Judgment 41/2013

HM Procureur v King et Al

25th July 2013

Appeal by HM Procureur against an order made in the Royal Court on 5 March 2013, discharging a restraint order made under and in terms of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 as modified by the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999.

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION
Appeal No. 459

9th & 10th July 2013

Before: **James Walker McNeill QC**
Sir Hugh Bennett
Sir David Calvert-Smith

Between: **H M PROCUREUR** **(Appellant)**

-V-

KING ET AL **(Respondent)**

Reserved Judgment handed down 25th July 2013

H M Procureur appeared with Crown Advocate F Raffray
Advocate N J Barnes appeared for the first Respondent
Advocate C Edwards and Advocate A Lyall appeared for the second to sixth Respondents

McNEILL, JA

Introduction

1. This is the judgment of the court in an appeal by HM Procureur against an order made in the Royal Court on 5 March 2013, discharging a restraint order made under and in terms of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 as modified by the

Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999, all as amended (the "modified Law"). The discharge was granted following a judgment on 20 February 2013 by the Lt Bailiff (Southwell QC).

2. The restraint order was made ex parte on 9 June 2006 on an application by the Law Officers at the request of the South African National Prosecuting Authority (the "NPA") pursuant to a Letter of Request dated 25 May 2006. The order prohibits the present respondents and two other companies from in any way disposing of, dealing with or diminishing the value of any of the realisable property held by them and situated within the Bailiwick of Guernsey either in the name of or for the direct or indirect benefit of Mr. King or the third to sixth named respondents or Glencoe Investments Trust and Caledonia Trust. There was no immediate application for discharge or variation but the order was subsequently varied to allow certain specified exceptions.

3. The Letter of Request sought orders restraining companies, structures or entities associated with the present first respondent, David Cunningham King ("Mr. King"), from dealing with his realised property in Guernsey so that such property might be available to be recovered by means of an external confiscation order following an anticipated conviction in criminal proceedings pending against Mr. King in South Africa (the "South African proceedings"). Part of the case put forward by the NPA in requesting the granting of the order was, put shortly, that Mr. King had created an off-shore structure (consisting of companies and entities referred to in the Request as the "Alter Ego Entities"). This structure, albeit in form independent of Mr. King, was said in substance to be controlled and manipulated by him to enable him to evade the consequences of his personal conduct, to hide the fruits of crimes and to frustrate the legitimate rights of relief that the State of South Africa and others might have against him. The Letter of Request stated that, to the extent that the structure purported to include trust structures, it was the State's case that the assets purporting to belong to such trusts were assets over which Mr. King maintained ownership and/or *de facto* control and that those trusts were facades, devices or shams. In the alternative it was contended that the trustees in question had, without fetter, lent their services to the attainment of Mr. King's wishes and acted as mere cyphers or nominees in the carrying out of his instructions. By the time of the hearing below, the case for the NPA was presented not on the basis of sham or manipulation but on the basis that Mr. King was one of a number of specified discretionary beneficiaries who had a contingent interest in the trust property held by the second respondent, as trustee, the others being his wife and their four children (now aged 29 years, 27 years, 25 years and 19 years).

Parties

4. The second named respondent, HSBC Trustee (Guernsey) Limited is a party to these proceedings as trustee of the Glencoe Investments Trust which is a Guernsey law discretionary trust, the named beneficiaries of which are Mr. King, his wife and four children. The trust is the beneficial owner of four British Virgin Island companies, namely, the third to sixth named respondents.

5. Mr. King is a successful South African businessman who, in 1997, settled in the Glencoe Investments Trust a majority holding in a South African company called Specialised Outsourcing Limited which was subsequently floated on the Johannesburg Stock Exchange. In due course Glencoe Investments Trust sold its holdings in that company for approximately £120 million.

6. Sometime thereafter an investigation was begun into the tax affairs of Mr. King. In due course he was charged with, among other matters, tax fraud in the South African proceedings. Associated with those investigations and charges, restraint orders were made not only in this

jurisdiction but also in England and Wales and in Scotland. It is understood that the Scottish order was discharged in November 2012 because, as a matter of Scottish law, there was a clerical error and because it was in some respect too wide. The order pronounced in England and Wales was discharged following a judgment handed down on 21 March 2013 (that is, after the hearing and determination of this matter in the Royal Court). The Serious Fraud Office has elected not to pursue an application for leave to appeal and it follows that the order has been discharged.

The Proceedings Below

7. The factual basis upon which discharge of the restraint order was sought was that it had been in place for an unduly lengthy period of time, that the elapse of time was due to the time taken in the South African proceedings, that the delays in those proceedings were unreasonable and not the fault of Mr. King and that trial was not expected to take place until 2017. The learned Lt Bailiff concluded that the elapse of time from the date of the alleged offences was material by 2006 when the restraint order was made and that the NPA had not moved the case to trial with all reasonable speed, that the total delay from March 2002, when Mr. King was warned of the impending prosecution, to the present day – with the start of a trial not yet in prospect – was well in excess of any reasonable assessment of the time appropriate for such a prosecution and that the delays had been primarily the responsibility of the prosecution: see paragraph 166.

