

Leave to appeal application regarding the Royal Court lacking jurisdiction to entertain the application made by HM Comptroller following a letter of request from the Thai authorities.

[2023]GCA087

IN THE COURT OF APPEAL OF GUERNSEY
CRIMINAL DIVISION

Between: **RAKESH SAXENA** **Applicant**

-v-

HIS MAJESTY'S COMPTROLLER **Respondent**

APPLICATION FOR LEAVE TO APPEAL

Decision on the Papers

Decision of Sir Richard McMahon, Bailiff

Date of Decision: 2 August 2023

The Applicant is representing himself

1. On 30 May 2023, Rakesh Saxena and two others were made the subject of an order by which three external confiscation orders were registered in the Royal Court pursuant to section 36(1) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended and as applied by the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999. That order further provided that the realisable property held by Credit Suisse (Guernsey) Limited in portfolio 30883-30 in the name of Yamerco Management Ltd SA should be confiscated and passed to His Majesty's Sheriff, subject to a number of conditions. Upon these steps being taken, the restraint order made under sections 25 and 26 of the 1999 Law on 18 April 2006 would be discharged.
2. Being dissatisfied with this outcome, Mr Saxena has served a handwritten Notice of Appeal dated 24 June 2023 in which he advances a single ground of appeal. (Mr Saxena is currently in prison in Singapore and without legal representation, which explains the handwritten document.) That ground of appeal is that "*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.*"

3. Mr Saxena has explained in correspondence with the Deputy Registrar that he seeks to rely on the written submissions that he made to the Royal Court in support of this application, and has nothing further he wishes to have taken into account.
4. I have decided that I should treat his wish to appeal in the same manner as if it related to a domestic confiscation order, which forms part of the sentence in criminal proceedings. For that reason, I have approached this application as one seeking leave to appeal and it is before me sitting as a single judge.
5. It is apparent from the steps that followed the making of an application dated 15 June 2022 for registration of the three Thai judgments by His Majesty's Comptroller that jurisdiction was an issue that Mr Saxena had raised before the Royal Court. Given that Mr Saxena would not be able to attend a hearing, the judge seized of this application first caused enquiries to be made through the Greffe and then issued three Notes to the parties in which she sought further submissions as to whether the three judgments, described as "*the Thai Confiscation Orders*", could properly be regarded as "*external confiscation orders*" capable of being registered. Eventually, the judge concluded that they could be, but gave Mr Saxena a final opportunity to supplement his submissions before determining the application on the papers and without an oral hearing. The reasons are set out in a document headed "Decision" dated 21 April 2023, although this document raises a number of ancillary issues about which the Lieutenant-Bailiff wished to be satisfied before making the order she did the following month.
6. The position is summarised in para. 4 of that Decision:

"Having at one time had some doubt as to whether the civil "part" of the Thai Orders, being restitutionary, could be described as "confiscation orders" at all (and therefore not "external confiscation orders") in Guernsey law, I was satisfied by Advocate Cheema's further submissions (a) that the term "external confiscation order" in Guernsey law had a particular definition and (b) that the Thai Order for the payment of the Thai Baht 1.132 Billion did fall within that definition, and that consequently I do have jurisdiction to make the order requested: see my previous Note of 9th March."

Accordingly, I have approached this application on the basis that Mr Saxena contends that this was an error of law on the part of the Lieutenant-Bailiff.

7. In doing so, it follows that this is different from an application for leave to appeal arguing that the sentence imposed was manifestly excessive. As a question of law, I have considered whether it can be said that Mr Saxena has a real prospect of success in persuading the plenary Court that the Lieutenant-Bailiff has fallen into error.
8. By way of further background, the restraint order was made by the Royal Court in April 2006 by Lieutenant-Bailiff Finch. It records in its recitals that "*there is reasonable cause to believe that an external confiscation order may be made in those proceedings*", being the proceedings then in train in a designated country (Thailand) against *inter alia* Mr Saxena. Accordingly, the purpose of the restraint order was to preserve assets in this jurisdiction in the event that registration and enforcement of an external confiscation order were later to be sought. The funds so restrained were those at Credit Suisse (Guernsey) Limited in the account of Yamerco Management Ltd SA. This background is, in my view, relevant because it demonstrates that the possibility of there being an external confiscation order when the proceedings in Thailand concluded was a factor needing to be borne in mind. In other words, the restraint order should not have been made, and Mr Saxena should have taken the opportunity to challenge it being made, if his argument that the Royal Court lacks jurisdiction has a good foundation.

