

The Tantular litigation: continuing the fight against cross-border financial crime

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The Judicial Committee of the UK Privy Council has confirmed three key points following the cases *Tan Chi Fang and three others v His Majesty's Attorney General (Jersey)*; *Tan Chi Fang and three others v His Majesty's Attorney General (Jersey) No 2*; *Robert Tantular v His Majesty's Attorney General (Jersey)*.

- A saisie judiciaire has no geographical limits and can extend to property situated outside Jersey where the court has in personam jurisdiction over persons who hold property abroad
- The holder of a charge over property subject to a saisie judiciaire does not have to apply to the court to vary a saisie judiciaire in every case where it proposes to assign a charge over property in which the net equity constitutes "realisable property". However, if there is any doubt as to whether such an assignment would interfere with the administration of justice, then it may be prudent to do so
- A foreign sovereign state that requests assistance, in respect of an external confiscation order, is not a party to proceedings then brought by the Attorney General consequently upon that request. It is therefore not liable for any associated adverse costs order and does not waive sovereign immunity by providing information and assistance to the Attorney General in dealing with those proceedings

The *Proceeds of Crime (Jersey) Law 1999* (the **1999 Law**) sets out the procedure whereby the Attorney General can apply to the Jersey Royal Court (the **Court**) for a saisie judiciaire (a form of freezing order) when someone is convicted of a criminal offence in Jersey. By virtue of the *Proceeds of Crime (Enforcement of Confiscation and Instrumentalities Forfeiture Orders) (Jersey) Regulations 2008*, the 1999 Law was modified (the **Modified Law**) so that the procedure can also be used by the Attorney General at the request of overseas authorities where criminal proceedings are ongoing in another jurisdiction and in which a confiscation order has either already been made or is likely to be.

Where such a request for assistance is made, the saisie will, in effect, freeze property up to the value of the actual or proposed external confiscation order.

The Attorney General makes the application ex parte. Once granted, "realisable property" held by the defendant in Jersey will vest in the Viscount of Jersey. Other property does not vest in the Viscount but is effectively frozen and can only be dealt with at the Viscount's discretion or subject to further order of the Court. Once the external confiscation order has been registered in the Court, the Court can then authorise the Viscount to realise the property vested in him or otherwise in his possession. Once realised, after payment of the Viscount's fees and expenses, the Viscount will apply funds towards the satisfaction of the confiscation order and the balance, if any, will be paid to the previous owner of the property as directed by the Court.

In the case of *Tan Chi Fang and three others v His Majesty's Attorney General (Jersey)*; *Tan Chi Fang and three others v His Majesty's Attorney General (Jersey) No 2*; *Robert Tantular v His Majesty's Attorney General (Jersey)*, [1] the decision of the Judicial Committee of the UK Privy Council (the **Privy Council**) finally settles the question over the reach of saisies judiciaires. This issue, long fought by the Tantular family, has been subject to considerable judicial consideration over the years in Jersey and is consequently known as the Tantular litigation.

The three issues raised by the appeals to the Privy Council were:

- **the Jurisdiction Appeal:** whether the Modified Law permits saisies judiciaires to be made in relation to property outside of Jersey, at least where the persons who own that property are subject to the jurisdiction of the Jersey courts
- **the Mortgage Appeal:** whether a mortgage holder of property subject to a saisie can assign its rights to a third party
- **the Immunity Appeal:** where the Attorney General becomes liable for costs in proceedings brought on the request of a foreign state, is the state liable to indemnify the Attorney General in respect of those costs?

Background to the appeals

Robert Tantular was the settlor of the Jasmine Investment Trust (the **trust**), a discretionary trust governed by Jersey law and settled in 2004. The beneficiaries of the trust were Tantular and members of his family, who were respondents to the proceedings. The Jersey-based trustee of the trust, H1 Trust Company Ltd (the **Trustee**), owned and controlled a British Virgin Islands (**BVI**) company, Jonzelle Ltd (**Jonzelle**). Jonzelle purchased an apartment in Singapore in 2005 (the **Singapore apartment**) that Tantular's wife and children lived in. The Singapore apartment was mortgaged to Credit Suisse. The amount of the loan due to Credit Suisse was around S\$4.4 million, which meant there was still considerable equity in the Singapore apartment when the first saisie was granted.

Tantular was president of an Indonesian bank. In 2014 and 2015, an Indonesian court convicted him of fraud and money laundering offences (the **2014 Criminal Proceedings** and the **2015 Criminal Proceedings**, respectively). Confiscation orders were made against him by the Indonesian authorities, who sought the assistance of the Attorney General in Jersey to gather in Tantular's assets so that they could be realised and applied against the confiscation orders. In particular, the Indonesian authorities were interested in the Singapore apartment.