8. The learned Lt Bailiff also found that prejudice had been caused to those not involved in the relevant prosecution – the trustee and the beneficiaries other than Mr. King – by reason of the existence of the restraint order. He further concluded that what he characterised as a change in the prosecution case as to the factual basis giving rise to the relationship between Mr. King and the trust "gives rise to some concern whether if that case had been put forward in 2006 the restraint order would have been made at all.": see paragraph 166(6).

9. The basis in law for the application was the availability to the Royal Court of a power to discharge or vary a restraint order under Section 25(6)(a) of the modified Law. The learned Lt Bailiff determined that the reasonableness of the time occupied by the proceedings in respect of which an order had been granted was a factor material to the exercise of that discretion. He concluded that the delays in question were such as to take the case well outside the limits of any reasonable time requirement, however complex the prosecution might be, that the NPA had failed to justify the excessive time taken so far and yet to come and that the passage of time had become unacceptable. He decided that he had to balance the public interest in ensuring that funds belonging to the defendant were made available to meet a confiscation order and the public interest in the basic right not to be prejudiced by unfair action of the State. He concluded that the balance was strongly in favour of the persons affected "looking first at the rights of the Trustee and the other beneficiaries, and second that of Mr. King" and that continuance of the restraint order would be unjust and oppressive: see paragraph 167.

10. In this appeal HM Procureur took issue with certain of the findings of the Royal Court In his submission a careful appraisal of the documents and transcript disclosed that the learned Lt Bailiff had been unduly selective and unduly critical of the work of the South African authorities. For our own part we do not find it necessary to enter into discussion of these contentions. They do not lie at the heart of this appeal. It is incontrovertible that the proceedings in South Africa have proceeded, and are proceeding, at a pace which, were it to occur in this jurisdiction, one would expect to be the subject of question both as to the reasons for the slowness and as to the impact, if any, of that speed and of those reasons upon the justice of the proceedings. It is also to be noted, however, that in the particular proceedings in South Africa which form the basis of this application, there has been no application in South Africa for a stay or other consideration of the extent of delay or its effect on Mr. King. We note that in Section

35 of the Constitution of the Republic of South Africa 108 of 1996 – Bill of Rights there is enshrined for every accused person, among other matters, the right to a fair trial and the right to have their trial begin and conclude without unreasonable delay. Counsel for Mr. King was unable to explain why such an application had not been made, even given that in the proceedings called King II, where the passage of time after institution of proceedings was far less, Mr King did make such an application.

The Statutory Framework

11. In 1999 the States of Deliberation of Guernsey made provision for confiscation orders both as part of the domestic Laws regarding proceeds of crime and as part of the international campaign to trace proceeds of crime. The domestic regime was set out in the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 which also, by Section 35, made provision for enforcement of orders made outside the Bailiwick. It provided that the States might by Ordinance direct that any country might be a designated country for the purpose of enforcement of orders and that, subject to such modifications as might be specified, Part I of that Law (subject to exceptions) should apply to orders made by courts in the designated country for purposes which appear to the States similar to those for which confiscation orders are made under the 1999 Law. It could also apply to proceedings, in which external confiscation orders might be made, which had been instituted but not concluded. By amendment in 2004 this provision was extended to allow for criminal investigation into criminal conduct to be covered. The scheme devised in respect of overseas matters was set out in the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance 1999 which, in relation to designated countries, provided that relevant provisions of the 1999 Law were to apply subject to modifications specified in Schedule 2 to that Ordinance. It is by reason of that structure that the Law is referred to as the "modified Law".

12. For present purposes the salient parts of the modified Law are the following:

> **"External Confiscation Orders**
>
> 2 (1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with criminal conduct or their value is referred to in the Law as an "external confiscation order".
>
> (2) …
>
> [Sections 3 to 5 were omitted]
> …….
>
> **Meaning of … "realisable property"**
>
> 6 (1) [omitted]
>
> (2) In this law "**realisable property**" means, subject to subsection (3) below –
>
> (a) in relation to an external confiscation order made in respect of specified property, the property which is specified in the order, and
> (b) in any other case –
>
> (i) any property held by the defendant, and
> (ii) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law.

(3) …

(4) [omitted]

Gifts Caught by this Law

8 (1) A gift (including a gift made before commencement of the Criminal Justice (Proceeds of Crime) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999 is caught by this law if –

(a) It was made by the defendant at any time since the beginning of a period of six years ending when the proceedings were instituted against him, or
(b) It was made by the defendant at any time and was a gift of property –

(i) received by the defendant in connection with criminal conduct carried on by him or another person, or
(ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.

(2) …

[Sections 9 to 24 omitted]

Restraint Orders and Charging Orders: General Provisions

25 (1)The powers conferred on the Court by Sections 26(1), 27(1) and 28(1) are exercisable where –

(a) proceedings have been instituted against the defendant in a designated country,
(b) the proceedings have not been concluded, and
(c) either an external confiscation order has been made in the proceedings or it appears to the Court that there are reasonable grounds for believing that such an order may be made in them.

(2) The powers mentioned in subsection (1) above are also exercisable where it appears to the Court that proceedings are to be instituted against the defendant in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them.

(2A)The powers mentioned in subsection (1) are also exercisable where –

(a) a criminal investigation has been started in a designated country with regard to criminal conduct, and
(b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.

