

Renewed application for leave to appeal an order in the Royal Court dated 30 May 2023, regarding the registration of three judgments of the courts of Thailand under section 36 of The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 for enforcement in Guernsey as “external confiscation orders”.

[2024]GCA007

IN THE COURT OF APPEAL, GUERNSEY

Case No. 517

12 February 2024

**Before: Clare Montgomery KC President
James Wolffe KC JA
Michael Furness KC JA**

Between: RAKESH SAXENA Applicant

And: HM COMPROLLER Respondent

WOLFFE JA

1. This is the judgment of the Court. We have before us a renewed application for leave to appeal an order of the Lieutenant Bailiff (Hazel Marshall KC) dated 30 May 2023 (“the Order”) in which she ordered, first, the registration of three judgments of the courts of Thailand under section 36 of The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 (“the 1999 Law”) for enforcement in Guernsey as “external confiscation orders” and, consequentially, the confiscation of realisable property held by Credit Suisse (Guernsey) Ltd in a specified portfolio in the name of Yamerco Management Ltd SA (“Yamerco”).

2. The Applicant is serving a sentence of imprisonment in Thailand and is unrepresented. He has requested us to deal with the subject matter of the appeal on the papers. HM Comptroller has confirmed that he agrees that the matter can be dealt with on the papers.

For the reasons we set out below, we grant the Applicant leave to appeal. The argument that the relevant part of the judgment against him (described in these proceedings as the “City Trading Judgment”) is not an “external confiscation order” has sufficient prospect of success to justify granting leave to appeal. The issue which arises appears to us to have some general significance and, notwithstanding the agreement of the parties, we consider that it would be unsatisfactory to determine the appeal at the instance of an unrepresented party on the papers. Accordingly, unless the Applicant is able to secure representation, we propose to appoint an advocate to present submissions, in addition to the Applicant’s submissions, as an *amicus curiae*.

Proceedings in Thailand

3. In 2012 the Applicant was convicted in the South Bangkok Criminal Court of violations of the Thai Securities and Exchange Act. The Court made the following order:

“The Defendant shall be imprisoned for ten years and fined THB 1,000,000. Should the Defendant fail to pay fine he shall be subject to a two-year confinement in lieu of fine pursuant to Sections 29 and 30 of the Penal Code. The Defendant shall also, jointly with others, repay an amount of THB 1,132,000,000 to the aggrieved party.”

4. The narrative judgment of the South Bangkok Criminal Court explains that the Applicant and others, through an entity called City Trading Corporation, embezzled THB 1,657,000,000 from Bangkok Bank and had dishonestly converted those sums to their own use. The Court found that the Applicant had procured the grant by the Bank to the City Trading Corporation of a credit facility of THB 1,657,000,000 for the purposes of a share takeover of three telecommunication companies. The loan was approved, in breach of the Bank’s protocols, by Mr Krirk-kiat, the Bank’s President. The Court found that the credit facility was not in fact used for that purpose, but “was used for personal matters of” the Applicant, including, for example, the discharge of advances made to companies of which the Applicant was believed to be “the true owner”. The credit facility was drawn down in five tranches, the application of each of which is explained in the judgment. The Court found that the Applicant and Mr Krirk-kiat had taken advantage of Mr Krirk-kiat’s position “by organising a

conspiracy, making plans and delegating tasks among them in order to exploit the benefits together ... with the support of the [Applicant's] associates" who had been charged in another case, "where the [Applicant] and Mr Krirk-kiat were continuously and mutually benefited from such exploitation".

5. The judgment records that the prosecutor had demanded that the Applicant "jointly make payment of THB 1,1657,000,000 to the aggrieved party" (ie the Bank). The Court found that City Trading Corporation had made a repayment of THB 525,000,000 "and remains to be liable to the aggrieved party for the principal amount of THB 1,132,000,000".

6. The Applicant's appeals were unsuccessful and the judgment became effective in 2016.

The Guernsey statutory regime

7. Part I of the 1999 Law inter alia makes provision for the making of a confiscation order in domestic criminal proceedings in Guernsey. Such an order falls to be made at the request of HM Procureur, when a defendant appears to be sentenced. The Court is required to address whether the defendant has benefited from criminal conduct. If the Court decides that the defendant has benefited from criminal conduct, the Court must or may (depending on whether the Court is satisfied that the victim of the crime has instituted or intends to institute civil proceedings) determine the amount to be recovered and order the defendant to pay that amount. The amount to be paid is the amount which the Court assesses to be the value of the defendant's proceeds of criminal conduct or, if the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less, that lesser amount or a nominal amount. There are provisions regulating the interaction between a confiscation order and a compensation order, and a confiscation order and civil proceedings brought at the instance of the victim.

