the Bailiff may have regard to the important policy objectives of the legislation in seeking to remove from offenders the benefit of criminal conduct but must at the same time have regard to the need for any order to be proportionate. 46. In the present case, there is evidence of gifts by the settlor to the Trust after the commencement of the alleged criminal conduct. Accordingly, at the conclusion of the hearing the Court maintained the *saisie* whilst directing that further investigations be carried out as to the extent and timing of any such gifts. In this respect the Court ordered the trustee of the Trust to provide information about gifts to the Trust. The application of the applicants therefore stands adjourned, but the Attorney General is, in our judgment, not entitled to maintain the *saisie* on the ground that all the assets of the Trust are realisable property by virtue of the settlor's position as a beneficiary of the Trust. *Authorities Proceeds of Crime (Enforcement of Confiscation Orders)(Jersey) Regulations 2008. Proceeds of Crime (Jersey) Law 1999. R v May*

[2008] 4 All ER 97 . *Re Kaplan*

[2009] JLR 088. In re Illinois District Court

[2001] JLR 160 . Gartside v Inland Revenue Commissioners

[1968] AC 553 at 617. Snell's Equity 32nd Edition. Lewin on Trusts (18th Edition). Matthews and Sowden, The Jersey Law of Trusts. Trusts (Jersey) Law 1984. R v Waya

[2013] 1 All ER 889 . European Convention on Human Rights 2000. Prest v Prest

[2013] 4 All ER 673 . Matrimonial Causes Act 1973. Court of Appeal [2013] 1 All ER 759. AG-v-Smale

[2003] JRC 099A . Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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