(3) *[**omitted** it provides –*

(3) The Court shall not exercise those powers by virtue of subsection (1) if it is satisfied –

(a) that there has been undue delay in continuing the proceedings or application in question, or

(b) that Her Majesty's Procureur does not intend to proceed.]

(4) …

(5) A restraint order or a charging order –

(a) may be made only on an application by Her Majesty's Procureur on behalf of the government of a designated country or, where an external confiscation order has been registered under Section 36 of this Law on behalf of Her Majesty's Sheriff,
(b) may be made on an ex parte application to the Bailiff in chambers,
(c) notwithstanding anything in Rules of Court, may provide for service on, or the provision of notice to, persons affected by the order in such manner as the Court may direct, and
(d) may be made subject to conditions, including, without prejudice to the generality of the foregoing, conditions as to when the order is to become effective.

(6) A restraint order or a charging order –

(a) may be discharged or varied in relation to any property, and
(b) shall be discharged –

(i) when proceedings in relation to which the order was made are concluded
(ii) in the case of an order made by virtue of such Section (2), if the proposed proceedings are not instituted within such time as the Court considers reasonable,
(iii) …

(7) An application for the discharge or variation of a restraint order or charging order may be made to the Court by any person affected by it.

(8) …

(9) …

Restraint Orders

26 (1) The Court may by order (in this Law referred to as a **"restraint order"**) prohibit a person from dealing with any realised bought property subject to such conditions and exceptions as may be specified in the order.

(2) A restraint order may apply –

(a) Where an application under Section 25(5) relates to an external confiscation order made in respect of specified property, to property which is specified in that order, and
(b) In any other case –

(i) to all realisable property held by a specified person, whether the property is described in the restraint order or not, and
(ii) to realisable property held by a specified person, being property

transferred to him after the making of the restraint order.

……

Designation of all countries on 28th July 2010.

35A (1)With effect on and from the 28th July, 2010 any country which is not already a designated country under section 35(1) (including any country which comes into existence after that date) is designated for the purposes of this Law and any Ordinance or subordinate legislation made under this Law.

…..

Meaning of "property" and related expressions.

50**.** (1) In this Law **"property"** includes money and all other property, real or personal, immovable or movable, including things in action and other intangible or incorporeal property.

(2)This Law applies to property whether it is situated in the Bailiwick or elsewhere.

(3) In this Law **"interest"**, in relation to property, includes right.

(4) In this Law –

(a) references to property held by a person include a reference to property vested in his committee of creditors or in a liquidator, and
(b) references to an interest held by a person beneficially in property include a reference to an interest which would be held by him beneficially if the property were not so vested.

(5) For the purposes of this Law –

(a) property is held by any person if he holds or is beneficially entitled (under a trust, as a member of a body corporate or otherwise) to that property or any interest in it, and
(b) property is transferred by one person to another if the first person transfers or grants to the other any interest in the property."

13. It is noteworthy that in the external scheme there is no provision similar to that of Section 25(3) directing the court not to grant a restraint order where there has been undue delay in continuing the proceedings.

14. It may also be pertinent to note the terms of certain comparable provisions in other jurisdictions with which this court is familiar. In the United Kingdom The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (UKSI 2005/3181) made provision, separately, both for England and Wales and for Scotland. For England and Wales the following provisons, among others, were made. Those for Scotland are to all intents and purposes identical.

"**Conditions for Crown Court to give effect to external request**

7 (1) The Crown Court may exercise the powers conferred by Article 8 if either of the following conditions is satisfied.

(2) The first condition is that –

(a) Relevant property in England and Wales is identified in the external request;
(b) A criminal investigation has been started in the country from which the external request was made with regard to an offence, and
(c) There is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct.

(3)The second condition is that

(a) Relevant property in England and Wales is identified in the external request;
(b) Proceedings for an offence have been started in the country for which the external request was made and not concluded, and
(c) There is reasonable cause to believe that the defendant named in the request has benefited from his criminal conduct.

(4)…

(5)…

Application, Discharge and Variation of Restraint Orders

9–(1) …
…

(4)The court –

(a) may discharge the order;
(b) may vary the order.

(5) If the condition in article 7 which was satisfied was that proceedings were started, the court must discharge the order if, at the conclusion of the proceedings, no external order has been made.

(6)If the condition in article 7 which was satisfied was that proceedings were started, the court must discharge the order if within a reasonable time an external order has not been registered under Chapter 2 of this Part.

(7) If the condition in article 7 which was satisfied was that an investigation was started, the court must discharge the order if within a reasonable time proceedings for the offence are not started."

Proper Interpretation of Section 25(6)(a)

15. As we have noted, the Lt Bailiff found that reasonableness of the time occupied by the continuance of the relevant proceedings was a factor material to the exercise of the discretion under Section 25(6)(a): see paragraph 90. However the only reasoning expressed was that the reference to "*such time as the Court considers reasonable*" in sub-paragraph (b)(ii) could arguably be said to indicate that reasonableness was a material factor for Section 25(6)(a). We understand that the learned Lt Bailiff was not addressed in any detail as to the proper interpretation of Section 25(6)(a), which may account for the short and tentative expression of

reasoning. Before us each of HM Procureur and the Respondents has addressed this issue in detail and with clarity. So far as we are aware, the proper interpretation neither of Section 25(6)(a), nor of the equivalent provisions in the United Kingdom legislation, has been the subject of detailed judicial consideration. In the judgment in the English proceedings to which we referred at paragraph 6 above, HH Judge Higgins appears to have viewed the ambit of Article 9(4) as rather restricted: see pages 19F, 29D, 40E and 46C.