8. Sections 35, 35A and 36 of the 1999 Law provide for the enforcement in Guernsey of external confiscation orders. Section 36 provides as follows:

“On application made by Her Majesty’s Procureur on behalf of the government of a designated country, the Royal Court sitting as an Ordinary Court may register an external confiscation order made there if –

(a) it is satisfied that at the time of registration the order is in force and not subject to appeal,

(b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them, and

(c) it is of the opinion that enforcing the order in the Bailiwick would not be contrary to the interests of justice.”

9. Section 35 provides:

“The States may by Ordinance –

(a) direct that in relation to any country in the British Islands or in relation to any other country ... designated by Ordinance of the States (any country so designated being referred to in this Law as a ‘designated country’) that, subject to such modifications as may be specified, this Part of this Law (except sections 10 and 16) and Part III of this Law shall apply –

(i) to orders which are made by courts in the designated country for purposes that appear to the States to be similar to those for which confiscation orders are made under this Law (“external confiscation orders”) and which are registered under section 36 ...”

10. Pursuant to these powers the States made The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance 1999 (“the 1999 Ordinance”). The 1999 Ordinance specifies modifications to the 1999 Law for the purposes of that Law’s application to external confiscation orders. For present purposes it suffices to observe that paragraph 1 of Schedule 2 to the 1999 Ordinance substitutes the following provision for section 2 of the 1999 Law:

“(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 as an ‘external confiscation order’.

(2) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.”

11. Thailand is a designated country. It is specified as such in Schedule 1 to the 1999 Ordinance. In any event, section 35A of the 1999 Law extends the provisions dealing with external confiscation orders to all countries.

The proceedings before the Royal Court

12. Following a request for mutual legal assistance from the Attorney General of Thailand, HM Comptroller presented an application to the Royal Court in June 2022 for registration under section 36 of the 1999 Law of the City Trading Judgment (along with two other judgments which do not concern the Applicant). These judgments were described in the application as “the Thai Confiscation Orders”. The application was supported by an affidavit and the exhibits to that affidavit.

13. Of the various parties upon whom the application was served (which included Yamerco) only the present Applicant opposed HM Comptroller’s application. The Applicant filed written submissions. His headline position was that: “No ‘external confiscation order’ against defendant Saxena has ever been issued by a Thai court and in this instance no senior and competent Thai official has explained under which law can a confiscation order (external or otherwise) be issued by a competent Thai court if a Thai court is competent in such a matter”.

14. The Applicant further elaborated on that submission, pointing out that the order had been described by the Thai authorities as a “restitution order” and not as a “confiscation order”. He drew the court’s attention to an expert report which had been produced in proceedings in the High Court of England & Wales concerning the City Trading Judgment

(*Official Receiver v. Saxena* [2023] EWHC 521) which characterised the restitution order as a “judgment in the civil part”. But he also stated that, as far as he was concerned, all the judgments against him were “penal judgments in the international sense” and therefore could not be enforced in Guernsey consistent with the doctrine that the courts will not enforce the penal laws of other jurisdictions.

15. Following receipt of written submissions for HM Comptroller, the Lieutenant Bailiff intimated to the parties, by an email dated 7 November 2022 and a subsequent Note, that she was concerned about whether the order for payment to Bangkok Bank properly fell to be regarded as an “external confiscation order”. The parties filed further written submissions addressing that point.

16. Advocate Cheema’s submissions, on behalf of HM Comptroller, pointed to the statutory definition in paragraph 1 of Schedule 2 to the 1999 Order and to a letter from the Director General of the International Affairs Department of the Office of the Attorney General of Thailand dated 19 April 2022 which explains:

“In Thailand this process of seeking restitution for the victims of the fraud is referred to as a civil case connected to a criminal offence. Although it is referred to as a ‘civil’ case it is not a truly civil case as the amount the Public Prosecutor can request be subject to the restitution order is limited to the property lost. There can be no claim for interest or damages and it is implicit in the Court’s judgment that the amount ordered to be returned is the proceeds of crime. Essentially these orders are made by the courts for the purpose of ensuring that rewards received in connection with criminal conduct can be recovered and returned to the victims of crime.”

17. In his submissions, the Applicant among other things stated:

“... all you have before you is a criminal cause of action and a consequential judgment and any Thai payment orders refer to property used to commit the underlying offence and property emanating from the underlying offence. A criminal

court (civil jurisdiction) cannot order damages under the criminal procedures of Thailand.”

