

Proceeds of Crime and Jersey Trust Assets

Representation of Gary Stephen Kaplan [2009] JRC 082 (29 April 2009)

The Royal Court has recently delivered the latest instalment in the matter of the Bird Charitable Trust and the Bird Purpose Trust (see Ogier briefing dated February 2008). The Bailiff's judgment of 29 April 2009 in the above case, concerned an application to discharge a saisie judiciaire granted in May 2007 by the Royal Court under the Proceeds of Crime (Jersey) Law 1999 (the "Law"), on the request of the United States, in respect of the realisable property of Mr Gary Kaplan situated within Jersey, including the assets of the Bird Trusts.

Facts

The salient facts are as follows. Mr Kaplan has been indicted in United States in relation to alleged offences arising out the online gaming business of BetonSports Plc. The proceeds of the floatation of BetonSports Plc were settled by Mr Kaplan on the Bird Trusts. Mr Kaplan applied to the Royal Court for a discharge of the saisie, on various grounds, including that: a confiscation order in the United States was not likely to be made; the dual criminality test under the Law was not met; and, in any event, the assets of the Bird Trusts were not situate in Jersey.

Decision

The Court held that, as a matter of discretion, the saisie should be discharged, even though it rejected all of the grounds on which Mr Kaplan relied in his application. As a preliminary matter, the Court confirmed that in discharge applications, there is no strict burden of proof falling on the Attorney General (on whose application the saisie was granted) or on the applicant for the discharge - the Court will apply a test of fairness.

The key points from a Jersey trust law perspective were as follows: first, the property settled into the Bird Trusts fell within definition of realisable property of the settlor under the Law, on the basis that it amounted to a "gift" (as defined in the Law); and, second, property held by Jersey based nominees (in this case, nominees of Basel Trust Corporation) was "situate" in Jersey for the purposes of the Law, even though the actual assets were located overseas (such as Swiss bank accounts), on the basis that the nominees were controlled in Jersey.

The factors which the Court took into account in exercising its discretion to discharge the saisie included

the following: first, the Viscount (in whom assets subject to a saisie vest under the Law) was in an impossible position as he was unable to manage the assets that had been vested in him (given their location overseas) (the Bailiff had also noted that as there were no liquid assets in Jersey the Viscount and his professional advisors would have to be paid from public funds); second, the ongoing situation was unfair to Basel, who had retired as trustee but who the Bailiff described as having acted with "*perfect propriety throughout*"; and third, following very recent House of Lords authority (King v Serious Fraud Office) the Bailiff considered that (notwithstanding the finding that assets held by Jersey nominees were situate in Jersey as noted above) assistance to be given to overseas prosecutors in such circumstances should be confined to situations where assets are actually located within the jurisdiction. In fact, the United States had also obtained a parallel freeze in Switzerland over bank accounts held by companies in the Bird Trusts, which no doubt gave comfort to the Court that discharging the saisie would not directly alter the status quo regarding the assets.

Comment

The approach of the Court, when considering how to exercise its discretion, to Jersey trust assets located overseas for the purposes of a saisie judiciaire is of importance. Whilst property held by a Jersey trustee or its nominee will strictly be considered situate in Jersey under the Law, a Jersey trustee should give consideration, if faced with a saisie judiciaire that purports to capture assets of which it is trustee, to the possibility that it should be seeking a discharge if the underlying assets are held (whether by the trustees or Jersey nominees) in other jurisdictions. It might also be the case that the Court will be less ready to grant saisies in the first place unless the Attorney General (whether acting on a request from a foreign prosecutor or not) can demonstrate that there are assets actually held in Jersey (as opposed to being within the ownership and control of Jersey persons or entities).

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