Trinity Term
[2023] UKPC 21
Privy Council Appeal Nos 0012 and 0018 of 2020
and 0010 of 2021

JUDGMENT

Tan Chi Fang and 3 others (Respondents) *v* His Majesty's Attorney General (Appellant) (Jersey); Tan Chi Fang and 3 others (Respondents) *v* His Majesty's Attorney General (Appellant) (Jersey) No 2; Robert Tantular (Appellant) *v* His Majesty's Attorney General (Respondent) (Jersey)

From the Court of Appeal of Jersey

before

Lord Sales
Lord Hamblen
Lord Leggatt
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
6 June 2023

Heard on 8 and 9 February 2023

Appellant – His Majesty's Attorney General
Collingwood Thompson KC
David O'Mahony
(Instructed by Charles Russell Speechlys LLP (London))

Appellant – Robert Tantular
Jeremy Cousins KC
Ian Smith
Timothy Hanson
(Instructed by Simons Muirhead & Burton LLP)

Respondents – Tan Chi Fang and 3 ors
Jeremy Cousins KC
Timothy Hanson
(Instructed by Simons Muirhead & Burton LLP)

LORD HAMBLEN, LORD STEPHENS AND LADY ROSE:

1. Introduction

1. This is the judgment of the Board in three appeals all arising from the same dispute over the scope of two *saisies judiciaires* granted by the Royal Court in 2013 and 2014. They were granted in respect of the property of a Jersey based trust called the Jasmine Investment Trust ("the Jasmine Trust") settled in 2004 by Robert Tantular. Mr Tantular was closely connected with an Indonesian bank called P.T. Bank Century Tbk. He has been convicted by an Indonesian court of offences of fraud and money laundering following two criminal trials in 2014 and 2015. The Indonesian authorities have made confiscation orders against him and have sought the assistance of the Attorney General of Jersey to gather in Mr Tantular's assets so that they can be applied to satisfy those confiscation orders.

2. One particular item of property which the Indonesian court wished to realise is an apartment in the Cuscaden district of Singapore ("the Singapore Apartment"). At the time that the *saisies judiciaires* were granted, that apartment was owned indirectly by the trustee of the Jasmine Trust. Mr Tantular and members of his family, some of whom were living in the apartment, are discretionary beneficiaries of the Jasmine Trust. Also at that time, the Singapore Apartment was subject to a charge in favour of the bank Credit Suisse SA in Singapore as mortgagee and the loan secured by that mortgage was in default.

3. The three issues raised by these three appeals can be expressed shortly as follows:

(i) **The Jurisdiction Appeal** Does the Jersey law pursuant to which the *saisies judiciaires* were granted by the Royal Court permit the *saisies judiciaires* to be made in relation to property situated outside Jersey at least where the persons who can exercise the rights of ownership or control of that property are subject to the jurisdiction of the Jersey courts? In this appeal Mr Tantular is the Appellant and the Attorney General is the Respondent.

(ii) **The Mortgage Appeal** If the *saisies judiciaires* are not limited to property within Jersey and do cover the Singapore Apartment, was the Court of Appeal right to grant a declaration that Credit Suisse as the holder of a charge over the apartment was entitled to assign its rights under that mortgage to a third party? In this appeal, the Attorney General is the Appellant and the First to Fourth Respondents are members of Mr Tantular's

family. The Viscount of Jersey (who is the Chief Executive Officer of the Royal Court) is the Fifth Respondent and the Jasmine Trust is the Sixth Respondent. Neither the Viscount nor the Jasmine Trust has played any role in the proceedings.

(iii) **The Immunity Appeal** When the Attorney General is unsuccessful in an application connected with the *saisies judiciaires* such that Mr Tantular and his family became entitled to a costs order in their favour, can the state of Indonesia be made liable for those costs on the basis that it has submitted to the jurisdiction of the Royal Court either by instituting the proceedings brought by the Attorney General or by taking steps in those proceedings to support the making of the *saisies judiciaires*? In this appeal the Attorney General is the Appellant and the First to Fourth Respondents are members of Mr Tantular's family. Again, the Viscount and the Jasmine Trust trustee are the Fifth and Sixth Respondents but have not played any role in the proceedings.

2. The Jersey proceeds of crime legislation as applied to external confiscation orders

4. In 1999, Jersey adopted the Proceeds of Crime (Jersey) Law 1999 ("POCL 1999"). This sets out the procedure whereby the Attorney General can apply to the Royal Court for a *saisie judiciaire* when someone is convicted of a criminal offence in the Jersey courts. The POCL 1999 contains a power to enable it to be applied in addition to the enforcement within Jersey of confiscation orders made in criminal proceedings pursued in overseas courts. Article 38 of the POCL 1999 empowers the States to make regulations directing that the POCL 1999 shall apply to external confiscation orders and to criminal proceedings begun in a territory outside Jersey which may result in an external confiscation order being made there.

5. Under that power, the States made Regulations in 2008, now called the Proceeds of Crime (Enforcement of Confiscation and Instrumentalities Forfeiture Orders) (Jersey) Regulations 2008 ("the 2008 Regulations"). The purpose of the 2008 Regulations was to enable the Attorney General to use the procedure set out in the POCL 1999 at the request of overseas territories which have criminal proceedings ongoing in their jurisdiction in the course of which they have imposed or are likely to impose their own confiscation orders on criminals. The 2008 Regulations are made up of nine regulations setting up the regime and a Schedule which modifies the provisions of POCL 1999 to make them appropriate for application for this new purpose. Regulations 2 to 6 deal with enforcing overseas confiscation orders in Jersey and regulation 7 deals with requests made by the Attorney General to an overseas court for assistance with enforcing a Jersey confiscation order.

6. Regulation 2 of the 2008 Regulations thus provides that the POCL 1999 "shall apply" to external confiscation orders with the modifications specified in the Schedule to the 2008 Regulations. Other regulations deal with, for example, how orders made by overseas courts are to be authenticated: regulation 3 and the evidence to be given about proceedings and orders in overseas countries: regulation 4.

7. Regulation 6 of the 2008 Regulations is important for the Immunity Appeal challenging the costs order made by the Court of Appeal against the Indonesian Government. That provides that the government of a country or territory outside Jersey "shall be represented" in any proceedings in the Royal Court by the Attorney General and that a request for assistance in the specified form constitutes the authority of that government for the Attorney General so to act.

8. The POCL 1999 as modified by the Schedule to the 2008 Regulations is referred to as "the Modified Law". Some sections of the POCL 1999 are not needed at all for the new purpose; some provisions of the POCL 1999 apply just as they appear in the POCL 1999 itself and some provisions are modified. As well as setting out in a Schedule the changes that need to be made to the POCL 1999, the 2008 Regulations helpfully contain a consolidated version of the Modified Law.