18. On 21 April 2023, the Lieutenant Bailiff issued a reasoned decision, determining that, subject to clarification of three matters, she considered that the judgments should be registered. She rejected the Applicant’s argument that because the judgment was penal it could not be enforced. She pointed out that Guernsey had legislated to over-ride the common law rule as regards the enforcement of foreign penal laws. On the question of whether the judgment was an “external confiscation order” she stated that she had been “satisfied by Advocate Cheema’s further submissions (a) that the term ‘external confiscation order’ in Guernsey law had a particular statutory definition and (b) that the Thai order for the payment of Thai Baht 1.132 Billion did fall within that definition”. On 30 May 2023, she pronounced the Order which is the subject of this application.

The application for leave to appeal

19. On 24 June 2023 the Applicant filed a Notice of Appeal, which stated the following single ground of appeal:

“the Royal Court was without jurisdiction to entertain the Thai judgments (the purported confiscation orders) since the judgments cite only a criminal cause, i.e. conversion. The judgments, based on Thai criminal laws, are penal judgments according to the rules of private international law. A Guernsey Court cannot enforce Thai penal laws, directly or indirectly.”

20. On 2 August 2023 the Bailiff, sitting as a single judge of this Court, refused leave to appeal on the basis that, in his view, the Applicant’s ground of appeal did not have any real prospect of success. He considered that the order for payment to Bangkok Bank was “comparable to a domestic confiscation order” and agreed with the Lieutenant Bailiff that the evidence supported the conclusion that the order to “return or pay” monies to Bangkok Bank fell within the statutory definition in paragraph 1 of Schedule 2 to the 1999 Ordinance.

He considered that the order was penal in nature and formed part of the criminal proceedings. He did not consider that the inclusion of Bangkok Bank affected “the categorisation of the order by converting it into something of a civil nature only”. He was not persuaded that the order had “a purpose other than recovering payments as part of a criminal set of proceedings”. He also rejected the Applicant’s contention that the enforcement of the City Trading Judgment would be contrary to the general rule that the courts will not enforce foreign penal laws. The States had deliberately legislated to permit the enforcement of overseas confiscation orders and it was the task of the courts to apply the relevant statutory provisions.

21. On 25 August 2023, the Applicant filed a short “Renewal Application”. This repeated the Ground of Appeal which we have quoted above, observed that there was “no evidence that a confiscation hearing was ever pursued by Thai prosecutors” in this matter, and reiterated the contention that the Order was contrary to the principle that the Royal Court will not enforce the penal laws of another country. The Applicant also has filed written submissions, dated 30 October 2023, in support of his appeal. The arguments which he advances in that document are, in summary, as follows:

(i) The Thai judgment is criminal in nature, and its enforcement would be contrary to the general principle that the Guernsey courts will not enforce the penal laws of other countries.

(ii) Although the Royal Court had concluded that the City Trading Judgment was an external confiscation order, the judgment was pronounced at the end of a criminal prosecution and there was no evidence that a confiscation hearing was ever conducted.

(iii) The amount which the Applicant had been ordered to pay Bangkok Bank did not emanate from any adversarial process and therefore does not qualify as a “common law obligation”. The Applicant refers to *Raulin v. Fisher* [1911] 2 KB, *Huntington v. Attrill* [1893] AC 150, *Wisconsin v. Pelican Insurance Co* (1887) 127 US 265 and *Piggott, Foreign Judgments and Jurisdiction*, 1908.

(iv) The Applicant relies on the letter from the Thai authorities dated 19 April 2022, which we have quoted above, and a letter from those authorities to the UK authorities dated 9 May 2018, which we quote below, for the proposition that the

order is criminal in nature and that “the amount to be returned is the proceeds of crime”.

22. In an email to the Judicial Greffier dated 16 November 2023, the Applicant raises an additional issue about the authentication of the Thai judgment, relying on Lord Brougham’s Act as described in an extract from Piggott, *The Effect of an English Judgment Abroad and Service on Absent Defendants*, 1881, which the Applicant has provided to the Court.

23. Written submissions have also been filed on behalf of HM Comptroller. These contend that the judgment falls within the statutory definition of “external confiscation order”, relying, in particular, on the letter dated 19 April 2022 which we have quoted above. HM Comptroller’s submissions also draw the Court’s attention to the decision of Dame Clare Moulder DBE, sitting as a Judge of the High Court of England & Wales in *Official Receiver v. Saxena*, which we describe more fully below.

