

JERSEY / JUDGMENT

Tantular -v- AG [2014] JRC 243 (08 December 2014)

[2014] JRC 243

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judgment

the bailiff: 1. On 21 st August, 2014, the Court sat to consider whether certain transfers of monies to a trust known as the Jasmine Investment Trust ("the Trust") were gifts and should therefore remain subject to the saisie judiciaire ("saisie") granted in these proceedings in respect of the realisable property of Robert Tantular ("Mr Tantular"). 2. At the conclusion of the hearing the Court gave its decision, which was that four of the disputed transactions were gifts, whereas two were not. It made consequential variations to the saisie so as to reduce the total amount caught by it. 3. What follows constitutes our reasons for reaching that decision. Factual Background 4. On 10 th June, 2014, Tantular-v-AG

[2014] JRC 128 , ("the June judgment"), the Court dealt with an earlier dispute in these proceedings. The factual background was described in that judgment, to which the reader is referred as necessary. We shall confine ourselves to reciting those facts which are relevant to our present decision. 5. 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 present trustee is BOS Trust Company (Jersey) Limited ("the Trustee"). The beneficiaries are Mr Tantular, his wife (the first applicant), his three children (the second to fourth applicants) and his wife's younger sister. 6. Mr Tantular was the president of an Indonesian bank called P. T. 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 nine years imprisonment. 7. 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. In the context of those proceedings, the District Court ordered the confiscation of the assets in the Trust even though Mr Tantular was not a defendant in those proceedings and therefore had no right of appeal. He filed an objection to the judgment on th February, 2011, but his objection was denied on 26 th April, 2011, and the Supreme Court

subsequently denied his request for cassation. 8. Mr Tantular has subsequently been charged with fraud and money laundering offences in relation to his position as president of Bank Century ("the 1631 proceedings"). 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 the Bailiff on 9 th August, 2013. The 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. 9. It is common ground between the parties that a saisie may only be granted in respect of the 'realisable property' of a defendant (or anticipated defendant) in foreign criminal proceedings. Article 2(1)(b) of the Proceeds of Crime (Jersey) Law 1999 , as it applies to external confiscation orders pursuant to the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 ("the modified Law"), provides that 'realisable property' means for present purposes:- (i) any property held by the defendant, (ii) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law, and (iii) any property to which the defendant is beneficially entitled. In order to be a gift which is 'caught by this Law' for the purposes of (ii), a gift has to be made by the defendant after the commencement of the conduct to which the external confiscation order relates and the Court must consider it appropriate in all the circumstances to take the gift into account (see Article 2(9)). 10. When applying for the saisie , the Attorney General asserted that the assets of the Trust were realisable property on two grounds:- (i) As Mr Tantular was a beneficiary of the Trust, he was 'beneficially entitled' to the assets of the Trust so that all the assets were realisable property as falling within (iii) of the preceding paragraph. (ii) Alternatively, he contended that Mr Tantular had made certain gifts to the Trust after the date of commencement of his alleged criminal conduct in the 1631 proceedings and the assets of the Trust were therefore realisable property under (ii) above to the extent of such gifts. 11. The applicants challenged the first ground relied upon by the Attorney General and, for the reasons given in the June judgment, the Court agreed with their submission. The Court held that a beneficiary of a discretionary trust is not 'beneficially entitled' to the assets of that trust. The Attorney General could therefore only assert that the assets of the Trust constituted realisable property to the extent of any gifts made by Mr Tantular to the Trust after the date of commencement of the alleged criminal conduct in relation to the 1631 proceedings. The Court gave various directions to procure appropriate evidence on this aspect, including an affidavit from the Trustee. It has now been agreed that the relevant date for the commencement of the criminal conduct in the 1631 proceedings is 1 st November, 2007. 12. On 16 th April, 2014, the District Court found Mr Tantular guilty of fraud and money laundering in the 1631 proceedings. It added a year to the existing 9 year sentence of imprisonment being served by Mr Tantular . It also, according to the Indonesian authorities, made a confiscation order against him in respect