9. The overall scheme of the Modified Law is broadly as follows. First the overseas authority sends a request for assistance to the Attorney General giving the necessary information about the criminal proceedings being pursued against the defendant. The Attorney General then applies to the Royal Court for a *saisie judiciaire* in effect freezing property up to the value of the actual or proposed external confiscation order. On the grant of the *saisie judiciaire*, the "realisable property" held by the defendant in Jersey vests in the Viscount and other property covered by the *saisie judiciaire* can be dealt with only at the Viscount's direction. Once the external confiscation order has been registered by the Royal Court pursuant to article 39 of the Modified Law, that Court may empower the Viscount to realise the property which is either vested in him or is otherwise in his possession pursuant to the *saisie judiciaire*: article 17. Once the Viscount has realised that property, he must make such payments out of the sums as the Court directs. After deducting his own fees and expenses, the Viscount then applies the remainder "on the defendant's behalf towards the satisfaction of the external confiscation order": article 20. That amount is paid into the Criminal Offences Confiscations Fund, set up under article 24, in so far as needed to satisfy the amount specified in the external confiscation order. If there is any money left over, the Viscount pays it to the previous owners of the property as the Court directs.

10. The main articles of the Modified Law that are relevant to all three appeals are set out here.

11. Article 1 defines the term "external confiscation order" as follows:

> "'external confiscation order' means an order made by a court in a country or territory outside Jersey –
>
> (a) for the purpose of recovering property obtained as a result of or in connection with criminal conduct;
>
> (b) for the purpose of recovering the value of property so obtained;
>
> (c) for the purpose of depriving a person of a pecuniary advantage so obtained; or
>
> (d) for the purposes of recovering property used in or intended to be used in such conduct or in predicate conduct outside Jersey or recovering property of equal value to such property;"

12. Article 15 of the Modified Law sets out when the powers of the Court to make a *saisie judiciaire* can be exercised:

> "**15 Cases in which saisies judiciaires may be made**
>
> (1) The powers conferred on the Court by Article 16 are exercisable where –
>
> (a) proceedings have been instituted in a country or territory outside Jersey and have not been concluded, and –
>
> (i) an external confiscation order has been made in the proceedings, or

(ii) it appears to the Court that there are reasonable grounds for believing that such an order will be made in the proceedings;

or

(b) it appears to the Court that proceedings are to be instituted against the defendant in a country or territory outside Jersey, and that there are reasonable grounds for believing that an external confiscation order will be made in those proceedings.

(2) Where the Court has made an order under Article 16 by virtue of paragraph (1)(b), the Court shall discharge the Order if proceedings have not been instituted within such time as the Court considers reasonable."

13. Article 16 of the Modified Law then sets out the scope of the *saisies judiciaires* that the Court can make. As this is the key provision for the purposes of these appeals, it is set out here in full:

"**16 Saisies judiciaires**

(1) The Court may, subject to such conditions and exceptions as may be specified in it, make an order (in this Part referred to as a *saisie judiciaire*) on an application made by or on behalf of the Attorney General on behalf of the government of a country or territory outside Jersey.

(2) An application for a *saisie judiciaire* may be made ex parte to the Bailiff in chambers.

(3) A *saisie judiciaire* shall provide for notice to be given to any person affected by the order.

(4) Subject to paragraph (5), on the making of a *saisie judiciaire* –

(a) all the realisable property held by the defendant in Jersey shall vest in the Viscount;

(b) any specified person may be prohibited from dealing with any realisable property held by that person whether the property is described in the order or not;

(c) any specified person may be prohibited from dealing with any realisable property transferred to the person after the making of the order,

and the Viscount shall have the duty to take possession of and, in accordance with the Court's directions, to manage or otherwise deal with any such realisable property; and any specified person having possession of any realisable property may be required to give possession of it to the Viscount.

(5) Any property vesting in the Viscount pursuant to paragraph (4)(a) shall so vest subject to all hypothecs and security interests with which such property was burdened prior to the vesting.

(6) A *saisie judiciaire* –

(a) may be discharged or varied in relation to any property; and

(b) shall be discharged when the proceedings in relation to which it was made are concluded.

(7) An application for the discharge or variation of a *saisie judiciaire* may be made to the Bailiff in chambers by any person affected by it and the Bailiff may rule upon the application or may, at the Bailiff's discretion, refer it to the Court for adjudication.

(8) Where it appears to the Court that any order made by it under this Article may affect immovable property situate in Jersey, it shall order the registration of the order in the Public Registry.

(9) For the purposes of this Article, dealing with property held by any person includes (without prejudice to the generality of the expression) –

(a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from Jersey.

(10) Where the Court has made a *saisie judiciaire* a police officer may, for the purpose of preventing the removal of any realisable property from Jersey, seize the property.

(11) Property seized under paragraph (10) shall be dealt with in accordance with the Court's directions."

14. Article 17 of the Modified Law provides for what is to happen to the realisable property once the external confiscation order has been registered under Article 39 and the Court has made a *saisie judiciaire*. The Attorney General may apply to the Court to empower the Viscount to realise any realisable property which is vested in the Viscount or which is in the possession of the Viscount pursuant to a *saisie judiciaire*. Before doing so, the Court must give anyone holding an interest in the property a reasonable opportunity to make representations to the Court.

15. Once the Viscount has realised the property, article 20 of the Modified Law provides that the sums in the hands of the Viscount shall be applied on the defendant's behalf towards the satisfaction of the external confiscation order after such payments (if any) as the Court may direct have been made out of those sums and then after payment of the Viscount's fees and expenses. The amount which the Viscount must apply to satisfy the external confiscation order is then paid into the Criminal Offences Confiscations Fund which is established under article 24 of the Modified Law.

16. Article 39 of the Modified Law concerns the registration of external confiscation orders. It provides for the Attorney General to apply to the Royal Court to register an external confiscation order if certain conditions are met, including that the Court is of the opinion that enforcing the order in Jersey would not be contrary to the interests of justice.

17. Clearly two of the key concepts in applying the Modified Law are the concept of "property" for this purpose and the concept of "realisable property".

18. "Property" is defined in article 1 which is the general interpretation article as follows:

> "'property' means all property, whether movable or immovable, or vested or contingent, and whether in Jersey or elsewhere, including –
>
> (a) any legal document or instrument evidencing title to or interest in any such property;
>
> (b) any interest in or power in respect of any such property;
>
> (c) in relation to movable property, any right, including a right to possession,
>
> and for the avoidance of doubt, a reference in this Law to property being obtained by a person includes a reference to any interest in that property being obtained;"

19. The term "realisable property" is defined in article 2:

> "2(1) In this Law, 'realisable property' means –
>
> (a) in relation to an external confiscation order in respect of specified property, the property that is specified in the order;
>
> (b) in any other case –

(i) any property held by the defendant,

(ii) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law, and

(iii) any property to which the defendant is beneficially entitled.

…

(4) Subject to the following provisions of this Article, for the purposes of this Law the value of property (other than cash) in relation to any person holding the property means the market value of the property.

…

(9) A gift (including a gift made before the commencement of the Enforcement Regulations) is caught by this Law if –

(a) it was made by the defendant at any time after the conduct to which the external confiscation order relates; and

(b) the Court considers it appropriate in all the circumstances to take the gift into account.

(10) For the purposes of this Law –

(a) the circumstances in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person directly or indirectly for a value that is significantly less than the value provided by the defendant; and

(b) in those circumstances, the preceding provisions of this Article shall apply as if the defendant had made a gift of

such share in the property as bears to the whole property the same proportion as the difference between the values referred to in sub-paragraph (a) bears to the value provided by the defendant."