16. HM Procureur submitted that when deciding whether to exercise the discretion available to discharge a restraint order, the principal question was whether the restraint order remained in place for a purpose connected with a prospective request for the registration of an External Confiscation Order. If it did, only where the applicant for discharge was able to demonstrate that there was no realistic prospect of a fair trial in the requesting jurisdiction should the restraining court consider intervention. The discretion to discharge was narrow and any issues of delay in foreign proceedings were a matter for the foreign court. The principal purpose of these portions of the modified law was to preserve assets during the dependence of foreign proceedings. Deference should be accorded to the legal processes in a requesting jurisdiction where there are safeguards, both constitutional and procedural, afforded to a defendant within criminal proceedings in that jurisdiction.

17. For the respondents it was submitted that the stance adopted by HM Procureur failed properly to characterise the nature of the delay which was being examined in proceedings under Section 25(6)(a). It was not the delay in the criminal proceedings in the requesting state which was being considered. For the purpose of addressing the discretionary power to discharge, what was being appraised was the delay or potential delay in seeking the registration of an external confiscation order (albeit that delay was consequent upon any delays in the foreign proceedings). The issue for the Guernsey Court under Section 25(6)(a) was one for its supervisory jurisdiction. So put, the question for the Royal Court as regards considerations of delay was one to be determined as a matter of Guernsey law.

18. In our judgment, upon a proper interpretation of Section 25(6)(a), the discretionary power given to the Royal Court to discharge or vary an order is not of such width as to permit it to enter into consideration of allegations of undue delay in the external proceedings. Our reasoning is as follows. It may be pertinent to begin by noting that the power is expressed not merely as a power to discharge or vary but, rather, to do so "in relation to any property." Those additional words might be thought to allow argument that the ambit of the discretionary power under paragraph (a) was not so as to permit discharge or variation of an entire order but only in respect of individual items of property covered by the order. It was not argued before us that such an interpretation should be adopted and we do not, ourselves, advance it. For example, Sections 25(1)(c) and (2) allow the relevant powers to be exercised where, among others, it appears to the Court that there are reasonable grounds for believing that an external confiscation order may be made. In our view, if that basis could be shown no longer to exist, the entire order ought to be capable of discharge and there is no other provision allowing that power. One possibility might be that property XY is vested in A at the time that the restraint order is made. That property, however, has become the subject of a dispute between A and B and a determination is issued finding that B has title to the property and ordering A to transfer the property to B. As a result of that determination, it might be open to contention that criterion (c) can no longer be a possibility and so the order should be discharged.

19. In turning to consider the ambit of the discretion and the factors which may be relevant in its exercise, it is, in our view, important to bear in mind that what is under consideration in the present case is the possible discharge or variation of a valid order. An application under Section 25(6)(a) might be made either (a) immediately in an application for discharge or variation of an order granted *ex parte* or (b) at a later stage. It would seem that the general circumstances put

before the court are likely to be the following. At the earlier stage there might be (i) (unusually perhaps) a contention that there was a lack of basis for the order, (ii) a contention that the discretion to grant should not be exercised (for example on the grounds of material non-disclosure: see *Brink's Mat Limited v Elcombe* [1988] 1 WLR 1350, 1358 and *Al Zayat and Others* [2008] EWHC 315 Criminal at paragraphs 81 and 82) or (iii) an application for variation to allow specified expenditure such as to provide for necessary living expenses or, on occasion, legal fees. At the later stage however, the validity of the original order is highly unlikely to be in issue either as regards basis or discretion. The general circumstances are likely to be such as support an application for specific expenditure. However, associated with the view expressed in the preceding paragraph (as regards a change in perception as to whether there are reasonable grounds for believing that an external confiscation order may be made) it seems to us only to be expected that, as with many discretionary exercises, where there is a change in the circumstances which were material to the exercise there should be an opportunity for review of the earlier determination.

20. The examples which we have been able to identify so far in respect of the possibility of a change in circumstances all reflect circumstances which can be characterised as either necessary to the granting of a restraint order in the first place or implicit in the continuing validity or extensiveness of an order. They fall within the parameters which the court making the restraining order will have had in mind – or ought to have had in mind – as regards statutory requisites and matters of natural implication. It is not immediately obvious to us that delay in the courts of the requesting state would, or ought to, come within such parameters. If the restraining court is to appraise whether any such delays have been unreasonable two tensions naturally arise: (i) that the court in the restraining jurisdiction must take a view as to the reasonableness of delays in another jurisdiction either by reference to the standards in the restraining jurisdiction or by way of some form of investigation into the standards of the courts of the requesting jurisdiction and (ii) that, whichever of those approaches is undertaken, there will be an impact on the usual comity between jurisdictions respecting the sovereignty of the other. It seems to us, at first sight, invidious to suggest that such an exercise can or ought to be undertaken as part of a general discretionary exercise under the statutory provisions.