9. The evidence in support of the application mentioned on the face of the registration and enforcement order included an Affidavit of Andrew Domaille, sworn on 9 June 2022, in which he sets out the proceedings involving Mr Saxena, who had been convicted of violations of the Securities and Exchange Act and appealed as far as is permitted in Thailand, with the Supreme Court issuing a final judgment in August 2016. Monies had been embezzled from Bangkok Bank using City Trading Corporation Limited. As well as being imprisoned and fined, Mr Domaille refers to the order, being part of the sentence, that Mr Saxena, with others, pay THB 1,132,000,000 to Bangkok Bank.
10. I am satisfied that this means that the terms of the sentence imposed include the order that Mr Saxena pays monies to Bangkok Bank. If this is considered by analogy to the position in this jurisdiction where a defendant is proceeded against by HM Procureur with a view to there being a confiscation order, I take the view that the evidence points towards what has been ordered in Thailand as being comparable to a domestic confiscation order. This was the view reached by the Royal Court on this material. It is the principal reason for treating this application as one seeking leave to appeal.
11. That view is reinforced by reference to the applicable statutory regime. In relation to an external confiscation order, it is necessary to have regard to the provisions in the 1999 Law as modified by the 1999 Ordinance. Those modifications are set out in section 1(2) of and schedule 2 to the 1999 Ordinance. Paragraph 2 of that schedule substitutes the entirety of section 2 in the 1999 Law as follows:
 - “(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) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.”
12. As the Lieutenant-Bailiff noted, the definition in substituted section 2(1) requires consideration first as to whether the country in question has been designated (and there is no dispute on the face of the Ordinance that Thailand has been so designated) and then to turn to consider whether, however the decision in question is described, whether it is an order “for the purpose of recovering payments or other rewards received in connection with criminal conduct or their value”. She was satisfied that the evidence in support of HM Comptroller’s application for registration and enforcement met this definition as it affects Mr Saxena and I agree.
13. Within his written submissions, Mr Saxena contends that no external confiscation order has ever been issued by a Thai court. He challenges the evidence of Mr Domaille that it is appropriate to treat the decision of the Thai Supreme Court as a “confiscation order”, referring to there being no support for this conclusion in Thai law. However, the material on which Mr Saxena relies confirms that the order of the Thai court, as upheld through his appeals, is penal in nature and forms part of the criminal proceedings he faced. Indeed, it is because of the penal nature of the order that he also argues that the Royal Court in Guernsey should not have been prepared to assist the Thai authorities by enforcing it.
14. Within the terms of the order made at first instance in Thailand, as upheld following appeals to the Court of Appeal and the Supreme Court, there was evidence of an order being made against *inter alia* Mr Saxena that he (and his co-defendants) return or pay monies to Bangkok Bank. Having reviewed the material, I do not think that the inclusion of Bangkok Bank as a co-Plaintiff with the Public Prosecutor affects the categorisation of the order by converting it into something of a civil nature only. Accordingly, I am not persuaded, were this to be Mr Saxena’s case (relying on the expert opinion appended to his original submissions), that the order made

in Thailand and being the subject of HM Comptroller's application, has a purpose other than recovering payments as part of a criminal set of proceedings. As such, the order made can fall within substituted section 2(1).