3. The facts and the proceedings so far

20. What follows is a brief outline of the main steps in the proceedings. The details relevant to the three appeals are given in the sections of this judgment considering those appeals.

21. The present trustee of the Jasmine Trust is H1 Trust Company Ltd which is a wholly owned subsidiary of Helm Trust Company Ltd, based in St Helier, Jersey. The beneficiaries were listed as Mr Tantular who was the settlor and the members of his family who are the Respondents. It is a discretionary trust in conventional form, governed by Jersey law. The Jasmine Trust wholly owns a British Virgin Island ("BVI") company Jonzelle Ltd ("Jonzelle") which was incorporated in 2004. In 2005 Jonzelle bought the Singapore Apartment, a valuable apartment in which Mr Tantular's wife and children lived. The apartment was mortgaged to Credit Suisse and the balance of the loan amounted to some S$4.4 million at the time that the first *saisie judiciaire* was granted so that there was a substantial equity left in the property.

(a) The first saisie judiciaire

22. The Attorney General received a request for assistance issued by Dr Amir Syamsudin, Minister of Law and Human Rights of the Republic of Indonesia on 29 July 2013. The request sought both the gathering of documentary evidence and a *saisie judiciaire* in respect of the assets of the Jasmine Trust. It related to alleged criminality surrounding the collapse of Bank Century in proceedings referred to as "the 1631 proceedings". The family accepted that the conditions set out in article 15 of the Modified Law were satisfied, namely that proceedings had been instituted in Indonesia for offences of fraud and money laundering, those proceedings had not yet been concluded but that there were reasonable grounds for believing that an external confiscation order would be made in those proceedings.

23. The Attorney General was granted the first *saisie judiciaire* by the Bailiff on 9 August 2013 following a without notice hearing. The Royal Court ordered that, pursuant to article 16(1) of the Modified Law, a *saisie judiciaire* be granted in respect of the realisable property situate in Jersey of Robert Tantular (whether movable or immovable, vested or contingent) which was known to include assets held by the

Trustee of the Jasmine Trust in Jersey and its underlying companies. It stated further that the property included cash, shares etc and immovable property held by the companies underlying the Jasmine Trust.

24. The first *saisie judiciaire* also provided that the Trustee "be prohibited from dealing with any realisable property of Tantular at present held by it or transferred to it after the making of the [saisie]" unless it did so at the direction of the Viscount. It directed the Viscount, in view of his statutory duty under article 16(4), to take possession of all realisable property situate in Jersey of Mr Tantular and to manage or otherwise deal with the same in accordance with the Court's directions.

25. After the Attorney General had been granted the *saisie judiciaire* in 2013, there was an initial dispute with the family as to what, if any, property fell within the definition of "realisable property" for the purposes of article 2 of the Modified Law. Mr Tantular applied to the Royal Court for an order releasing trust assets from the *saisie judiciaire* arguing that the Trust assets were not caught. He did not at this stage raise the issue that now arises in the Jurisdiction Appeal. Rather the issue was whether Mr Tantular was "beneficially entitled" to all the assets of the Jasmine Trust by reason of being a discretionary beneficiary of the trust. If he was, then all the trust assets became realisable property within article 2(1)(b)(iii) of the Modified Law. If he was not, then it would only be trust property that comprised gifts that had been made by Mr Tantular to the Jasmine Trust that came within the category of realisable property under article 2(1)(b)(ii).

26. This was an important point because if the *saisie judiciaire* caught only tainted gifts, it would apply only to gifts made after the start of the criminal conduct that was the subject of the 1631 proceedings in which the external confiscation order was likely to be made: see article 2(9) of the Modified Law. At this early stage it was thought that the criminal conduct began in January 2007 so that only gifts made to the Jasmine Trust after that date would be caught if the Attorney General could rely only on article 2(1)(b)(ii). Although it was clear that the Singapore Apartment was acquired by Jonzelle before that date, that did not necessarily mean that the apartment was not caught. The Court needed further evidence as to when the mortgage on the Singapore Apartment was paid down and where the money had come from to make those payments. That would enable the Court to find how much of the equity in the Singapore Apartment held by the Jasmine Trust had been contributed by gifts after the start of the criminal conduct.

27. The Royal Court determined Mr Tantular's application to release the trust assets in its judgment of 10 June 2014. [2014] (2) JLR 25. They held at para 24 of that judgment that a discretionary beneficiary is not entitled to the property which is the

subject of the trust for this purpose. Article 2(1)(b)(iii) did not therefore apply here. They adjourned the hearing for further evidence to be adduced as to the timing of gifts into the Jasmine Trust (through Jonzelle) by Mr Tantular so that they could determine what gifts were caught by article 2(1)(b)(ii).

28. Following a subsequent hearing in August 2014, the Royal Court determined which assets within the Jasmine Trust were gifts caught by article 2(1)(b)(ii) and so subject to the *saisie judiciaire* and which were not. The Court announced its conclusion and varied the *saisies judiciaires* on 21 August 2014. It delivered its reasoned judgment on 8 December 2014: [2014] JRC 243.

29. By that time, it had been agreed that the relevant date for the start of criminal conduct concerned in the 1631 proceedings was 1 November 2007 – that was the relevant date for article 2(1)(b)(ii). Further, by that time, Mr Tantular had been convicted of fraud and money laundering at the Central Jakarta District Court.

30. In its judgment on this point, the Royal Court considered six transfers of assets to companies owned by the Jasmine Trust and held that four of them were made after the commencement of the criminal conduct, those four amounting to US$1.7 million. That was held therefore to be the value of the assets held by the Trust which were covered by the first *saisie judiciaire*. The Viscount was required to release assets back to the Trust which he held in excess of that. At that point it seemed that the Singapore Apartment would not be needed because the proceeds of sale of a different property and the cash in the Trust were sufficient to cover that sum of US$1.7 million.

(b) The second saisie judiciaire

31. On 1 September 2014, however, the Attorney General applied to the Royal Court for the second time based on a further set of criminal proceedings which had been started against Mr Tantular in Indonesia in 2012 for embezzlement and fraud, referred to as “the 210 proceedings”. That application was prompted by a further request for assistance (dated 22 August 2014) from the Indonesian Ministry. In the 210 proceedings, the period of offending ran from 2003 to November 2008. Those proceedings concluded with the conviction of Mr Tantular on 18 May 2015 of fraud and money laundering. That conviction was upheld on appeal.

32. In making his application to the Royal Court for the second *saisie judiciaire*, the Attorney General submitted that property gifted to the Jasmine Trust during that longer period should be subject to a *saisie judiciaire*. That would undoubtedly cover

the Singapore Apartment which had been acquired by the Trust (through Jonzelle) in 2005. The family contested the application for a second *saisie judiciaire* on the grounds of abuse of process. That argument was rejected by the Royal Court in its judgment of 17 December 2014: [2015] (1) JLR 97. Following that judgment, the second *saisie judiciaire* was reissued on 17 December 2014 to stay in force until further order of the Court.