21. In reaching this view we consider that there is some immediate support in the fact, which we have already noted, that the States, in promulgating the external scheme, specifically determined not to include a provision such as Section 25(3) of the 1999 Law precluding the granting of an order where there has been undue delay in continuing proceedings. However, as the point is one of some considerable importance, we continue with a more general analysis particularly as we are conscious that, within the mandatory provisions – both in the United Kingdom and in Guernsey – some consideration of external delay may be required.

22. In our opinion consideration of those mandatory provisions does not suggest that delay in the continuing of external proceedings should be a material issue. Section 25(6)(b) of the modified Law provides for mandatory discharge (i) on conclusion of the external proceedings or (ii) in the event of non-institution within a reasonable time. Each is quite specific. Accordingly, whilst there is place for a provision regarding delay in continuance of proceedings, there is none. Further, sub-paragraph (i) cannot assist in respect of whether delay should be material: it merely reflects the fact of judicial determination (albeit perhaps surprisingly without the addition of the wording in Article 9(5) of the United Kingdom provision that no external order has been made). On another view, however, it might be thought of importance that there is no reference to continuation of the proceedings, merely to their conclusion. As regards sub-paragraph (ii), whilst it permits consideration of elapse of time, it does not result, in doing so, in interference with judicial comity: it looks only at an administrative act, the institution of proceedings. Given the balancing of the interests of justice in protecting assets which might be the subject of an external confiscation order and the interests of the owner of the property, it is understandable

that a Legislature takes the view that the determination as to whether or not there has been reasonable expedition on an administrative matter should be in the hands of the restraining court.

23. The United Kingdom scheme has an additional mandatory provision in Article 9(6), namely delay in registration. In the judgment in the English proceedings to which we referred at paragraph 6 above, HH Judge Higgins appears to have viewed the ambit of Article 9(6) as sufficiently wide to embrace the totality of delay in proceedings and not merely a delay in the final act of seeking registration, but there is no indication as to the extent of any discussion before him on this point of interpretation. For our own part, we would take that provision as looking at delay between the obtaining of a valid external enforcement order and proceeding to apply for registration, and not as embracing any delay in the whole proceedings. We note, for example, that wording such as 'undue delay in continuing the proceedings' are not used. Those words are taken from Section 40(7) of the Proceeds of Crime Act 2002, which makes, for the internal scheme for England and Wales, a provision similar to that in Section 25(3) of the 1999 Law for the internal regime in Guernsey. In the Guernsey scheme registration is subject to the discretion of the Court: see Section 36. That can be seen as a tolerably direct equivalent to Article 9(6) on our interpretation. We therefore do not read the omission in the Guernsey scheme of a direct equivalent to Article 9(6) as indicating a failure to make specific provision for the ability of the court to consider any delay in the whole proceedings at a stage prior to application for registration.

24. On the other hand, consideration of delay in the prosecution – as opposed to institution – of proceedings in another jurisdiction involves an exercise of a different quality. It seems all but inevitable that it will result in a determination by the courts of the restraining jurisdiction that the judicial – as opposed to administrative – processes of another jurisdiction have been unreasonable in respect of the time taken. The tension with comity involved in such an exercise was well appreciated by the learned Lt Bailiff. In paragraph 139 he stated that the Court would make no criticism of the South African courts or prosecution, but merely reach a conclusion applying Guernsey law. To our minds, it is impossible to read the learned Lt Bailiff's views in paragraph 167 as other than involving such a criticism as he sought to abjure. He stated: "The delays…are such as to take this case well outside the limits of any reasonable time requirement…. The prosecution have, in my judgment, failed to justify the excessive time taken so far and yet to come… The passage of time has become unacceptable. The prejudice to Mr. King of remaining so long in a state of uncertainty about his fate is excessive." The same tensions, abjuration and result are to be found in the judgment in the decision on discharge of the English restraint order at a private and confidential hearing held before His Honour Judge Higgins at Southwark Crown Court on 21 March 2013 (see pages 34C-36A and 41F-44E).

25. The results of those two exercises come as no surprise. Whilst, as we have noted, the respondents urged on us that it was not the delay in the criminal proceedings in the requesting state which was being considered but merely a matter of supervisory jurisdiction, the practical evidence to which we have just referred shows otherwise. The application, manifestly, is in respect of delay in the foreign proceedings: it is only as a result of those proceedings that a restraint order has been pronounced. There is no separable Guernsey issue as to delay, such as might occur if there had been some statutory or customary law provision regarding limitation or prescription of a protective order after a specific time had elapsed. As it happens, our analysis leads us to agree with the respondents to the extent that a supervisory jurisdiction might be engaged in an application under Section 25(6)(a). Examples of applications which we have already given can be characterised in that way: the application when title has been clarified and the application for release of funds. An application the substance of which was that continuance of the order either in whole or in part was oppressive – without impugning either the validity of the original order or the external proceedings themselves – could also be seen as the exercise

of a supervisory role. Accordingly the proper ambit of the discretion to which our analysis leads respects both the supervisory role of the Royal Court of its own orders and proper comity between jurisdictions. At the outset of a process such as this, Royal Court exercises its discretion to grant a restraint order and, thus, accepts the appropriateness of potential enforcement of a determination made in another jurisdiction. It is expected to do the same when an application is made for registration: Section 36(1)(c), applying both to internal and external matters, specifically requires the Royal Court to consider whether enforcement of the order would be contrary to the interests of justice. With such domestic safeguards there seems to us no call for a power to interfere with the external proceedings as they progress.