24. On 10 December 2023 the Applicant filed a short responsive submission, confirming that he rests his arguments on the written submission of 30 October 2023, “with the exception of reiterating the fundamental flaw in the Respondent’s method, i.e. the ‘delinking’ of the cause of action (criminal conversion) in the Thai judgment from the court’s order of payment (Thai Baht 1,132,000,000) following conviction and sentencing”. The responsive submission also adds a new point, in the following terms:

“On a final note, the Appellant cannot comprehend how the Respondent expects enforcement on the Yamerco assets with Credit Suisse Guernsey since according to a “Decree” issued by the District Attorney of the Canton of Zurich:

(a) the Yamerco assets are under a Swiss sequestration proceeding and

(b) penal consequences under Swiss laws will follow any disturbance of the Yamerco assets

...

Effectively there is no effective beneficial ownership of the Yamerco assets until a Swiss-Thai mechanism is completed.”

The Swiss decree referred to is attached to the submission.

The letter to the UK authorities dated 9 May 2018

25. As we have mentioned, the Applicant relies in his written submission in support of his appeal on a letter from the Deputy Attorney General of Thailand to the UK authorities dated 9 May 2018. This appears to relate to a letter of request for mutual legal assistance in relation to the Applicant and others. It responds to two queries concerning a request to obtain/maintain a restraint order in the UK, in the following terms.

“1. Specify more definitively whether the order made in Thailand is a) criminal or b) civil in nature.

The Thai authorities confirm that the restitution order made by the Thai Supreme Court in the City Trading Case to repay an amount of THB 1,132,000,000 to the injured party is indeed criminal in nature.

2. Please let us have the basis for this, in other words let us know the features of the order and the reasoning as to why it is considered to be an order which is criminal or civil in nature (whichever applies)

The reasons as to why such restitution order is considered to be criminal in nature are as follows:

A) In addition, section 44 of the Thai Criminal Procedure Code stipulates that ‘The claim for restitution of property or value under the previous section may be attached with a public prosecutor’s charge in a criminal case. Alternatively, a motion may be filed at any time in the course of trial in the Court of First Instance.

The judgment in the part of the claim for restitution of property or value shall be given as a part of the judgment in the criminal case.’

This demonstrates that the Criminal Procedural Law in Thailand deems as part of the criminal judgment restitution order made by the court exercising criminal jurisdiction over an offence and therefore this restitution order is penal in character under Thai Criminal Procedural Law.

B) It must be accepted that the City Trading Corporation case, which gives rise to the authority to request mutual legal assistance in this matter, is indisputably a criminal case. In this case the defendants dishonestly misappropriated and embezzled BBC (Bangkok Bank of Commerce Public Limited Company)'s assets, and consequently the public prosecutor – a government authority responsible for prosecuting criminal cases on behalf of the state – filed a criminal charge against the defendants on various offences under the Securities and Exchange Act... The case was tried before the South Bangkok Criminal Court. The defendants were convicted of these offences. All of these offences carry criminal penalties of both imprisonment and fine. In relation to Rakesh Saxena, the Appeal Court sentenced him to a 10-year imprisonment and a one-million-baht fine and also made a restitution order in question against him. This judgment was subsequently upheld by the Supreme Court which means that it is final.

Last but not least, providing that the UK renders a mutual legal assistance in this criminal matter, enforcing the Supreme Court's judgment of restitution on the assets of Mr Rakesh Saxena and others located in your jurisdiction and returning those assets to the Kingdom of Thailand, the assets will be returned to BBC [ie Bangkok Bank] of which its majority creditor is Financial Institution Development Fund (FIDF). The FIDF is an entity (part of the Central Bank of Thailand) established under the effect of the Royal Decree amending the Bank of Thailand Act in 1985 with an objective of safeguarding, improving and stabilising the financial institution system in Thailand under the supervision and policy guided by the Central Bank of Thailand and the Thai government. Essentially during the BBC crisis the FIDF played vital roles in bailing out cash-strapped financial institutions during the 1997 financial crisis in addition to its usual responsibilities in guaranteeing full repayment to depositors and creditors of financial institutions to maintain public confidence and financial

institution system stability. Injecting funds into a number [of] financial institutions in difficulties, the FIDF ended up holding stakes in several financial institutions, including BBC, asset management companies, and eventually managed assets and collect debt occurred from bailing them out. All in all the restitution order works, in effect and purpose, like a confiscation order in a way that the requested assets will be returned to the state in a form of collection of debt to the FIDF”.