of his assets, including specifically the assets of the Trust. That is however disputed on behalf of the applicants and that is therefore the first issue which we must consider. Is there an external confiscation order? 13. It is important to appreciate that this is not an application to register an external confiscation order. That will no doubt occur in due course. It is simply an application to discharge the *saisie* on the basis that the assets of the Trust do not constitute realisable property because there were no gifts made to the Trust after 1 st November, 2007. However, Advocate Renouf also argues that there are no longer reasonable grounds for believing that an external confiscation order may be made in the 1631 proceedings because they have terminated without any such order being made. The Attorney General, on the other hand, argues that the District Court did make an external confiscation order in those proceedings. There remains therefore a reasonable expectation of an application to register an external confiscation order in due course. 14. It is on the face of it somewhat surprising that there is disagreement on the latter point. However the circumstances are fairly unusual. 15. The Attorney General has relied upon an affirmation from Mr Cahyo Rahadian Muzhar, the Director for International Law and Central Authority, Ministry of Law and Human Rights, Indonesia. His responsibilities include managing inbound and outbound requests for mutual legal assistance in criminal matters. He has exhibited to his affirmation an extract (in both Indonesian and a certified English translation) of the last few pages of the judgment in the 1631 proceedings. That extract lists various assets of Mr Tantular (including specifically the assets of the Trust) and goes on to state that these various assets:- ".....are seized for the State Cq Lembaga Penjamin Simpanan (Indonesia Deposit Insurance Corporation) as decided in criminal case of Hesham Talaat and friends in judgment number 399.... dated December 16 2010." 16. Mr Muzhar asserts that this is a valid and enforceable confiscation order under Indonesian law and, although recalling the fact that Mr Tantular's assets were confiscated under the 399 proceedings, is a confiscation order in its own right. 17. The applicants have produced an affidavit by Professor Dr Eddy O. S. Hiarij, who is a professor of criminal law at the Faculty of Law, Universitas Gajah Mada. He was asked to provide an expert opinion on the judgments in the 399 proceedings and the 1631 proceedings. He gives as his opinion that Mr Tantular's assets were confiscated in the 399 proceeding and that the 1631 judgment did not make any new confiscation order. It merely referred to the confiscation order made in the 399 proceedings. However he goes on to state that as Mr Tantular was not a defendant in the 399 proceedings, it was inappropriate in those proceedings to make a confiscation order against Mr Tantular's assets, because such orders can only be made if the assets which are to be confiscated are directly linked to the criminal act which has first been set out in a charge against a defendant. As Mr Tantular was not a defendant in the 399 proceedings, this could not be done. 18. Professor Hiarij's view is supported by Mr Andi Simangunsong, an Indonesian lawyer who represented Mr Tantular in the 1631 proceedings. He states that it is also his opinion that the District Court in the 1631 proceedings did not make a new confiscation order; it merely referred to the order made in the 399 proceedings, although he too agrees that in general, for a confiscation order to be effective, it must be made in a judgment where that particular defendant is being tried