26. We add one further point. Were delay in the prosecution of the external proceedings to be a consideration within the general discretionary exercise set out in Section 25(6)(a) what other factors could be relevant as a counterweight to the impact of delay? We do not see how a general consideration of the importance of maintaining an effective anti-avoidance system could be weighed in the balance with unreasonable delay. If the delay was indeed unreasonable in Guernsey eyes, why should such a general substratum take precedence? Or, to the opposite effect: if that general substratum is of such importance, how could unreasonable delay in the course of prosecuting a legitimate process outweigh it? Unreasonable delay in Guernsey eyes ought not, in our view, to have any part to play if there was a process which might result in an order, the potential effectiveness of which should be protected in Guernsey. We cannot ourselves identify any logical process by which to carry out a discretionary exercise in which prejudice to parties in not being able to deal with property or prejudice to a state in losing a protective order can be balanced with, respectively, an anti-avoidance substratum and unacceptable delay. We can discern the logic, therefore, in a legislature determining that in the case of unreasonable delay on a particular aspect discharge is mandatory.

27. It seems to us, therefore, that this consideration of the practical difficulties in the operation of a system which permitted unreasonable delay in the requesting jurisdiction to be a material fact in a discretionary exercise reinforces our view that unreasonable delay cannot be a relevant factor in the exercise under sub-paragraph (6)(a). Upon the basis which we have set out above, this approach does not deprive the Guernsey framework of practical effect. Circumstances may arise which permit variation or discharge of the order either in whole or in part; albeit such circumstances are restricted to those in which there has been a change of circumstances from those which existed at the time when the restraint order was made and which, expressly or impliedly, were the basis upon which the order was made.

28. In reaching our conclusions we have gained some assistance from consideration of the decision of Gross J. (as he then was) in *Al Zayat and Others* [2008] EWHC 315 Criminal. That decision followed the re-hearing of an initial *inter partes* hearing where discharge of the original *ex parte* order was sought. As such, the hearing considered numerous issues as to whether the original order should have been granted. Two of the numerous issues canvassed were of potential interest: whether the Order had to be discharged by reason of delay and whether in its discretion the court should continue the Order.

29. The issue of delay in *Al Zayat* fell to be addressed in the context of delay in the institution of Iranian proceedings and, accordingly, under the mandatory provisions of Article 9(7). The learned judge's approach to whether or not to discharge the order therefore had to consider whether there had been unreasonable delay in starting proceedings and not the issue before us as to whether delay in continuance is embraced within the general discretionary provisions. Whilst, at paragraph 58(v) Gross J. briefly considered what his approach might be "to the extent that the matter is one for my discretion (quite apart from the mandatory provisions of Art. 9(7)" it does not appear that there was any discussion during the hearing of the conceptual issues

involved in interpreting the general discretionary power to discharge or vary as embracing delay in the external jurisdiction.

30. Turning to discretion in general, it seems clear that the unusual circumstances of *Al Zayat* resulted in Gross J being required to consider both the appropriate exercise of discretion in granting the order and the appropriate exercise in allowing its continuance. As regards the latter, the factual basis upon which the learned judge had to proceed was not allegations of undue delay but issues as to fair trial and non-disclosure: see paragraphs 61 and 81. Whilst the impact of a lack of fair trial and that of undue delay in continuing proceedings are likely to be of a quite different nature, we have found assistance in considering the judge's appraisal of the fair trial issue in the context of the general discretion as to whether or not to allow continuance of proceedings.

31. In the view of Gross J., Human Rights issues – essentially here the issue as to whether or not there has been a fair trial – will largely fall to be dealt with when or if a confiscation order comes to be sought as it is only then that it will be known whether or not there has been a fair trial. This is a preferable course rather than indulging in invidious speculation: paragraph 70. Instances where it was clear that there was no realistic (or reasonable) prospect of a fair trial in the requesting state – and, accordingly, no reasonable possibility of the restraining court giving effect to an external confiscation order – will probably be identified at the time of the making of the restraint order. Such cases are likely to be rare and the subject of appraisal by Crown authorities in the restraining state: paragraph 71. The ambit of the discretionary power is therefore narrow: paragraph 78. Human rights issues as to the legal system in the requesting state are not necessarily irrelevant at the stage of considering a restraint order – or, we would add, at the stage of considering an application for discharge at an interim point in the foreign proceedings. The remedy of a restraint order is of considerable importance internationally and the benefits of the remedy should not too readily be lost: paragraph 78.