33. The second *saisie judiciaire* was in identical terms to the first in all respects relevant to these appeals. The Board notes here that in one of the many judgments issued by the Bailiff, he describes the *saisie judiciaire* as being "in normal form in that it was granted in respect of the realisable property of Mr Tantular situated in Jersey, but it was also expressed specifically to extend to the assets of the trust": see [2015] (1) JLR 97, para 6. What is not expressly specified in the *saisie judiciaire* is that it extends to the assets of the trust wherever they are located and not just to the assets of the trust in Jersey. But no point has been taken at any stage on the drafting and the parties and the Jersey courts have proceeded on the basis that the *saisies judiciaires* purport to cover all the assets of the Jasmine Trust wherever located, the issue in the Jurisdiction Appeal being the legal one of whether that scope is permissible according to the terms of the Modified Law. No doubt this point can be clarified in the terms of any future *saisie judiciaire* sought by the Attorney General in the event of a further request from an overseas territory.

(c) Credit Suisse's representation to vary the saisies judiciaires

34. On 7 June 2018, Credit Suisse issued a representation to the Royal Court. The bank stated that they had been notified of the first *saisie judiciaire* on 14 August 2013. Under the loan agreement, that caused the whole remaining balance of the debt secured on the Singapore Apartment to fall due immediately. On 6 December 2013 they sent a notice of demand to Jonzelle for the unpaid balance, failing which Jonzelle and the family had to deliver up vacant possession of the apartment. Jonzelle failed to comply with that demand. Credit Suisse applied to the Royal Court to vary the two *saisies judiciaires* to realise its security. In the representation, Credit Suisse said that following the sale of the Singapore Apartment, they agreed to remit the net proceeds of sale to the Viscount after deducting the money owed to them and their costs.

35. Following a hearing, judgment was given in favour of making that variation: [2018] JRC 161 (4 September 2018) (Sir Michael Birt Commissioner, and Jurats Crill and Christensen) ("the variation judgment"). In his judgment, the Commissioner recorded that the Attorney General, the Viscount and the Trustee did not oppose the relief sought by Credit Suisse. Counsel for the family raised various issues, but none

of those challenged the *saisies judiciaires* on the basis that the assets caught were only those within the jurisdiction and so did not catch the Singapore Apartment.

36. Although the variation judgment is not one which is directly involved in any of the three appeals before the Board, the Commissioner's reasoning is relevant to the issues raised by the Mortgage Appeal. He addressed first whether the position was covered by article 16(5) of the Modified Law which provides that any property vesting in the Viscount "shall so vest subject to all hypothecs and security interests with which such property was burdened prior to the vesting". He held that the mortgage was not the kind of hypothec or security interest mentioned in article 16(5). Since the mortgage was not covered by article 16(5), that meant that "the whole of the property" vested in the Viscount. It is not entirely clear what the Commissioner meant by that, but it appears to be on that basis – namely that the whole interest in the apartment vested in the Viscount despite the existence of the mortgage – that he considered that a variation of the *saisies judiciaires* was needed in order to permit Credit Suisse to sell the Singapore Apartment.

37. The Royal Court granted the variation sought:

> "However, the principle underlying Article 16(5) is very clear. What is intended to be caught by a saisie and to be available for confiscation in the event of registration of an external confiscation order is the equity in the asset. The operation of the Modified Law is not intended to prejudice the position of a bona fide lender, such as a bank, which holds security over the asset in question. Lenders such as banks should be able to realise their security and obtain repayment of what they are owed, with only the equity in the property remaining available for confiscation. Similarly, when property has been realised by the Viscount, the court should exercise its power under Article 20(1) to direct that the bank should first be paid out of the sale proceeds with only the balance (reflecting the offender's equity in the property) being applied towards satisfaction of any external confiscation order."

38. An order was then made on 6 August 2018 varying both the *saisies judiciaires* to allow the sale to take place, subject to the condition that the net proceeds of sale be remitted to the Viscount.

(d) The judgments leading to the Mortgage Appeal

39. Credit Suisse did not make use of the variation made by the variation judgment by selling the Singapore Apartment immediately. Instead, the family sought to persuade the bank to assign its rights under the mortgage to an old family friend, Mr Herman Koswara. He would then pay off the debt owed by Jonzelle to Credit Suisse and, the family hoped, be more flexible about the repayment of the loan than Credit Suisse were likely to be. Initially Credit Suisse were prepared to consider this proposal but they were concerned to avoid any potential liability.

40. The family therefore applied to the Royal Court on 16 April 2019 for a declaration that there was nothing in the terms of the *saisies judiciaires* which prevented Credit Suisse from assigning its rights under the mortgage to a third party. If the Royal Court was not prepared to grant that declaration, the family asked in the alternative that the Royal Court make such variations to the *saisies judiciaires* or give such directions as would enable the assignment to Mr Koswara to take place. The application was opposed by the Attorney General.

41. The Royal Court (Commissioner JA Clyde-Smith and Jurats Ramsden and Pitman) refused either to grant the declaration sought or to vary the *saisies judiciaires* to allow the assignment to go ahead: [2019] JRC 114 date 18 June 2019 ("the RC's mortgage judgment"). The reasoning of the Royal Court is considered in more detail later as this is the first judgment from which one of the three appeals before the Board arises. Referring back to the variation judgment, the Royal Court held that assigning the mortgage amounted to dealing with the apartment contrary to the prohibition on dealing imposed by the *saisies judiciaires*. To take any action which would or might materially affect the realisable property would, the Court held, be to deal with it. The Court was therefore unable to make the declaration sought: para 34.

42. Turning to the alternative application for a further variation to allow the assignment, the Royal Court declined to vary the *saisies judiciaires* to permit the assignment to Mr Koswara: para 37.

43. Following the RC's mortgage judgment, Credit Suisse decided not to pursue the proposal of assigning the rights in the mortgage to Mr Koswara or to any third party. Permission was, nonetheless, sought by and given to the family to appeal against the RC's mortgage judgment. The Court of Appeal allowed the appeal and granted the declaration: [2019] JCA 207 (28 October 2019) ("the CA's mortgage judgment"). That is the judgment which is challenged before the Board in the Mortgage Appeal.

44. In the CA's mortgage judgment, the Court of Appeal first rejected the Attorney General's argument that since Credit Suisse had made clear that it was not interested in assigning the mortgage, the appeal was academic and should be dismissed for that reason. As to the merits of the appeal, the Court of Appeal held that the Royal Court had erred in conflating the ownership of the legal estate in the apartment with the legal interest that the mortgagee enjoyed in the mortgage over the property: para 54.

45. Further, the Court of Appeal held that the assignment of Credit Suisse's interest in the mortgage did not of itself put at risk the value of the realisable property because it had no effect on the property which was the subject of the mortgage. The subsequent actions of the assignee might have an impact on that value, but they rejected as too broad the Royal Court's conclusion that dealing with the realisable property included taking any action that would or might materially affect the realisable property held under restraint: para 60.

46. The Court of Appeal therefore granted the declaration sought. They went on to record that if they had held that a variation of the *saisies judiciaires* was necessary, they had no doubt that the Royal Court had been correct to refuse to sanction the assignment to Mr Koswara.