and not in the trial of another person, as was the case in the 399 proceedings. 19. A saisie is granted in order to protect the position pending an anticipated application for a registration of an external confiscation order. It is only following such registration that assets in Jersey are confiscated. It is not for us at this stage to make a definitive ruling on whether the order in the 1631 proceedings does or does not amount to an external confiscation order. That will only become necessary as and when the application to register it is brought forward. However, we do have to be satisfied that there is a reasonable likelihood that it is a confiscation order because if we were satisfied that it was not, there would be no likelihood of an application to register it being successful and the saisie should therefore be discharged. 20. On the basis of the evidence before us at present, we find that there is sufficient likelihood of the order in the 1631 proceedings amounting to a confiscation order to justify the retention of the saisie. The wording used is that the assets in question (which include the assets of the Trust) "... are seized for the state...". On the face of it that is an order for confiscation. It is quite true that it goes on to add "... as decided in [the 399 proceedings]" but that does not in our judgment detract from the opening words of the passage. Furthermore, the construction put forward by Advocate Renouf leads to very undesirable consequences. On any view, it is clear that the District Court has, one way or another, determined to confiscate the assets of Mr Tantular. It either did that in the 399 proceedings (although there appears to be an issue over whether the Court could validly do that) or it did so in the 1631 proceedings, affirming what was done in the 399 proceedings. On Advocate Renouf's argument, we are asked to conclude that because the confiscation order may have been made in the 399 proceedings rather than the 1631 proceedings, we should lift the saisie altogether and thereby refuse to assist the Indonesian authorities in enforcing a confiscation order which has undoubtedly been made in one or other of the two proceedings. 21. These adverse consequences of Advocate Renouf's argument are of course not a reason for rejecting that argument if it is valid. However, for the reasons we have given, we think that the more natural construction of the 1631 judgment is that, as suggested by Mr Muzhar on behalf of the Indonesian authorities, the District Court was itself making a confiscation order, albeit thereby in effect affirming what was done in the 399 proceedings. 22. We therefore turn to consider the second limb of Advocate Renouf's arguments, namely whether the transactions in question did or did not amount to gifts which are caught by the Law. Are the relevant transfers gifts? 23. As mentioned earlier, the Trustee has sworn an affidavit setting out details of various transfers to the Trust - or more accurately to companies owned by the Trust. These go back to the beginning of 2007 but now that it has been agreed that the criminal conduct which underlies the 1631 Proceedings commenced on 1 st November, 2007, it is only those transactions falling after that date which can conceivably constitute gifts caught by the Law. These are six in number and we shall deal with each in turn.

- (i) 14th February 2008; US\$1,130,000 24. On 12 th December, 2007, Mr Tantular requested the Trustee to transfer the sum of US\$1,125,000 out of Golden Bright Corporation (GBG), a company wholly owned by the Trust. He said it was for working capital for his business. His

letter was forwarded by ING Asia which recorded that he needed the money urgently for his business working capital. The Trustee acceded to the request. There is a minute of a meeting of the directors of GBG held on that date resolving to declare a dividend of US\$1,125,000 to the Trustee and a corresponding resolution by the Trustee recording that it had been requested to consider making a distribution out of the assets of the Trust and going on to resolve to make a distribution of US\$ 1,125,000 to Mr Tantular as a beneficiary of the Trust. The money was paid out on 13 th December. 25. On 14 th February, 2008, the sum of US\$1,130,000 was received into the account of GBG, having been transferred from Mr Tantular's personal account. This sum was treated as additional settled funds. This was in accordance with a resolution of the Trustee dated 17 th June, 2004, at the time of the establishment of the Trust, which recorded the Trustee's intention "to treat funds added to the Trust's account from time to time as additional settled funds". 26. The applicants argue that the payment of US\$1,130,000 on 14 th February, 2008, was not a contribution of additional funds by way of gift but was repayment of a loan. In support they have produced an affidavit from Mr Tantular. He states that he was not aware of the Trustee resolution of 17 th June, 2004. He says in relation to this particular transaction that he requested a temporary bridging loan from the Trust which he placed in a fixed deposit account at ING because he was applying for a loan to buy a property in the USA and he had to show liquid assets above US\$1 m. He states that he intended to repay this amount and that he did so on 14 th February, 2008, when he transferred the sum of US\$1,130,000 which he considered to be the original sum plus interest. It was therefore repayment of a loan rather than a gift. 27. Advocate Renouf points to a number of occasions prior to 1 st November, 2007, where the settlor asked for monies out of the Trust for a short period and then repaid them shortly afterwards. He says that this pattern of behaviour shows that the sum paid out by the Trustee to Mr Tantular on 13 th December, 2007, was in fact a loan even if it was not called by that name. 28. The difficulty with this submission is that, when he wished to repay a sum which he was requesting from the Trustee, Mr Tantular tended to say so. Thus on st May, 2007, his letter of request to the Trustee refers to it making a loan and to his plan to repay the loan within two weeks. Similarly, on 24 th July, 2007, he asked for a loan of \$680,000. Ultimately, there is simply no contemporaneous evidence to support the contention that the payment to Mr Tantular of \$1,125,000 on 13 th December, 2007, was a loan rather than a distribution. Mr Tantular's original request does not request a loan nor does it indicate that he will repay the sum. It simply asks for a transfer of the sum for working capital for his business. Working capital is not usually required for the short term so that it can expect to be repaid. Furthermore, the Trustee clearly did not regard this as a loan. It exercised its power under the trust deed to make a distribution and the contemporary documentation records this. If the Trustee had shortly afterwards claimed repayment of the sum of \$1,125,000 from Mr Tantular, we think that claim would have been doomed to failure. The Trustee's own documentation referred to it being a distribution (which is wholly inconsistent with it being a loan) and there was nothing from Mr Tantular indicating that he was under any obligation to repay the sum. In the face of that evidence, how would any court have determined that it was a loan which Mr Tantular was legally obliged to repay? 29. In those