32. The test which the learned judge adopted appears to have been whether it would be futile or otherwise inappropriate to continue the Restraint Order: paragraph 80. The case remained one where the right balance had to be struck between competing interests: ibid. Although there was a risk of unfairness at trial, there was no proper basis for concluding that there was no prospect of a fair trial: Paragraph 80 (v). The matter should be left to the Judicial Organisation of Iran to ensure a fair trial. If it did, and a confiscation order was made, then the Defendant's assets in England and Wales would not have been dissipated before any such confiscation order was considered by the restraining court: paragraph 80 (vi). At that stage the fairness of any trial could and would be subjected to close scrutiny: paragraph 80. Although a breakdown in co-operation might occur, it would not be by reason of any reluctance on the part of the English court or the United kingdom to combat international financial crime: paragraph 80 (vi).

33. We read in this approach of Gross J. a similar underlying thread in the process of considering potential interference through the exercise of discretion to that which underlies our own approach to statutory interpretation, namely that the process of enforcing external orders is one of co-operation between different national and judicial systems. The issue as to whether an individual is likely to receive a fair trial cannot be characterised as being of a less serious nature than the issue as to whether there is likely to be inherent prejudice in unduly delayed proceedings. It therefore seems to us that the approach of Gross J., in looking for a lack of prospect of fair trial before intervening prior to conclusion of the external proceedings, adopts a similar stance to that which we have put forward in respect of proper statutory interpretation.

34. However, the decision and reasoning in *Al Zayat* does not persuade us to go so far as to accept the submission by HM Procureur that only where the applicant for discharge was able to demonstrate that there was no realistic prospect of a fair trial in the requesting jurisdiction

should the restraining court intervene prior to conclusion of proceedings. It seems to us that there might be other relevant circumstances but that they will be exceptional. We reach this view by analogy with the terms in which the reasoning of the House of Lords was expressed in the speech of Lord Carswell in *Government of the United States of America (No. 2)* [2004] 1 WLR 2241, especially at paragraphs 26 – 28. That case dealt with, among other matters, an exception to the principle of the territorial limitation on the operation of the European Convention on Human Rights, whereby article 6 might become indirectly engaged in a Convention state on an application for enforcement of a judgment obtained in a non-Convention state. His Lordship stated:

> "26 In the Ullah case [2004] 3 WLR 23 and the Razgar case [2004] 3 WLR 58 the House accepted the validity of these propositions, but also underlined the extreme degree of unfairness which would have to be established for an applicant to make out a case of indirect effect. It was of opinion that it would have to amount to a virtually complete denial or nullification of his article 6 rights, which might be expressed in terms familiar to lawyers in this jurisdiction as a fundamental breach of the obligations contained in the article.
>
> 27 Counsel for the defendant referred to a passage in the concurring opinion of Judge Matscher in Drozd and Janousek v France and Spain (1992) 14 EHRR 745 , 795, in which he said:
>
> > "According to the court's case-law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a state may violate articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention (*Soering v United Kingdom [11 EHRR 439]*); other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable. The same argument applies in reverse, so to speak; a contracting state may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting state, which has been obtained in conditions which constitute a breach of article 6, whether it is a civil or criminal judgment, and in the latter case whether it imposes a fine or a sentence of imprisonment."
>
> In so far as this dictum suggests that enforcement of a foreign judgment might in principle give rise to responsibility on the part of a Convention state, I have no difficulty in accepting its correctness. It is to be observed, however, that in the following sentence Judge Matscher went on to say "This must clearly be a flagrant breach of article 6 ", so recognising the exceptional nature of the circumstances which could give rise to such responsibility. I therefore do not understand him to have meant to lay down any wider proposition than that which the House has accepted in the Ullah case [2004] 3 WLR 23 and the Razgar case [2004] 3 WLR 58."

35. It respectfully appears to us that this approach in their Lordships' House, albeit pronounced in a matter concerning the Convention, informs the correct approach to the proper interpretation of the general discretion to discharge or vary an order in that it emphasises the exceptional nature of circumstances which would entitle a court not to register a judgment. That being the correct approach in respect of registration, it seems to us to apply with equal – if not greater – force in respect of an application prior to the conclusion of the external proceedings under the modified Law.

36. There may be particular, rare, occasions when local state authorities make application for the granting of a restraint order, but where the scrutiny of the court leads it to refuse to grant such an order or, shortly after the grant, to discharge an order made ex parte. But, once that order has been made, its status is one of a protective mechanism pending some event in the requesting jurisdiction. Once a trial has concluded, albeit in a state other than that of the restraining court, it may be necessary to gain a sufficient understanding of the proceedings, the procedure and the result in order to reach a view as to whether, on all proper and objective criteria, the trial has been fair. The determination of such an issue can clearly be seen as an appropriate element in the exercise of the discretion whether to grant the application for registration. It is true that such an exercise will involve consideration by the courts of one state as to whether or not certain standards have been met by the courts of another state; but that is an exercise which has to be carried out in balancing what are then the competing interests, namely, the right to property and the interest in enforcing a foreign judgment. Such an exercise will be carried out on verifiable information as to the process in the other country and will not be mere speculation; nor will it run counter to the earlier presumption, in the granting of the restraint order, that the proceedings in the foreign jurisdiction are such as are entitled to interim protection. That is the distinction to be drawn with the prospect of carrying out such an exercise at an interim stage, when, as here, not even an application for stay of trial has been made in the current proceedings in the foreign court.

37. It therefore follows that, in our judgment, the proper ambit of the discretion provided for in Section 25(6)(a) is not of a width sufficient to allow for consideration of allegations of undue delay in continuing proceedings in an external jurisdiction.