47. Permission to appeal to the Board against the CA mortgage judgment was granted on 26 May 2021.

(e) The judgments leading to the Jurisdiction Appeal

48. In the meantime, the Attorney General applied to the Royal Court on 10 July 2019 pursuant to the 2008 Regulations and article 39 of the Modified Law for the registration of the two Indonesian external confiscation orders that had by this time been made in the 1631 and 210 proceedings. He also sought an order that the Court authorise the Viscount to realise the realisable property held by Mr Tantular in Jersey in satisfaction of the outstanding balance due under the Indonesian orders.

49. It was in response to that application to register the confiscation orders that Mr Tantular lodged a fresh representation on 19 September 2019 seeking to discharge or vary the two *saisies judiciaires*. He raised the point that article 16(4)(a) of the Modified Law limits, as a matter of law, the imposition of the *saisie judiciaire* to realisable property that is situated in Jersey. Further, he submitted that the only assets owned by the Trustee were the shares in Jonzelle and in another company and that the better view was that their proper legal situs was the BVI where the relevant

share register was located. Mr Tantular argued that the shares in Jonzelle (and hence the Singapore Apartment owned by Jonzelle) were not "realisable property situate in Jersey" for the purposes of article 16(4) of the Modified Law. Mr Tantular's representation stated that, as a result, both the *saisies judiciaires* were without effect and should be discharged.

50. Commissioner J A Clyde-Smith delivered his judgment on the jurisdiction point raised by Mr Tantular's representation on 8 April 2020: [2020] JRC 058 ("the RC's jurisdiction judgment"). The Commissioner noted that the category of realisable property with which the *saisies judiciaires* were concerned was that set out in article 2(1)(b)(ii), namely any property held by a person to whom the defendant has made a gift caught by the Modified Law: para 33. The Commissioner stated that the definition of "property" in the Modified Law was broad and unambiguous and expressly included property "whether situated in Jersey or elsewhere": para 41. In this case, the Court had personal jurisdiction over the trustees, directors and shareholders and could therefore prohibit them from dealing with any property without geographical limits.

51. At the end of the RC's jurisdiction judgment the Commissioner said:

> "79 In conclusion, the Court's powers under the Modified Law are not limited to property within its jurisdiction as contended by the Representor. Properly construed, the Modified Law empowers the Court to regulate the conduct of a person, over whom it has personal jurisdiction, in relation to property that person owns outside the jurisdiction, in this case over H1 and the property it ultimately owns in Singapore."

52. Mr Tantular appealed against the RC's jurisdiction judgment but his appeal was dismissed by the Court of Appeal (Lord Anderson of Ipswich, Sir Wyn Williams and Sir William Bailhache): [2020] JCA 234 (12 November 2020) ("the CA's jurisdiction judgment"). Permission to appeal to the Board from the CA's jurisdiction judgment was granted on 15 December 2021.

(f) The judgment leading to the Immunity Appeal

53. When the family lodged their appeal against the RC's mortgage judgment (which refused to declare that Credit Suisse were entitled to assign their rights under the mortgage to a third party) the Attorney General had cross-appealed. That cross

appeal raised the issue as to costs in the event that the family's appeal was successful in overturning the RC's mortgage judgment. The Attorney General wished to argue that if the appeal were successful, he was protected from an adverse costs order by the enactment of the International Cooperation (Protection from Liability) (Jersey) Law 2018. In response to that cross appeal, the family argued that if the Attorney General was indeed protected from an adverse costs order, the Court of Appeal should direct that the Appellants' costs be paid by the Government of Indonesia: see para 18 of the CA's mortgage judgment.

54. Having allowed the family's appeal against the RC's mortgage judgment, the Court of Appeal had to address the issue of costs, including the Attorney General's cross appeal. At the close of the CA's mortgage judgment, therefore, the Court of Appeal gave directions for further written submissions on the various costs issues: para 67.

55. The Court of Appeal then delivered a judgment on the papers on the questions of costs consequential to the CA's mortgage judgment: [2020] JCA 013 dated 27 January 2020. That is the judgment which gives rise to the Immunity Appeal. In summary, the Court of Appeal held that the International Co-operation (Protection from Liability) (Jersey) Law 2018, article 2, which was brought into force as from 18 June 2019 did not have retrospective effect. It did not override the family's acquired right to seek costs as soon as their proceedings were brought before the Court: see paras 43 onwards of the CA's costs judgment.

56. The Court of Appeal then turned to the question of the Indonesian Government's liability to costs. The Court held that the determination of that liability turned on the appropriate characterisation as a matter of law of the request made by the Ministry, taken together with the agreement of the Attorney General to make the representations which led to the proceedings: para 82 of the CA's costs judgment. The Court held that it was "all but incontrovertible" that the commencement of the process for the *saisies judiciaires* should be characterised as an institution of proceedings by the Ministry: para 90. Further, the Attorney General's applications had been supported by evidence given by Mr Muzhar Director for International Law and Central Authority, Ministry of Law and Human Rights. That was a clear indication of the direct interest of the Ministry.

57. The Court of Appeal therefore ordered, amongst other things,

(i) The Appellants would be allowed reimbursement of their costs before the Royal Court and before the Court of Appeal from the Jasmine Trust on the indemnity basis;

(ii) The Attorney General and the Ministry were ordered on a joint and several basis to pay the Appellants' and the Trustee's costs on the standard basis to be taxed, if not agreed. The payment would be made either to the Appellants and the Trustee directly or to the Trust if the Appellants had been reimbursed those costs by the Trust.

58. Permission to appeal to the Board from the costs judgment was granted on 26 May 2021.

59. The family applied for permission to cross appeal in the Attorney General's appeal against the costs judgment. They noted in their application that the Singapore Apartment had been sold on behalf of Credit Suisse in or about December 2020 and the net proceeds of sale of £2,491,099.85 had been remitted to the Viscount on 5 March 2021. The proposed ground of the cross appeal was that if the Court of Appeal had been wrong to decide that the Indonesian Ministry should be liable for costs along with the Attorney General, then the Court should have acceded to the family's request to join the Ministry as a party to the proceedings for the purpose of making a costs order against it. Her Majesty refused permission for the cross appeal by Order dated 15 December 2021.

60. Following the hearing and while the Board was preparing this judgment, the parties notified the Board that they had reached an agreement resolving the remaining disputes between them. On 23 March 2023, Sir Michael Birt made an agreed order:

(i) Registering the Indonesian external confiscation orders under article 39 of the Modified Law;

(ii) Directing the Viscount as to the disposal of the monies in his possession pursuant to the *saisies judiciaires*, including the payment of a sum to the Criminal Offences Confiscations Fund, the retention of a sum in respect of the Viscount's expenses, the payment of the costs and fees incurred by various others including to Trustee of the Jasmine Trust and the winding up of Jonzelle and the Jasmine Trust.

61. The Attorney General, however, requested that the Board proceed to promulgate its judgment on the three appeals, since they raise issues which are of public importance for the proper administration of the Modified Law. The Respondents no longer opposed the appeals on the basis that no order for costs

before the Board would be sought by any party, regardless of the outcome of the appeals. The Board has acceded to the Attorney General's request.

4. The Jurisdiction Appeal

62. The issue is whether and, if so, in what circumstances article 16 of the Modified Law permits the Jersey courts to make a *saisie judiciaire* in relation to property outside Jersey. The Appellant, Mr Tantular, contends that article 16 is limited in its territorial reach to property situated in Jersey.