The first saisie

The first request for assistance was made by Cahyo Rahadian Muzhar, Director General of Legal Administrative Affairs in the Ministry of Law and Human Rights of the Republic of Indonesia (the **Ministry**), in 2013. A saisie was granted at a time when the external confiscation orders had not yet been made but there were reasonable grounds to believe such an order would be made (the **first saisie**). The first saisie was granted in respect of the realisable property of Tantular (whether movable or immovable, vested or contingent) and was known to include assets held by the Jasmine Trust, expressly stated to include cash, shares and immovable property held by underlying companies of the trust. The Trustee was prohibited from dealing with any realisable property held by it or transferred to it after the saisie without the direction of the Viscount.

The family sought to dispute what, if any, property fell within the definition of "realisable property" under the Modified Law and sought (with partial success) an order releasing the trust assets from the first saisie. The issue at that stage was whether Tantular was beneficially entitled to the assets. If he was not, then only gifts made by Tantular to the trust after the criminal conduct was thought to have begun, in 2007, would be caught by the saisie. The Singapore apartment had been bought prior to 2007, but the Court needed to understand the source of the funds used to pay down the mortgage to determine whether that should be caught. The Court could then understand how much equity in the Singapore apartment, held through the trust, had been contributed by Tantular post-2007.

In determining the application by the family to release the trust assets, the Court confirmed that, as a discretionary beneficiary, Tantular was not entitled to the trust assets. Therefore, the trust assets did not constitute realisable property for the purpose of the Modified Law, capable of being subject to the first saisie. However, the Court subsequently determined that some of the assets of the trust (albeit not the Singapore apartment at that stage) did amount to realisable property because they had been gifted to the trust by Tantular after 2007 and so the first saisie was varied to capture only that property determined to be realisable property.

The second saisie

When the first saisie was granted, it did not appear that the Singapore apartment would be needed because there was sufficient value in other property subject to the first saisie. However, in 2014, the Indonesian authorities informed the Attorney General of further criminal proceedings (the **2015 Criminal Proceedings**) that related to offences committed between 2003 and 2008, during which time

the Singapore apartment was purchased. The authorities sought a second saisie judiciaire covering that longer period and the Singapore apartment (the **second saisie**). The second saisie was granted in identical terms to the first saisie (together, the **saisies**), which included express provision for the saisie to extend to the assets of the trust. However, neither of the saisies specified that they extended to assets of the trust wherever they were located (not just in Jersey). The family sought to challenge the Second Saisie without success.

In looking to challenge the saisies, the family never challenged the scope and reach of the saisies to assets outside of Jersey. Up to this point, the parties had proceeded on the basis that the saisies purported to cover all assets of the trust, wherever they were located. However, when the Attorney General later applied to register the external confiscation orders and sought an order authorising the Viscount to realise the realisable property held by Tantular in Jersey, Tantular sought to challenge that. He applied to discharge or vary the saisies and sought to argue, for the first time, that the Modified Law limited the reach of the saisies to realisable property situated in Jersey only. He asserted that the only assets owned by the trust were the shares in Jonzelle and another company, but their proper legal situs was the BVI, not Jersey, and so they could not constitute realisable property for the purpose of the Modified Law and the saisies should be discharged as being without effect.

The Court concluded that there were no geographical limits to the saisies. As the Court had personal jurisdiction over the Trustee, it could prohibit them from dealing with any property of the trust, wherever located. Tantular appealed that decision to the Jersey Court of Appeal without success and, in 2021, he was granted permission to appeal to the Privy Council (the **Jurisdiction Appeal**).

The Credit Suisse mortgage assignment

Prior to that, and of relevance to the other issues before the Privy Council, in 2018, Credit Suisse had applied to the Court seeking to vary the saisies so that it could realise the Singapore apartment to settle the loan due to it. The family sought to challenge that application without success. The variation was granted, permitting the sale of the Singapore apartment subject to the condition that the net proceeds of sale be remitted to the Viscount.

Credit Suisse did not sell the Singapore apartment immediately and so, in between times, the family sought to persuade Credit Suisse to instead assign its rights under the mortgage to a family friend, Herman Koswara, the idea being that he would pay off the mortgage due to Credit Suisse. Although Credit Suisse was, in principle, agreeable to this, it understandably wanted to avoid any potential liability in doing so. As a result, the family applied for a declaration and/or a variation to the saisies that would permit the assignment to Koswara, but the Attorney General opposed this application. The Court refused to grant the declaration or vary the saisies. Credit Suisse decided not to pursue the assignment proposal further but the family appealed that decision successfully and, in 2019, the Jersey Court of Appeal granted the declaration permitting the assignment to Koswara (the **Mortgage Judgment**).

