Battling financial crime in Jersey

As the Attorney General of Jersey succeeds in three appeals before the Privy Council in a long-running financial crime dispute, Joseph Dyke outlines the significance of the judgment.

By an important judgment handed down on 6 June 2023 in Fang and others v His Majesty’s Attorney General (Jersey) [2023] UKPC 21, [2023] All ER (D) 82 (Jun), the Privy Council, Jersey’s highest appeal court, determined three appeals arising out of the same dispute concerning the scope and ambit of two saisies judiciaires issued in the Royal Court of Jersey in August 2013 and September 2014. Saisies judiciaires are similar to freezing orders in that they are a restraint order the Jersey courts may impose in respect of property pending confiscation proceedings.

The saisies judiciaires had been granted pursuant to the Proceeds of Crime (Jersey) Law 1999 (the 1999 Law) and the Proceeds of Crime (Enforcement of Confiscation and Instrumentalities Forfeiture Orders) (Jersey) Regulations 2008, 08.780.60 (the 2008 Regulations). The 2008 Regulations modify the provisions of the 1999 Law that relate to foreign confiscation and forfeiture orders. That legislation is fundamental to Jersey’s legal powers to battle financial crime.

Factual background

Mr Robert Tantular was ‘closely connected’ with an Indonesian Bank named PT Bank Century Tbk (Bank Century). In 2014 and 2015, Mr Tantular was convicted in the Indonesian courts of a variety of criminal offences, including fraud and money laundering offences, related to the collapse of Bank Century. His convictions were upheld on appeal in Indonesia.

In 2004, Mr Tantular created the Jasmine Trust (the trust) by settling assets on its trustee in Jersey. The original trustee was ING Trust Company (Jersey) Ltd (ING). In 2005, the trust’s BVI-incorporated holding company spent SGD7.1m to purchase an apartment in Singapore. Mr Tantular’s wife and children lived in the apartment.

In July 2013, the Attorney General of Jersey received requests for mutual legal assistance (MLA) from the competent authorities of the Republic of Indonesia, which was seeking to enforce confiscation orders against Mr Tantular. The other parties to the proceedings included Mr Tantular, various of his family members, the trustee of the relevant underlying assets, and the Viscount of Jersey, who was the administrator of the assets subject to the saisies judiciaires.

There were three appeals to the Privy Council—two of the three were brought by the Attorney General of Jersey, while the other appeal was brought by Mr Tantular and his family members.

Decision

The Privy Council found in favour of the Attorney General of Jersey in respect of all three appeals.

Appeal 1: The jurisdiction appeal

In the first of the three appeals before the Privy Council, the beneficiaries of the trust appealed on a jurisdictional issue. The question was whether the 1999 Law and the 2008 Regulations allowed for saisies judiciaires to be issued in relation to property that was not situated inside Jersey, in circumstances where the persons entitled to exercise the rights of ownership or control of such property were subject to the jurisdiction of the Jersey courts (such as a Jersey-based trustee). The beneficiaries of the trust asserted that the Jersey courts had no jurisdiction under the 1999 Law (as modified by the 2008 Regulations) to grant the saisies judiciaires over the apartment because (i) the apartment (the trust property) was situated in Singapore and (ii) the apartment was held through a holding company incorporated in the British Virgin Islands (BVI).

The Privy Council upheld the decisions of the Royal Court and Jersey Court of Appeal. The Privy Council determined that the legislation needed to be given a broader interpretation that ‘allows Jersey to provide more effective co-operation and asset recovery’. Moreover, there were ‘particular reasons why it is appropriate for Jersey to provide such assistance’ (para [72]), including that Jersey is a jurisdiction with a ‘very substantial trust industry’ which commonly saw structures similar to the one in the instant matter (ie a discretionary Jersey law trust, with a BVI-incorporated asset holding company holding underlying assets situated abroad). The legislation needed to be interpreted to allow the court to make interim orders, such as saisies judiciaires, that ensured that the Jersey-held assets owned or controlled by a criminal or suspected criminal were restrained pending the resolution of the underlying issues relating to confiscation. Thus, the Royal Court was empowered to grant a saisie judiciaire attaching to realisable property located outside of Jersey, provided that the person exercising de facto ownership or control over that property was within Jersey’s territorial jurisdiction. Such an interpretation would ‘without doubt, provide significant assistance in helping to protect Jersey’s reputation in financial matters’ (para [73]).

Appeal 2: the mortgage appeal

The Attorney General of Jersey appealed against the Court of Appeal’s decision (reversing the Royal Court) to grant a declaration that Credit Suisse was (as the holder of the mortgage over the apartment) entitled to assign to a third party its rights under the mortgage. In 2018, Credit Suisse had sought and had been granted a variation to the saisies judiciaires that allowed a sale of the apartment to take place. However, Mr Tantular’s family members had subsequently sought a declaration that the saisies judiciaires did not restrain Credit
The Privy Council’s findings on state immunity represent an important application of public international law principles in domestic courts

The Privy Council allowed the appeal of the Attorney General of Jersey. On a proper understanding of the provisions of the UN Convention against Transnational Organised Crime 2000 (the Palermo Convention), Art 4 of which required its parties to ‘carry out their obligations… in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of non-intervention in the domestic affairs of other states’, the correct position was that, when acting on the request of and for the benefit of a foreign government or competent authority, the Attorney General nevertheless brings the proceedings on his own behalf. The Attorney General’s doing so does not have the effect of making the foreign government in question a party to the proceedings for costs purposes. The involvement of an official from the Ministry of Justice did not demonstrate that it was Indonesia that instituted proceedings, or that anything done by the relevant official constituted an intervention or a step in the proceedings by Indonesia for the purposes of the State Immunity Act 1978 (as extended to Jersey by the State Immunity (Jersey) Order 1985).

Settlement
As the Privy Council recorded in its judgment (at paras [60]–[61]), the proceedings were, in fact, the subject of an agreed settlement between the parties subsequent to the hearing before the Privy Council. Nevertheless, the Attorney General of Jersey had requested, given that the appeals raised issues of broader public importance, that the Privy Council proceed to issue its judgment. According to public sources, following the parties’ settlement, the Attorney General of Jersey is continuing to negotiate with Indonesia the terms of an asset sharing agreement in respect of £1,325,000 currently ring-fenced in Jersey’s Criminal Offences Confiscation Fund.

Concluding remarks
The Privy Council’s judgment provides important clarification regarding the jurisdiction of the Jersey courts to effectively pursue asset freezing and confiscation relief in respect of the proceeds of crime in response to MLA requests from foreign governments. The Privy Council’s findings in respect of state immunity also represent an important application of public international law principles in the domestic courts, and will be of interest to foreign government authorities considering MLA requests to the competent authorities in the UK and its dependent territories.

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