63. The starting point is the text of the Modified Law and the natural or ordinary meaning of the relevant word or phrase in its context. In the present case the specific wording in issue is the meaning of "realisable property" in article 16(4)(b) which provides:

> "(b) any specified person may be prohibited from dealing with any realisable property held by that person whether the property is described in the order or not;"

Does "realisable property" here mean only property situated in Jersey or does it extend to property elsewhere?

64. The obvious textual point to be made is that "realisable property" is referred to in general and unqualified terms. No geographical limitation is expressed.

65. This is borne out by the definition of "property" and "realisable property" in articles 1 and 2. Article 1 defines the word "property" as meaning "all property, whether movable or immovable, or vested or contingent, and **whether in Jersey or elsewhere**" (emphasis added). It further provides that the phrase "realisable property" is given the meaning attributed to it by article 2(1) and (2). Article 2(1) defines what is realisable property. Under article 2(1)(a) it means "the property that is specified" in the external confiscation order; under article 2(1)(b) it means "any property" (i) "held by the defendant", (ii) "held by a person to whom the defendant has directly or indirectly made a gift caught by this Law" and (iii) "to which the defendant is beneficially entitled". Article 2(2) sets out certain circumstances in which "property" is not realisable property. No geographical limitation is stated in relation to the meaning of realisable property and so, in accordance with article 1, it covers property "whether in Jersey or elsewhere".

66. It is further borne out by the specific distinction drawn in article 16 between "any realisable property" in 16(4)(b) (and 16(4)c)) and "all the realisable property held by the defendant **in Jersey"** in 16(4)(a) (emphasis added). Article 16(4)(a) provides:

> "(a) all the realisable property held by the defendant in Jersey shall vest in the Viscount."

In accordance with the definition of property and realisable property as meaning property "whether in Jersey or elsewhere" the drafter has expressly stated in article 16(4)(a) where a geographical limitation to Jersey is to be applied. The same has been done in article 16(8) which refers to "immovable property situate in Jersey". By contrast, no such limitation is expressed in article 16(4)(b) (and (c)).

67. As the Court of Appeal stated at para 56 of the CA's jurisdiction judgment:

> "…the obvious and natural meaning of Article 16(4)(a) is that the power conferred thereby can be exercised only in respect of property which is located in Jersey whereas the obvious and natural meaning of the power conferred by Article 16(4)(b) contains no such geographical limitation."

68. As the Royal Court stated at para 41, in a passage endorsed by the Court of Appeal:

> "The definition of ***'property'*** is broad and unambiguous namely all property ***'....whether situated in Jersey or elsewhere ...'*** It is significant that it is only Article 16(4)(a) that restricts this wide definition of property to realisable property held by the defendant ***'in Jersey'*** which ***'shall vest*** *in* ***the Viscount',*** presumably because it is only property within this jurisdiction that the Modified Law could purport to directly vest in the Viscount. Sub-paragraphs (b) and (c) of Article 16(4) have no such geographical restriction, and as a matter of ordinary reading the wide definition of ***'property'*** must apply to them."

69. The difference in geographical application between article 16(4)(a) and sub-paragraphs (b) and (c) is logical because the effect of sub-paragraph (a) is the

mandatory vesting ("shall vest") of the property in the Viscount. That could only operate in relation to property in Jersey. By contrast, sub-paragraphs (b) and (c) are discretionary and involve a prohibition on dealing with the property rather than any vesting of it. As such, in an appropriate case there is no difficulty about their operation against a "specified person" on a wider geographical basis. As the Court of Appeal pointed out at para 59:

> "They offer the court the equivalent of a Mareva jurisdiction, which may take effect worldwide in the sense that a specified person can be prohibited from doing certain things outside the jurisdiction. Such prohibitions are unlikely to be issued against non-Jersey residents because of the difficulty of enforcement, but no territorial limitation by residence of specified persons (any more than by location of their assets) is expressed in the Modified Law."

As with a Mareva injunction, the court's *in personam* jurisdiction over specified persons in Jersey means that they can be made to comply with orders of the court and the prohibition from dealing can be effectively enforced.

70. In summary, the relevant wording is subject to no geographical limitation and the inference that there is no such limitation is strongly supported by the immediate context of the distinction between articles 16(4)(a) and (b), the wider context of the definitions of property and realisable property in articles 1 and 2 and the internal logic of the provisions. Indeed, Mr Cousins KC for Mr Tantular, accepted that their case required article 16(4)(b) to be "read down".

71. As to the purpose of the Modified Law, in *Attorney General v Rosenlund* (2015) (2) JLR 29 the Royal Court explained that:

> "50 The purpose of the Modified Law is to facilitate international co-operation in the recovery of assets from criminals. This statutory purpose is supported by important considerations of domestic and international public policy. Provisions based on this public policy are contained in a number of treaties. The interpretation which is most in accord with this statutory purpose is that which makes it easier for Jersey to co-operate and recover assets when requested to do so by foreign governments…"

72. An interpretation of article 16(4)(b) which enables prohibitions of dealing on property outside Jersey enhances that purpose. It allows Jersey to provide more effective co-operation and asset recovery. There are also particular reasons why it is appropriate for Jersey to be able to provide such assistance.

73. As observed by the Royal Court at paras 31 and 32 of the RC's jurisdiction judgment, Jersey has a very substantial trust industry and the trust structure in this case is in the common form of Jersey based trustees holding underlying assets situated abroad. If the Modified Law is restricted to dealings in property in Jersey, the international assistance in the fight against crime which Jersey would be able to provide would be limited, risking damage to its financial reputation. As the Court of Appeal stated at para 60, an interpretation which "allows the Court, pending registration of an external confiscation order, to make interim orders the effect of which is to ensure that the assets of a criminal or suspected criminal are retained pending a resolution of the issues relating to confiscation" will "without doubt, provide significant assistance in helping to protect Jersey's reputation in financial matters."

74. A similar point was made by the Royal Court at para 80:

> "The purpose of the Modified Law and analogous legislation is to comply with Jersey's international obligations to assist in the fight against cross-border financial crime, and it would be surprising if this legislation did not apply to assets held through the very structures for which Jersey is most known. It would also be surprising if a defendant could use a common feature of such structures to argue that certain assets were beyond the Court's reach."

75. The decision of the courts below also reflects established jurisprudence in Jersey, as illustrated by the decision of the Royal Court in *In re Kaplan* (2009) JLR 88. That case concerned an application to discharge a *saisie judiciaire* made in relation to trust assets held by two companies which were registered and controlled in Jersey, although the underlying assets were in Costa Rica and Switzerland. One of the grounds for seeking discharge was that the trust assets were not realisable property as they were not situated in Jersey. The Royal Court (Sir Philip Bailhache, Bailiff and Jurats Le Breton and Clapham) rejected this ground but did discharge the *saisie judiciaire* as a matter of discretion.