Prejudice

38. Upon the hypothesis that we had been persuaded that this was a case where the Royal Court was entitled to enter upon an exercise of discretion, we would not have found ourselves in agreement with the learned Lt Bailiff, in paragraphs 163 and 164 in the judgment below, as to the relevance and materiality of the issues of prejudice put before him.

39. Those in respect of whom the issue of prejudice was put forward as a compulsitor for discharge were the trustee, Mr. King, and the other discretionary beneficiaries. The issue for Mr. King, as regards delay, can be characterised as merely one of a state of uncertainty as to what his financial position was going to be. Were the delay, contrary to our view, a relevant consideration, we would not see this point as adding anything of materiality. Furthermore, if Mr King views the passage of time in the proceedings in South Africa as unreasonable and/or prejudicial to him, his remedy is to apply in the South African courts to terminate the proceedings - see paragraph 35 above. Were he to be successful the restraint order in Guernsey would be discharged. The position of the trustees and the other beneficiaries is different. As far as the trustee is concerned, it is the fiduciary administrator of the trust and, if there were concerns as to an inability properly to manage the funds on behalf of whoever should be ultimately entitled to them, the trustee should have made an application for an appropriate variation in the terms of the order. An example might be to allow a particular transaction such as the removal of funds from bank deposit and a placing of those funds in the hands of a reputable asset manager.

40. As far as the other beneficiaries are concerned, their position is, as we understand it, merely that of discretionary beneficiaries whose interest in the trust funds depends upon an exercise of a power in their favour. Were there to be a particular desire to have a proportional release of funds – such as for the provision of education or accommodation or a modest contribution to business commencement – and were such an application to be agreeable to the trustee, the

trustee and the appropriate beneficiary could, again, have made application for an appropriate variation. But, as regards an application for discharge of a restraint order, we consider it highly unlikely that there could be particular circumstances in which the interests of a trustee and beneficiaries (whether discretionary or otherwise) as recipients of a defendant's property, could be a material consideration. It was urged on us that knowledge of the history of matters here indicated that the NPA – through HM Procureur – would have resisted such applications strenuously. So be it. It is for the Royal Court to determine the appropriateness of an application upon the basis of all the competing circumstances and issues put before it.

Alleged Change of Case

41. As we have noted above at paragraph 3, the learned Lt Bailiff indicated that, whilst the Letter of Request had described certain entities as Mr. King's "alter ego entities" and suggested that certain structures were, in effect, shams, the current position of the NPA was simply that Mr. King was one of a number of beneficiaries of the trust which stood at the apex of the structure. At paragraph 165 the Lt Bailiff referred to this as a 'change of case' and queried whether, had the current position been advanced, the order would have been made. At the conclusion of that paragraph he went on to describe that question as hypothetical but then stated that the 'change of case' 'is one material factor to be taken into account on the present applications.' In his formal conclusions in paragraph 166(6) the Lt Bailiff repeated his determination that the change in the prosecution's case gave rise to some concern whether if that case had been put forward in 2006 the restraint order would have been made at all.

42. It is not clear to us to what extent, if at all, this finding played a part in the eventual determination below. In paragraph 167 the passage of time was found to be unacceptable with the prosecution having failed to justify the excessive time so far taken. It was then observed that there was prejudice to Mr. King in remaining so long in a state of uncertainty about his fate and that there was prejudice to innocent parties (namely the trustee and the other beneficiaries). Accordingly, on the face of paragraph 167 and notwithstanding the remarks in paragraph 165, it does not appear that the learned Lt Bailiff considered that the 'change of case' to be material.

43. For our own part we do not consider that there was such a change in the NPA's case that, had the application been put forward in 2006 on the basis merely of beneficial interest rather than sham, no restraint order would have been made. As we have noted above, a restraint order can be made where there are reasonable grounds for believing that an external confiscation order may be made: Section 25(1)(c). Such an order is one made for the purpose of recovering payments or other rewards received in connection with criminal conduct: Section 2(1). There is no dispute here but that the proceedings in South Africa relate to allegations of criminal conduct. Nor is there any dispute but that the funds controlled by HSBC are funds settled by Mr. King, nor that the interest of HSBC is merely as trustee nor that the interest of the other beneficiaries is merely as gratuitous and discretionary beneficiaries under the trust.

44. The Letter of Request had sought orders restraining companies, structures or entities associated with Mr. King from dealing with his realised property in Guernsey in order to make such property available to be recovered by means of an external confiscation order following an anticipated conviction in criminal proceedings pending against Mr. King in South Africa. Given that a s. 26 restraint order may apply to all realisable property held by a specified person and that the definition of 'realisable property' in Section 6(2)(b)(ii) includes any property held by a person to whom a defendant has directly or indirectly made a gift caught by the Law (as to which see Section 8), we do not ourselves see how the removal of allegations of sham, without further consideration of the circumstances surrounding the trust and of its provisions, lead to a perception the 2006 restraint order would not have been made.

Conclusion

45. For the reasons set out above we are of the view that the appeal should be allowed and the order of 5 March 2013 set aside. Accordingly the restraint order made on 9 June 2006, as subsequently varied by other orders, will remain in force.