26. The letter also quotes, in a footnote, section 43 of the Criminal Procedure Code of Thailand, which stipulates that in various types of case, including theft, fraud and criminal misappropriation, “where the injured party has a right to claim restitution of the property he/she has been deprived of through the offence, or the value thereof, the public prosecutor shall apply for restitution of the property or the value thereof on behalf of the injured person when instituting criminal prosecution”.

The High Court proceedings

27. As we have also mentioned, the Applicant relied, before the Lieutenant Bailiff, on an expert report which had been produced for the purposes of *Official Receiver v. Saxena* in the High Court of England & Wales, and HM Comptroller has also drawn the judgment in those proceedings to our attention. The proceedings were brought by the Official Receiver of Bangkok Bank seeking an order from the High Court to enforce in England & Wales the restitution order which forms part of the City Trading Judgment and which is the subject of this appeal. The present Applicant (who represented himself by remote link from Thailand) resisted those enforcement proceedings on the basis of the exclusionary rule that the English courts will not enforce a foreign penal order. The Official Receiver’s case was that the exclusionary rule was engaged “where the claim amounts to an attempt by a foreign state to exercise its sovereign authority in England but that this case is a claim to enforce in substance a claim for damages which in England might have been brought in a civil case”.

28. Dame Clare Moulder DBE, sitting as a Judge of the High Court in the King’s Bench Division dealt with the case. A two-day hearing took place on 27 and 28 February 2023; and

judgment was` handed down on 14 March 2023. The judge heard expert evidence on Thai law from Mr Praphan Subsaeng, who had been a full-time judge in Thailand from 1973 to 2017, including as a Presiding Justice of the Supreme Court from 2007 to 2017. The Applicant has produced to us Mr Subsaeng’s expert report upon which, as we have explained, he relied before the Lieutenant Bailiff. Dame Clare Moulder described Mr Subsaeng’s oral evidence as follows (paragraph 18).

“Mr Subsaeng’s oral evidence was that in Thai law there can be a civil case ‘*in connection with the criminal case*’.

Mr Subsaeng’s evidence was as follows:

“For example, for the offence of theft, when you steal something from someone, the person who is injured has a civil claim against you to claim back the property. That is a civil claim in connection with a criminal case. When this kind of case happens the injured party has the following rights. Number one, they can claim at the criminal court and put in the civil claim in the criminal court to claim back a property or they can separately claim in the civil court as well. So the injured party has the option to choose whether they would concede the claim at a criminal court with a civil claim. That is the case. The matter of this case is an offence of misappropriation committed against the injured party, which is the bank. For this case to proceed the public prosecutor can file a criminal charge against the offender and also put in a civil claim to claim back the money from the offender. That is a civil case in connection with criminal case. And the claim for the return of the property is made on behalf of the injured party. Naturally, in a case like this, as you can see in the complaint there will be two requests. Request number 1 is the request to charge against the offender for the criminal offences committed. The second request will be a civil request to return the misappropriated asset or property.” [emphasis added]

The judge accepted Mr Subsaeng’s evidence.

29. The present Applicant challenged the capacity of the Official Receiver to bring the proceedings against him. The judge rejected that challenge, on the basis of Mr Subsaeng’s evidence that the Official Receiver had sole power to receive and manage Bangkok Bank’s property, following the Bank’s insolvency, and was eligible to institute an action against the

Applicant in the UK. The section of Mr Subsaeng’s report to which the judge refers describes the Official Receiver as a “judgment creditor” of the Applicant.

30. The judge discussed the ambit of the exclusionary rule. She noted that the exclusionary rule is based on the proposition that the courts will not enforce an assertion of sovereign authority by one state in the territory of another. Under reference to *Huntington v. Attrill*, *supra*, *USA v. Inkley* [1989] QB 255 and *Iran v. Barakat* [2007] EWCA Civ 1374, she noted that it was for the English court to characterise the nature of the claim. The principles which she quoted from *Inkley* included the following:

“(3) that the category of the right of action, i.e. whether public or private, will depend upon the party in whose favour it is created, upon the purpose of the law or enactment in the foreign state upon which it is based and upon the general context of the case as a whole;

(4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained.”

31. The judge then turned to consider the substance of the right which the Official Receiver was seeking to enforce. She considered the two letters from the Thai authorities to which we have already referred and Mr Subsaeng’s evidence about Thai criminal procedure. She referred to Mr Subsaeng’s evidence in the following terms.