circumstances we cannot possibly conclude that this was a loan. There is not a single document at the time to suggest that it was. The only evidence that it was a loan is what Mr Tantular now says coupled with the fact that he did in fact contribute US\$1,130,000 shortly after receiving US\$1,125,000. We cannot place much weight on Mr Tantular's evidence. He is a convicted fraudster and it is clearly in the interests of his family as beneficiaries that the transaction should be a loan rather than a gift and therefore not fall within the definition of realisable property. We do not feel we can go behind the contemporaneous documents and the evidence of the Trustee that the payment was an addition to the trust fund made without consideration and was therefore a gift. 30. In reaching this conclusion, we have not placed any weight on the resolution of the trustee of 17 th June, 2004, referred to at paragraph 25 above. Such a resolution could not change the true nature of any payment. If the payment on 13 th December was in truth a loan, the existence of the resolution could not change what would in fact be repayment of a loan into a gift of additional money. However, for the reasons we have given, we find that there was no loan or repayment of a loan in this case. (ii) 10 th October 2008 - US\$190,000 31. On 14 th October, 2008, the sum of US\$190,000 was received into the account of GBG from CIC Investment Corporation ("CIC"), a company wholly owned by Mr Tantular. In this case there had been no corresponding earlier payment out of the Trust. The only explanation given by the Trustee is that the funds transferred represented the total of a forex premium received from accounts that CIC held with the Bank of Singapore. That is the only explanation which Mr Tantular gives as well. Thus it would appear that CIC received this forex premium but there is no explanation for its transfer to GBG other than by way of gift as there was no suggested consideration for the transfer. We accordingly hold that it is to be treated as an indirect gift of additional monies by Mr Tantular to the Trust. (iii) 5th December 2008 - US\$3,326.09 32. On the 5 th December, 2008, the sum of US\$3,326.09 was received into the bank account of GBG. These monies were transferred from Mr Tantular who was closing his personal bank account with the Bank of Singapore. This is agreed by Mr Tantular. There is no consideration or cause for the payment and it clearly therefore is to be treated as a gift from Mr Tantular to the Trust. (iv) 11th December 2008 - US\$11,380.72 33. On 11 th December, 2008, the sum of US\$11,380.72 was received into the bank account of GBG. This had been transferred from an account which CIC held with the Bank of Singapore and which was being closed. Again, there was no cause or consideration for the transfer and it is to be treated as an indirect gift on behalf of Mr Tantular to the Trust. (v) 27th July 2009 - Singapore \$278,000 34. The Trust owns a company called Perennial Investments Holdings Ltd ("Perennial") which in turn owns a property in Singapore in relation to which there is a mortgage with Credit Suisse. On 10 th July, 2007, Credit Suisse wrote to the Trustee advising that, owing to the reduction in value of the property, the loan to value ratio of the mortgage had reached the level at which they were entitled to ask that the total monies outstanding be reduced. They requested an immediate reduction of S\$278,000. 35. According to the Trustee, Mr Tantular's wife (the first applicant) decided to pay the reduction from funds that she held personally and therefore on 27 th July, 2009, she paid S\$278,000 into the account of Perennial by way of a cheque drawn on her personal bank account with a bank in Singapore. 36. Crown Advocate