76. In its judgment in *In re Kaplan*, the Royal Court endorsed the adoption of a broad construction of the Modified Law given that "the whole purpose of the legislation is to curb the menace" of the targeted offending and that "in furtherance of that end it is undesirable for the court to adopt a restrictive view" (para 18). The Royal Court cited with approval a passage from *Maxwell on the Interpretation of Statutes* (12th ed) at p201 which stated that: "Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act" (para 19).

77. In relation to the meaning of realisable property, the Royal Court cited the definitional provisions in articles 1(1) and 2(1) and concluded as follows:

> "32 It is clear from these definitions that 'realisable property' embraces property held outside the Island. It is also clear that art. 16(4) vests in the Viscount, following a saisie judiciaire, only realisable property held by the defendant in Jersey. Mr Dessain for the Viscount contended, and we agree, that the effect of article 16 is to empower the Viscount to require any specified person to repatriate to Jersey any realisable property situated outside the jurisdiction. In practice, such a specified person would no doubt be in the jurisdiction of this court. Counsel for the Viscount also submitted, and again we agree, that the court has an inherent jurisdiction to compel a defendant to disclose his assets, as the English Court of Appeal found to be an incident of a restraint order under the Criminal Justice Act 1988 in *In re O (Restraint order: Disclosure of assets)* [[1991] 2 QB 520]."

78. In summary, the natural or ordinary meaning of the wording in its context, the Modified Law's purpose both generally and with specific regard to Jersey, and Jersey's established jurisprudence all bear out the interpretation of the Royal Court and the Court of Appeal.

79. Against that, Mr Cousins KC raised six main points, namely: (a) the international context; (b) the presumption against extra-territorial effect; (c) decisions in other jurisdictions; (d) indirect overseas enforcement; (e) multiplication of effort and expense and (f) textual points. Each will be addressed.

(a) The international context

80. Five treaties which contain confiscation proceedings have been extended to Jersey. These are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (the "Narcotics Convention") (7 July 1997); the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 (the "Strasbourg Convention") (1 May 2015); the United Nations Convention against Transnational Organised Crime 2000 (the "Palermo Convention") (17 December 2014); the United Nations Convention against Corruption 2003 (the "UN Corruption Convention") (9 November 2009), and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 (the "Warsaw Convention") (1 August 2015). The letters of request in this case were sent in reliance upon the Palermo Convention, although it had not then been extended to Jersey.

81. Mr Cousins contended that because the articles of these treaties dealing with the specific obligation to provide assistance to freeze and confiscate assets refer expressly to property situated in the territory of the requested state, it would be inconsistent with Jersey's international obligations, and the international context against the background of which the Modified Law was enacted, if the Modified Law was interpreted as conferring a wider domestic power.

82. There is, however, nothing in any of the treaties which prohibits the exercise of a jurisdiction over persons within the state's territory in relation to property held by them elsewhere. It is the exercise by the Jersey courts of that established *in personam* jurisdiction which is sought to be challenged.

83. The exercise of such a jurisdiction is, moreover, consistent with various general statements made in the Conventions to the effect that the requested state should provide mutual assistance to the greatest extent allowed within their domestic legal systems. So, for example, article 12(1) of the Palermo Convention provides that state parties "shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of" proceeds of crime. Article 18(1) of the same Convention provides that state parties "shall afford one another the widest measure of mutual legal assistance". General statements to similar effect are to be found in Article 31 (1) and Article 46 (1), (3) (i) and (30) of the UN Corruption Convention; Article 5 (1) and Article 7 (1) and (3) of the Narcotics Convention and Article 15(1) of the Warsaw Convention.

(b) The presumption against extra-territorial effect

84. As explained in the UK Supreme Court's recent decision in *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] AC 519 (*"KBR"*) at paras 21-

25, this presumption in statutory interpretation is well established under UK law. As stated in *Bennion, Bailey and Norbury on Statutory Interpretation,* 8th ed (2020), section 6.8: "Unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters". The presumption "reflects, in part, the requirements of international law that one state should not by the claim or exercise of jurisdiction infringe the sovereignty of another state in breach of rules of international law", but its rationale and resulting scope is wider than this and is rooted in international comity (per Lord Lloyd-Jones at para 24 of *KBR*).

85. *KBR* concerned whether a notice to produce documents under section 2 of the Criminal Justice Act 1987 could be served in respect of documents held outside the jurisdiction on a company with no connection to the jurisdiction. The court held that it could not, there being no clear or express provision to rebut the presumption against extra-territorial effect. It was common ground, however, that such an order could be made in respect of such documents in relation to a UK company (see para 30). As Lord Lloyd-Jones stated, in such a situation "it is questionable whether … the legislation is given any material extra-territorial effect. A UK company would be required to produce here a document it holds overseas. It would simply be required to bring that document into the jurisdiction in order to produce it". This was to be contrasted with the position of KBR which was a foreign company which had never done business in the UK.

86. The present case similarly concerns an order made against a person within the jurisdiction. In such circumstances, if the presumption against extra-territorial effect applies at all, it is a weak presumption since it is "questionable" whether the legislation is being given "any material extra-territorial effect".

(c) Decisions in other jurisdictions

87. Mr Cousins placed particular reliance upon the House of Lords decision in *King v Director of the Serious Fraud Office* (*"King")* [2009] UKHL 17, [2009] 1 WLR 718 and the Supreme Court decision in *Serious Organised Crime Agency v Perry* (*"Perry*") [2012] UKSC 35, [2013] 1 AC 182.

88. *King* concerned a restraint and disclosure order sought against a South African resident pursuant to a letter of request from the South African authorities to the UK authorities. The issue was whether the order was restricted to property located in England and Wales or whether it could extend to property elsewhere. The case turned on the proper interpretation of Part 2 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) ("the 2005 Order") made

pursuant to the Proceeds of Crime Act 2002 ("UK POCA"). In support of the wider interpretation reliance was placed upon section 447 of UK POCA which concerned the interpretation of external requests and orders and stated in sub-section (4) that "Property is all property wherever situated….". In support of the narrower interpretation reliance was placed upon various provisions in the 2005 Order which referred only to property in England and Wales. In particular, under article 6 the Secretary of State could only refer an external request seeking assistance at the investigation stage to the Director of Public Prosecutions ("DPP") or the Serious Fraud Office ("SFO") if it concerned "relevant property in England and Wales"; under article 7 a pre-condition for the Crown Court to make a restraint order was that "relevant property in England and Wales is identified in the external request", and under article 18 the Secretary of State could only refer an external order arising from an overseas criminal conviction to the DPP or the SFO if it concerned "relevant property in England and Wales".

89. The House of Lords upheld the narrower interpretation. As Lord Phillips of Worth Maltravers stated at para 36:

> "These provisions amount to a clear and coherent scheme. From first to last, the powers conferred by that part of the Order that relates to England and Wales can only be exercised in relation to property in England and Wales. Furthermore, no machinery is provided for exercise of those powers outside England and Wales."

90. In relation to the reliance on section 447(4) of UK POCA and the definition of property as being "all property wherever situated", Lord Phillips stated that the meaning to be given to property depended on the context in which it is used and that in the context of the 2005 Order, which only refers to property in England and Wales, it meant property "wherever situated" in England and Wales.