“62. In his expert report Mr Subsaeng’s evidence as to the nature of the process to claim civil reparation or restitution of property alongside a criminal case was as follows (paragraph 13-15):

‘13. As a matter of Thai law, whilst a particular action may give rise to Thai criminal offences, they may also create a civil liability which the offender owes to the victim. In

such cases, these actions may give the victim a right to claim civil reparation or restitution of property from the offender, alongside whatever criminal rights they may have. Therefore, Thai law allows victims to exercise the right to proceed with civil cases together with the right to proceed with criminal cases by filing the claims in one case. The case with this nature is called “civil case in connection with criminal case”.

14. The above mentioned principle appears in section 40 of the Criminal Procedure Code. Under this provision victims have the right to choose whether to exercise the right to file a civil case to claim civil reparation or restitution of property from the criminal offender by filing the civil case together with the criminal case in one complaint, or to file a civil case separately from the criminal case.

15. Section 43 of the Criminal Procedure Code also provides authority for the Public Prosecutor to claim, on behalf of the victims, for civil reparation or restitution of the property the victims have been deprived of through the commission of crime by the offender. This can be done in the case that the victim is eligible to claim civil reparation or restitution for deprived property as a result of the offence, which also gives rise to criminal sanction. If this is the case, it would no longer be necessary for the victim to file a civil claim in a separate case.

...

17. Even though the law empowers the Public Prosecutor to apply for civil restitution of the property or the value of the property in the same case as the criminal case, the hearing is separated and can be divided into two parts, namely, the criminal part and the civil part. The hearing of the civil case must be in accordance with section 40 of the Criminal Procedure Code which states that the hearing of civil cases must be subject to the provisions under the Civil Procedure Code...

...

19. Under section 47 of the Criminal Procedure Code, when the court orders civil restitution of the property or the value of the property from the Defendant, this is separate from the criminal part of the judgment. The determination of the civil part is

in accordance with the law on personal civil liability and it does not require the court to consider whether or not the defendant is found guilty on a criminal basis.

20. *In addition, section 50 of the Criminal Procedure Code stipulates that when the court orders civil restitution of the property or the value of the property, or reparation to the victim, the victim is deemed a judgement creditor of the offender...* [emphasis added]

63. The evidence of Mr Subsaeng (as set out in his written response to the question [posed by the present Applicant] whether he had seen proof of a case under section 40) is that the Complaint consisted of two separate parts and the second part of the Complaint that sought payment of THB 1.657m is where the Public Prosecutor relied on section 40 of the Criminal Procedure Code to request the court to order Mr Saxena to pay THB1.657m to the 'crime victim' (BBC or the OR).

64. Mr Subsaeng stated that his opinion was supported by section 18 of the Thai Penal Code which prescribes the types of criminal penalties available under the Thai legal system and from which it can be seen that the request for payment to the injured is not one of the criminal penalties available. Mr Subsaeng therefore concluded that the Civil request was a civil complaint and *'thus the judgment in relation to this particular part of the Complaint should be considered as a judgment in the civil case.'*

65. Mr Subsaeng further stated that the judgment of the SBCC is in two parts, the first part ruled that Mr Saxena was guilty and subject to imprisonment and a fine; the second part he described as

'a civil judgment which ordered Mr Saxena to pay restitution for the crime victim (BBC or the Claimant)'

which he said was a *'judgment in the civil case and separate from the judgment in the criminal case'.*

32. Against that background, the judge made the following observations about the two letters from the Thai authorities:

“69. Looking at the reasons given in the letter [to the UK authorities] for concluding that the order is penal in nature, the Thai Attorney General relied on:

- (1) section 44 and that the claim for restitution could be attached with a Public Prosecutor’s charge in a criminal case and;
- (2) the judgment for restitution of property was given as part of the judgment in the criminal case.

70. It seems to me having regard to the evidence of Mr Subsaeng that the fact that the Thai procedural law allows for the claim for repayment to be brought in the criminal courts and judgment given on both elements in the same judgment is not inconsistent with the analysis that in substance this is still a civil claim which could equally have been brought in the civil courts.

71. In relation to the letter to the Guernsey authorities it is in my view notable that the Attorney General describes the repayment order as a way of making restitution to the injured party and not as a means of the State recouping lost revenue. Further even though the letter says it is ‘*not a truly civil case*’, the letter acknowledges that it is ‘*a civil case connected to a criminal offence*’ and this would support an interpretation that it is in substance a civil claim on behalf of the injured party and not the enforcement of a penal order. Given that the process exists in connection with criminal cases it is not surprising or inconsistent with this conclusion that the property is said in the letter to be the proceeds of crime.”