At the time the family appealed, the Attorney General had cross-appealed in relation to the issue of costs. They argued that he was protected from any adverse costs order in the event the appeal was

successful by virtue of the International Cooperation (Protection from Liability) Jersey Law 2018 (the **Liability Law**). The family argued that if the Attorney General was so protected, then the Indonesian government should be ordered to pay the family's costs, if they were successful on appeal.

The Court of Appeal subsequently determined that the Liability Law, which was brought into force in 2019, did not have retrospective effect and so the family had the right to seek costs. As to the Indonesian government's liability for any adverse costs order, the Court of Appeal held that the request by the Ministry should be characterised as the commencement of proceedings by it and that evidence given by the Ministry to assist the Attorney General clearly indicated its direct interest in the proceedings. The Court of Appeal ordered, among other things, that the Attorney General and Ministry were liable on a joint and several basis for the family's and the Trustee's costs on the standard basis (the **Costs Decision**).

In addition to the Jurisdiction Appeal, the Attorney General appealed the Mortgage Judgment and Costs Decision to the Privy Council.

The Jurisdiction Appeal

In considering the Jurisdiction Appeal, the Privy Council considered in detail the overall scheme of the Modified Law. Tantular contended that the Modified Law was limited in its territorial reach to property situated in Jersey, whereas the Attorney General argued that the Modified Law has no such limitation.

There is a suite of well-established Jersey jurisprudence in this area. Indeed, the Privy Council noted that the purpose of the Modified Law had been previously explained by the Court in *Attorney General v Roselund* [2] - to facilitate international cooperation in the recovery of assets from criminals. It also noted the earlier case of *In re Kaplan*, [3] in which the Court endorsed the adoption of a broad construction of the Modified Law, noting that the:

"whole purpose of the legislation is to curb the menace ... [of offending] and ... in furtherance of that end it is undesirable for the court to adopt a restricted view".

The Privy Council noted, with approval, the utility of article 16 of the Modified Law, which:

"... enables a prosecutor to obtain assistance from the Jersey courts, the jurisdiction in which the offshore structure is administered, in relation to all property held, rather than requiring him or her to engage with many different jurisdictions. If it were otherwise, offshore structures could be made an effective shield against enforcement in criminal cases."

The Privy Council observed, as the Court had done in the context of this litigation, that Jersey has a very substantial trust industry. The trust in this case is the common form used in Jersey for holding assets in and outside of Jersey. Were the Modified Law (and therefore a *saisie*) to be restricted to property in Jersey only, as contended for by Tantular, the Privy Council observed that the international assistance Jersey could provide to fighting crime would be limited, which would risk damaging its

financial reputation.

The Privy Council upheld the earlier decisions of the Court and the Court of Appeal, concluding that the natural and ordinary meaning of the relevant wording in the Modified Law in its context and Jersey's well-established jurisprudence in this area all bear out the interpretation given to the Modified Law by the Court and the Court of Appeal - it is not limited to property situated in Jersey only and does extend to property held overseas, at least where the Court has in personam jurisdiction over persons exercising control of the property in question.

The Mortgage Appeal

On the Mortgage Appeal, the issue for consideration was limited to the ability of a mortgagee to assign its rights to a third party, where that property is subject to a saisie.

The Singapore apartment had been bought by Jonzelle for S\$7.1 million in 2005, with 80% of the purchase price coming from a loan from Singapore United Overseas Bank to Jonzelle. The other 20% was provided through an indirect gift by Tantular to the Trust, meaning that the net equity in the Singapore apartment was regarded as realisable property. The loan was secured by a mortgage on the Singapore apartment and was later refinanced with Credit Suisse.

The Court of Appeal, in granting the Mortgage Judgment, had determined that the mortgage due to Credit Suisse was not realisable property within article 2(1) of the Modified Law and that the only realisable property in the Singapore apartment was the net equity after discharge of the mortgage. The Privy Council agreed but noted that one point not previously raised before the Court and the Court of Appeal was whether assigning the mortgage to a third party would:

"knowingly aid or abet a breach of the order [the saisie] in respect of the net equity in the Singapore Apartment or whether it would intentionally frustrate or thwart the achievement of the purpose of preserving or prohibiting dealing in the realisable property which was the net equity in the Singapore Apartment".

It followed from the above that the second question then was whether Credit Suisse had to apply to vary the saisies, even where it was clear an assignment would not aid or abet a breach of the saisies or intentionally frustrate or thwart the purpose of the saisies.

