

Battling financial crime in Jersey



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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

IN BRIEF

► The Privy Council has provided 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 mutual legal assistance requests from foreign governments.

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. By 2013, the apartment was mortgaged to Credit Suisse for approximately \$SGD4.4m.

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

Suisse from assigning its rights to a third party, proposing that Credit Suisse's rights should be assigned to a person who was a family friend in Indonesia. The family friend would then pay off the debt to Credit Suisse and would be able to be more flexible about repayment of the loan, the net result of which would be that the family would be able to stay in the apartment.

The Royal Court had refused that application by Mr Tantular's family members, finding that assignment of the mortgage would amount to 'dealing with' the apartment, and thus be restrained by the *saisie judiciaire*. However, the Jersey Court of Appeal had reversed that decision and granted the declaration sought, finding that Credit Suisse's interest in the mortgage was outside the scope of the *saisie judiciaire*.

The Privy Council, in turn, reversed the Court of Appeal's decision, considering that the assignment proposed by the Tantular family to their family friend had the potential to aid or abet a breach of the *saisie judiciaire* and permit a property transfer which interfered with the administration of justice. The Privy Council's judgment provided guidance to banks in the position of Credit Suisse and found that, in this case the differences between Credit Suisse (a regulated global financial institution acting at arm's length to the Tantulars) and the Tantulars' family friend (an unregulated individual) 'could not be more clear cut' (para [156]).

Appeal 3: the immunity appeal

The Attorney General of Jersey also appealed against the Court of Appeal's decision to issue an order rendering the Ministry of Justice of Indonesia jointly and severally liable with the Attorney General of Jersey to pay the legal costs of the application concerning the declaration relating to the assignment of the mortgage on the apartment. The decision was taken on the

grounds that Indonesia, by (1) requesting the Attorney General to institute the proceedings; or (2) taking a step in the proceedings by supporting the grant of the *saisies judiciaires*, had submitted to the jurisdiction of the Jersey courts. The Court of Appeal had placed particular reliance on the direct involvement of a Ministry of Justice official in the application for the second *saisie judiciaire* in 2014 for its conclusion that Indonesia had taken a 'step' in the Jersey proceedings.

“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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