33. The judge considered *Raulin v. Fischer, supra* and *SEC v. Manterfield* [2009] EWCA Civ 27 before concluding (para. 87):

“It is therefore clear that the crux is not whether two separate judgments were given but the substance of what is being sought to be enforced. In my view in this case it is the civil claim for damages which resulted in the repayment order and which is separate from the criminal case. My conclusion is supported by the position under Thai law as set out in the evidence of Mr Subsaeng at paragraph 19 of his report that the order for civil restitution is separate from the criminal part of the judgment.”

Enforcement of the City Trading Judgment in England & Wales was, accordingly, not barred by the exclusionary rule.

Discussion

34. The Applicant's contention that the City Trading Judgment should not be registered for enforcement under the 1999 Law because it is "penal" in nature is unstateable. The Applicant is correct that in Guernsey law, as in English law, there is a longstanding general rule that the courts will not enforce the penal laws of other jurisdictions. But that exclusionary rule is a rule of customary law, which may be modified by legislation. In the contemporary environment, where criminal conduct may transcend national and jurisdictional borders, and where criminals and the proceeds of crime may readily move from one jurisdiction to another, it is unsurprising that legislators in many jurisdictions, including Guernsey, have made substantial inroads on the common law principle in support of the international interest in tackling criminal conduct.

35. HM Comptroller's application for registration of the City Trading Judgment is made under reference to the 1999 Law, as amended by the 1999 Ordinance for application to external confiscation orders. It is no objection to an application for registration of an external confiscation order that this will result in the enforcement, within Guernsey, of the penal laws of another jurisdiction. Indeed, that is precisely what the statute is intended to permit and provide for. The exclusionary rule accordingly has no relevance, and is no objection to, an application properly made under this statutory regime.

36. The more substantial issue is the one which concerned the Lieutenant Bailiff – namely, the question of whether the City Trading Judgment falls within the definition of an "external confiscation order" so as to qualify for registration under the 1999 Law. We are not surprised that the Lieutenant Bailiff raised that question. At first blush, the order (which requires payment to the victim of the crime) is different from a domestic confiscation order in a number of respects. The question is brought into sharp focus by the decision of the High Court in *Official Receiver v. Saxena*. The judge concluded that, although the restitution order was obtained at the request of the public prosecutor in a criminal case, it was in substance

“a civil claim for damages” which was separate from the criminal case. Although the order was obtained at the request of the public prosecutor, the terms of section 43 of the Thai Criminal Procedure Code indicate that the prosecutor was acting on behalf of the victim of the crime with a view to enforcing a right of the victim. And the High Court proceedings were pursued by the victim, as the “judgment creditor”.

37. The judgment in that case, which concerned the very order which is at issue in the present case, does not appear to have been before the Lieutenant Bailiff when she reached her decision to grant the Order or before the Bailiff when he was considering the application for leave to appeal. Dame Clare Moulder’s characterisation of the order as, in substance, a civil claim for damages is, on the face of it, at odds with the Bailiff’s view, when he was considering the application for leave to appeal, that the restitution order was “penal in nature” and that the inclusion of Bangkok Bank as a co-plaintiff did not affect the categorisation of the order by “converting it into something of a civil nature only”.

38. We acknowledge at once that the order was directed to enabling the victim of the Applicant’s crime to recoup the amount which had been embezzled from it, insofar as not already repaid. But HM Comptroller has invoked the 1999 Law, and this requires the Court to be satisfied that the order is indeed an “external confiscation order” as defined for the purposes of that Law in paragraph 1 of Schedule 2 to the 1999 Ordinance. And as the Lieutenant Bailiff observed, if the order is not registrable under the 1999 Law, there are likely to be other mechanisms for its enforcement. We can see one such mechanism being given effect in the High Court decision, and other mechanisms may be available (including, perhaps, the powers available under The Forfeiture of Assets in Civil Proceedings (Bailiwick of Guernsey) Law 2023).

39. The question of whether the order is an “external confiscation order” depends on whether it satisfies the definition in paragraph 1 of Schedule 2 to the 1999 Ordinance, which, we remind ourselves, refers to orders “made ... for the purpose of recovering payments or other rewards received in connection with criminal conduct or their value”. Its resolution requires the Court, first, to construe that definition, and, secondly, to

characterise the purpose of the foreign court's order, in order to decide whether that purpose is the purpose set out in the definition.

40. We acknowledge that correspondence from the Office of the Attorney General of Thailand has stated that:

“There can be no claim for interest or damages and it is implicit in the Court's judgment that the amount ordered to be returned is the proceeds of crime. Essentially these orders are made by the courts for the purpose of ensuring that rewards received in connection with criminal conduct can be recovered and returned to the victims of crime.”