Belhomme argues that this should be treated as an indirect gift by Mr Tantular. But we can see no grounds for doing so. The onus lies on the Attorney General to show that there is evidence that this was an indirect gift from Mr Tantular. None has been produced. This was a payment from his wife's personal bank account and no evidence has been produced that her bank account was funded by Mr Tantular. In the circumstances, we cannot go behind the prima facie position which is that this was a gift from the Mr Tantular's wife to the Trust, not one from Mr Tantular. 37. As it happens, following the payment, Mr Tantular requested that a distribution be paid to his wife in order to repay these monies and that was done on 9 th September, 2009, by way of a dividend from GBG to the Trust and thereafter a distribution (supported by a minute of the Trustee) of that sum to the first applicant in her capacity as a beneficiary of the Trust. (vi) 18th September 2009 - Singapore \$60,000 38. On 29 th September, 2009, Credit Suisse again wrote to the Trustee to advise that, owing to a further reduction in the value of the property owned by Perennial, the loan to value ratio of the mortgage had again reached the level at which they were entitled to ask that the total monies outstanding be reduced. They requested an immediate reduction of S\$380,000. The Trustee duly made this payment but, at the same time, without prior notice, the first applicant transferred S\$60,000 from her own bank account to that of Perennial in order to assist with the payment requested by Credit Suisse. 39. The Trustee subsequently contacted the first applicant and advised her that she was not to settle funds into the account in this manner. The sum was repaid to her on 12 th October, 2009. 40. Again, we can see no reason for attributing this payment of S\$60,000 (which was in any event repaid) to Mr Tantular. Summary 41. We therefore find that transfers (i) - (iv) totalling US\$1,605,898.07 were gifts to the Trust whereas transactions (v) and (vi) totalling Singapore \$338,000 were not. 42. Article 2(7) of the modified Law provides as follows:- "(7) Subject to paragraph (10), references in this Law to the value at any time .. of a gift caught by this Law are references to:-

- (a) the value of the gift to the recipient when he or she received it, adjusted to take account of subsequent changes in the value of money; or
- (b) ..., whichever is greater." 43. The Court was provided with agreed evidence as to the increase in the value of money since the date of these gifts. Using that formula, the adjusted value of the four gifts referred to above is US\$1,615,418 as at June 2014. The Court therefore varied the saisie so as to authorise the Viscount to release assets from the saisie subject to retaining assets having a value of US\$1.7m, this latter figure being decided upon in order to allow for further inflation and costs until any application to register an external confiscation order in the 1631 proceedings is adjudicated upon. Postscript 44. The argument before the Court centred exclusively on whether the assets of the Trust constitute 'realisable property' as defined in Article 2(1)(b) of the modified Law as set out in paragraph 9 above. i.e. do the assets fall within one of those three categories? In the course of preparation of this judgment, we noted that Article 2(1)(a) provides as follows:- "(1) In this Law, 'realisable property' means :-

- (a) in relation to an external confiscation order in respect of specified property, the property that is specified in the order ..." 45. Accordingly, it might be argued that, if an external confiscation order has been made and if property in Jersey is specified in that external confiscation order, such property could be made the subject of a saisie even if it is not realisable property falling within the three categories set out in Article (2)(1)(b). 46. Nevertheless, on such an application, the Court would have to bear in mind the provisions of Article 39 dealing with the registration of external confiscation orders the relevant part of which provides as follows:- "(1) On the application of the Attorney General, the Court may register an external confiscation order if:-
- (a) ...
- (b) ...
- (c) it is of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice." 47. If the Court were concerned with an external confiscation order which applied to property in Jersey which did not fall within Article 2(1)(b), i.e. the property in question was not held by the defendant, the defendant was not beneficially entitled to it, and it was not property held by a person to whom the defendant had made a gift caught by the Law, it would clearly be strongly arguable that to confiscate any such property would be contrary to the interests of justice. In those circumstances, the Court would presumably be dealing with property which did not in any sense belong to the defendant in the criminal case but belonged instead to someone else. It would follow that the Court would have to consider very carefully whether it would be right to grant a saisie in respect of such property. 48. However, the point was not raised in these proceedings and no doubt much would depend on the facts of the particular case. Accordingly we say no more about it. Authorities *Tantular-v-AG*

[2014] JRC 128 . Proceeds of Crime (Jersey) Law 1999. Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008. Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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