The Privy Council concluded that it is not necessary for a bank to apply to the Court to vary a saisie in every case where it proposes to assign a property in which the net equity is realisable property. It said that it was open to Credit Suisse to form an assessment in good faith on whether such a move would interfere with the aims of the order. If it got that assessment wrong then it could be liable for contempt, but the Privy Council noted that will not be the case where one regulated bank is assigning a mortgage to the other. The position here was different, however, as the proposed assignee was not another bank. Instead, it was a family friend, Koswara, which was a matter of "grave concern" to the Ministry.

The Ministry had previously made it clear to the Court that Koswara's long-standing friendship with Tantular meant it was not unreasonable to suspect that Koswara was no more than a nominee or front man for Tantular and his family. This, therefore, created uncertainty as to the effect the proposed assignment would have on achieving the purpose of the saisies. In the circumstances, the Privy Council concluded that a variation permitting the transfer of the mortgage to Koswara would have been "highly prejudicial" as it would have thwarted the purpose of the saisies and accordingly allowed the Mortgage Appeal, so setting aside the Mortgage Judgment that otherwise permitted the assignment to Koswara.

The Immunity Appeal

When the Court of Appeal considered the question of costs, the Attorney General had argued that the international conventions that create the schemes by which foreign states can request assistance did not envisage that state becoming subject to any rights or obligations arising under the law of the state receiving the request. The Attorney General had otherwise indicated that the Ministry wished to claim state immunity and should not be taken as having waived immunity by requesting assistance or doing anything else in connection with the proceedings.

The Court of Appeal had concluded that it was all but "incontrovertible" that the request and commencement of proceedings should be characterised as an institution of proceedings by the Ministry and that the assistance it provided to the Attorney General in pursuing those proceedings demonstrated a clear direct interest in them. The Privy Council held that that the Court of Appeal had erred in so concluding, noting that the international treaties that enable the assistance to be given between states also make this clear. In particular, the UN Convention against Transnational Organised Crime (the **Palermo Convention**), which protects the sovereignty of state parties and makes it clear, as the Privy Council observed, that the cooperation and mutual assistance envisaged by the Palermo Convention does not involve giving up any jurisdiction on the part of the requested state or of any sovereign immunity by the requesting state.

The Privy Council considered the two leading cases on the effect of a request for assistance on the sovereign immunity of the requesting state: *Propend Finance Pty Ltd v Sing* [4] and *Blaxland v Commonwealth Director of Public Prosecutions*. [5] In applying the reasoning given in those cases, the Privy Council concluded that the proceedings, even though prompted by the request for assistance made by the Ministry, were instituted and pursued by the Attorney General only and the involvement of Muzhar on behalf of the Ministry in providing evidence to assist the Attorney General does not alter this. It followed that the Privy Council concluded that the Court of Appeal was wrong to treat Indonesia as having commenced the proceedings or taken a step in them, to treat it as having waived immunity and to make an adverse costs order against it. The Immunity Appeal was therefore allowed.

The Privy Council considered that Muzhar's actions were ultimately beneficial to the proper conduct of the proceedings under the Modified Law and stated that it would be "inimical" to the conduct of such proceedings if the requesting state was "at risk of waiving immunity by giving every assistance possible to the Attorney General". The Privy Council put particular emphasis on the fact that saisies judiciaires

are draconian in nature and the Court should, therefore, be abreast of the "fullest" and "most direct evidence of what has happened in the courts of the requesting state". Practically, the Privy Council recognised this was likely to come from officials in the requesting state going to and from Jersey to assist and report back, which "does not amount to taking a step or intervening".

Concluding remarks

The outcome on all three appeals will be welcome clarification for many. The dismissal of the Jurisdiction Appeal and confirmation as to the international reach of the saisie judiciaire reinforces Jersey's reputation as a financial centre and the international assistance Jersey can provide in assisting both with the seizure of assets held through Jersey trusts and continuing, more generally, the fight against cross-border crime.

The outcome of the Mortgage Appeal similarly provides helpful guidance to banks wanting to assign mortgages on properties that may otherwise be subject to a saisie judiciaire, clarifying that the benefit of the mortgage is not itself realisable property and that it will not always be necessary to apply to vary a saisie where a mortgagor wishes to assign the mortgage. Nevertheless, banks should take heed of the warning given as to the need to give careful consideration as to whether such an assignment will interfere with the administration of justice and thus risk a finding of contempt of court. If there is any doubt, an application may be prudent.

Finally, the outcome of the Immunity Appeal will be welcome clarification for foreign states making requests for assistance, providing comfort and reassurance that such requests can continue to be made without waiver of sovereign immunity and the risk of adverse costs orders being made against them in doing so.

[1] [2023] UKPC 21

[2] (2015) (2) JLR 29

[3] (2009) JLR 88

[4] (1997) 111 ILR 611

[5] 323 F 3d 1198 (2003)

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