15. The copies of the orders made appear to me to meet the requirements of sections 2 and 3 of the 1999 Ordinance. As such, the Royal Court was entitled to take them at face value.
16. The ground of appeal Mr Saxena advances is that, because the order made against him is penal in nature, it should not be capable of being enforced here in Guernsey. This repeats the argument he raised before the Royal Court relying on *Huntingdon v Attrill* [1893] AC 150, as supplemented by the summary given in *Dicey, Morris and Collins on The Conflict of Laws* (in particular para. 8-008 of the 16th ed., a copy of which he attached to his submissions).
17. As a matter of general principle, Mr Saxena is correct that the private international law principles deriving from those operating in England that apply under Guernsey law means that our courts will not execute the penal laws of another country. However, as the Lieutenant-Bailiff has already pointed out to him, footnote 49, which relates to the passage "*Since "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it," the English court will not enforce a foreign criminal (or otherwise penal) judgment*", sets out:

"This is subject to legislative inroads in the field of international co-operation: see, e.g., Criminal Justice Act 1988, s. 97 (registration of foreign confiscation orders): Government of the United States v Montgomery (No. 2) [2004] UKHL 37, [2004] 1 W.L.R. 2241."

18. The reference therein to the Criminal Justice Act 1988 can be read as if it referred to the statutory regime that has been created by the legislature in Guernsey, namely the 1999 Law and the 1999 Ordinance. It is quite clear that the States of Deliberation have decided that Guernsey should engage in international co-operation to enable other jurisdictions to request the Law Officers here to seek registration and enforcement of orders made elsewhere. In respect of Thailand, that level of reciprocity has been in place since the making of the 1999 Ordinance. If there were to be a domestic confiscation order made in the Royal Court, it ought to be capable of enforcement against assets in Thailand in much the same way as the Thai authorities have sought assistance in relation to the monies held at Credit Suisse (Guernsey) Limited. This is apparent from the terms of section 6 of the 1999 Ordinance. This form of international co-operation recognises that the proceeds of criminal conduct (as defined in section 1 of the 1999 Law, which clarifies that it extends to conduct taking place elsewhere, so long as it "*would constitute [a criminal] offence if it were to take place in the Bailiwick*") should be capable of being pursued even if they have been moved outside of the jurisdiction trying the offending. There has been no suggestion that the activities for which Mr Saxena has been convicted would not have constituted a criminal offence if they had taken place in the Bailiwick of Guernsey.
19. This analysis, which is consistent with the position adopted by the Lieutenant-Bailiff, means that Mr Saxena's single ground of appeal that the Royal Court lacked jurisdiction to entertain the application made by HM Comptroller following receipt of a letter of request from the Thai authorities does not, in my judgment, have a real prospect of success. His argument appears to me to be based on a misconception that the general principle summarised in *Dicey, Morris and Collins* continues to operate in an unqualified manner. However, because the States of Deliberation have intervened and legislated to enable what are termed "*external confiscations orders*" to be registered and thereafter enforced domestically, this clearly falls within the exception referred to in that footnote. The task of the courts is to interpret and give effect to the legislation enacted. The way in which the Lieutenant-Bailiff interpreted the relevant provisions accords with my own view of how they operate. I am not persuaded that there is

any ambiguity to be explored on an appeal. The decision reached is, in my view, consistent with the evidence adduced in support of HM Comptroller's application. Accordingly, I do not regard Mr Saxena's ground of appeal as having any real prospect of success.

20. For these reasons, I am not persuaded that, sitting as a single judge, I should grant the leave to appeal sought by the Applicant.
21. The effect of section 40 of the Court of Appeal (Guernsey) Law, 1961, as amended, is that Mr Saxena will be informed that he is entitled to renew his application for leave before the plenary Court. Although there has not been any formal application in respect of legal aid under section 33 of the 1961 Law, having refused leave to appeal, I would not have been minded to grant any form of legal aid to Mr Saxena to pursue any renewed application. All I will add is that, given Mr Saxena's circumstances, he might consider consulting with the Legal Aid Administrator as to whether he could be eligible for some form of advice from an Advocate, possibly under the so-called Green Form scheme.