Nevertheless, it seems to us to be open to argument, in light of the fuller information about Thai law which is available to us in the expert report of Mr Subsaeng and which is described in the High Court judgment, that, as the Applicant contended in his initial submissions before the Lieutenant Bailiff, the order in question is not an “external confiscation order” as defined in the statute. If the purpose of the order is properly characterised as being to give effect to the Bank's civil right to payment of the amount which had been embezzled from it, or, indeed, if the order is characterised (as it was by the High Court in England) as a civil award of damages, then it seems to us that it may not satisfy the terms of the definition.

41. We express no view one way or the other on the ultimate merits of the argument. It suffices, for present purposes, that it appears to us to have sufficient prospect of success to justify granting leave to appeal. Its resolution will require the Court to address both the interpretation of the statutory definition, and the characterisation of the Thai order.

42. The definition has, perhaps, been framed in broad terms so as to encompass orders (including orders from legal systems very different from that of Guernsey) which may properly be regarded as “confiscation orders” even though they differ in material respects from a domestic confiscation order. Nevertheless, the statutory language, read in its context, may raise questions as to which, if any, of the features of the domestic confiscation order must be reflected in the foreign order in order for it to be treated as an “external

confiscation order”. Should the definition, for example, be read as assuming that the payments or rewards are “recovered” by state authorities? Must the focus of the order be on securing the disgorgement of benefits received (and perhaps also retained) by the accused, rather than, say, on compensating the victim for its loss? Can an order the purpose of which is to vindicate a civil right of the victim (bearing in mind that many legal systems make provision for such orders to be pronounced in the context of criminal proceedings) fall within the definition?

42. Questions may also arise in relation to the approach which should be taken when characterising the foreign order. It is for the courts of Guernsey, considering an application for registration, to be satisfied that the purpose of the foreign order is such as to satisfy the statutory definition. Its characterisation in the foreign system (or, indeed, in another legal system such as England & Wales), may be of assistance, but, we are inclined to think, would not be determinative. But how is the purpose of the order to be ascertained? To what degree must the Guernsey court be informed of the relevant provisions of the foreign legal system, so as to properly understand the nature of the order? In the present case, as it happens, we have before us both reasonably substantial information about the relevant law of Thailand and the detailed narrative in the Thai court’s judgment of the circumstances, and all of that may on the face of it be useful in characterising the purpose of the particular order which is before us.

43. A question may also arise as to whether or not there is any inconsistency between the pursuit of a civil claim by the victim and a request by the Attorney General for Thailand for mutual legal assistance, and indeed as to the interaction of the external confiscation orders regime with other enforcement regimes which may be available.

43. These points appears to us to be of general significance and, indeed, may have ramifications beyond Guernsey. Many jurisdictions make provision for orders to be made in favour of the victim of a crime (including orders which are intended to vindicate civil rights of the victim) in the context of the criminal process. Whilst we have been shown a number of cases which discuss how the exclusionary rule against enforcing penal laws apply to such cases, neither party has drawn to our attention any case in which provisions for recognition

and enforcement of external confiscation orders have been applied to such orders. That consideration too justifies allowing the point to be ventilated on appeal.

44. Given the nature and potential general significance of the argument, we do not consider that we should determine the appeal on the papers, and we accordingly grant leave to appeal on this ground with a view to hearing oral submissions. We consider that it will be helpful to the Court, in circumstances where the Applicant does not have legal representation in Guernsey, to appoint a Guernsey advocate as *amicus curiae* to assist the Court, so that the issues can be fully canvassed. We propose to authorise the hearing to take place remotely.

45. Finally, we address the points about authentication and the Swiss decree raised by the Applicant in his communications of 10 November and 16 December 2023 respectively. These points are not encompassed within the Applicant's Ground of Appeal. We decline to grant leave to appeal on these points. They were not taken before the Lieutenant Bailiff and it is far too late to raise them at this stage.

46. We accordingly:

- (i) grant leave to appeal solely in respect of the contention that the City Trading Judgment is not an "external confiscation order";
- (ii) direct the Greffier to make arrangements for the appointment of an *amicus curiae*; and
- (iii) direct that the appeal hearing may proceed remotely.

Once a date for the hearing has been identified, and an *amicus* appointed, the Court will fix a timetable for the filing of further submissions and authorities by the parties, if so advised, and by the *amicus*. We propose to direct HM Comptroller to prepare a bundle for the hearing.