91. The decision in *King* rested upon the terms of the 2005 Order. There are no equivalent terms in the Modified Law. Unlike the 2005 Order, the only geographically restricted definition of property which is material is that set out in article 16(4)(a). The "scheme" of the Modified Law is that property means property "whether in Jersey or elsewhere" unless the contrary is stated. That generally applicable definition appears in the Modified Law itself, not in a parent statute. Moreover, unlike the more generalised definitional wording in *King,* the Modified Law definition cannot be interpreted as meaning "wherever situated" in Jersey. By its terms it applies to property "in Jersey or elsewhere".

92. *Perry* concerned whether the jurisdiction of the courts of England and Wales to make a civil recovery order under Part 5 of UK POCA applied only to property in England and Wales or whether it extended to property worldwide. Whereas Parts 2, 3 and 4 of UK POCA impose personal liability on defendants convicted of criminal liability in the United Kingdom, the focus of Part 5 is on property obtained through unlawful conduct ("recoverable property"), which conduct may occur in the United Kingdom or elsewhere. Under section 266 if a court is satisfied that property is recoverable property it "must make a recovery order" and that recovery order "must vest the recoverable property in the trustee for civil recovery". The vesting provision is therefore similar to that under section 16(4)(a) of the Modified Law. It was held that such an order operates *in rem* (see para 12(viii) per Lord Phillips). As Lord Reed explained at para 123:

> "… a recovery order operates in rem to transfer title to the property to the trustee. That is the usual, although not invariable, sense in which the concept of vesting is employed, and that sense is consistent with the power to sever the property, and with the power of the trustee to sell the property and his function of realising its value."

93. Although, as Lord Reed stated (para 126), "one would ordinarily expect an order having the effect of transferring a real right of ownership to apply only in relation to property situated in the territory of the state where the order is made", the argument of the Serious Organised Crime Agency ("SOCA") was that such an order could be made in respect of property situated anywhere in the world and in circumstances where the courts of England and Wales have no jurisdiction over the offence in question or over the defendant, who need have no connection to the jurisdiction. SOCA's case was that "Parliament has decided that a Chinese thief, living in China, who has stolen property in China from a Chinese citizen may be the subject of civil recovery action". Lord Phillips described the result of SOCA's case as being "startling" and as having "no precedent in international law" (para 70). It is not surprising that such a wide ranging and territorially untethered case was rejected. As Lord Reed further observed at para 121:

> "It is … inherently unlikely that such a result could have been intended by Parliament: in such circumstances, there would be no reason for the holder of the property to submit to the jurisdiction of the courts of this country, and no likelihood that any order granted by those courts without appearance would be given effect overseas."

94. The decision in *Perry* is readily distinguishable from the present case. The analogue to the provisions considered in *Perry* is article 16(4)(a) which similarly operates *in rem* and can only be made in relation to property situated in Jersey. The present case, however, concerns a prohibition on dealing rather than a vesting provision, an order which operates *in personam* rather than *in rem* and over persons who are subject to the jurisdiction of the Jersey courts. Moreover, in *Perry*, as in *King*, the court was able to interpret the definitional provision in UK POCA that "property" meant "all property wherever situated" as being limited by its context to property "wherever situated" in England and Wales. Such an interpretation is not possible in relation to the definition of "all property… whether in Jersey or elsewhere".

95. Mr Cousins also relied on the decision of the Guernsey Royal Court in *King v HM Procureur* (2011-12) GLR 285. The legislation in Guernsey is similar to that in Jersey but the Guernsey court nevertheless decided to follow *King*, notwithstanding the different legislation in issue in that case. It was held (see para 12(2)) that the scheme for restraint or charging orders under the Guernsey legislation "is directed only to property in Guernsey and enforcement in respect of such property". In those circumstances it was further held (without elaboration or explanation) that this meant that *in personam* orders could not be made in relation to property outside Guernsey. It was further stated that:

> "(4) The statutory scheme in England and Wales is differently worded, though it has one feature similar to the scheme in Guernsey - the wide definition of 'property' in an omnibus interpretation section, which in my judgment (as in the English courts) must give way to the context in and wording of Part I of the 1999 Law."

96. In fact the wide definitions of "property" are different. The definition of property in the Guernsey legislation is comparable to that under the Modified Law. It applies to property "whether it is situated in the Bailiwick or elsewhere" and not (as in the English legislation) to property "wherever situated". The Guernsey court did not explain how as a matter of statutory interpretation this definition was to be read down so as to apply only to property "in the Bailiwick". The contrary decision of the Jersey Royal Court in *Kaplan* was not cited to the Guernsey court. In the present case the Royal Court concluded in the RC's jurisdiction judgment:

> "62. It would not be appropriate for me to question the Guernsey Court's interpretation of its own legislation, but I am not persuaded that the decision of the Guernsey Court

> in *King v HM Procureur* provides good reasons for saying that the decision of this Court in *Re Kaplan* was wrongly decided."

The Board agrees with that conclusion.

97. The Board does not consider that the cases relied upon by the Respondents materially advance their case. The Jersey legislation is different to that in England and Wales and there is no read-across in relation to the issue in question. The defendants also sought to rely on what they asserted was the law in Singapore, the USA and France. It was said that in each of those jurisdictions, execution of a confiscation order issued by a requesting state cannot be made in another state. On the limited material before the court no firm conclusions can be drawn as to the effect of the legislation adopted in those countries. In any event, that legislation is in different terms to the Jersey legislation, those countries do not share Jersey's trust business model, and it is unclear whether the possible exercise of *in personam* jurisdiction arises or has been addressed.

(d) Indirect overseas enforcement

98. Mr Cousins submitted that if, as is the case, overseas property cannot be made the subject of a vesting or *in rem* order under the Modified Law, then it should not be interpreted as allowing orders which indirectly have the same effect. For the *in personam* jurisdiction to lead to there being property which is realisable, the repatriation of that property would be required, but that would be tantamount to the assertion of jurisdiction over overseas property, which is impermissible.

99. Mr Cousins further pointed out that there is a complete absence of provision for giving effect to arrangements that might be required with a view to recovery of property from overseas, nor is there any provision for safeguards for those caught up in any attempted enforcement. Such a fundamental absence of provision reflects an absence of intention that the legislation was to have any effect in relation to overseas property.

100. The courts in Jersey, like those in England and Wales, have, however, a well-established jurisdiction to make orders *in personam* against those subject to its jurisdiction in relation to property held abroad. In civil proceedings, for example, the court has long been ready to appoint a receiver over the overseas assets of a company. As stated by Cozens-Hardy J in *Re Maudslay Sons & Field Ltd* [1900] 1 Ch 602 at p611:

> "This power, I apprehend, is based upon the doctrine that the Court acts in personam. The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession…"

As explained in *Gee, Commercial Injunctions,* 7th ed (2021), at para 16-021:

> "If an order is made appointing a receiver over assets abroad, on the grounds that the defendant may otherwise dissipate the assets, it will ordinarily contain an express provision directed to the defendant to give up possession of the assets to the receiver or his agent.
>
> The court has power under s.37(1) of the Senior Courts Act 1981 to order the defendant to deliver up specified chattels to the receiver or to provide the receiver with particular funds or their proceeds held by the defendant."

101. In relation to the Mareva jurisdiction, having regard to the purpose for which a Mareva injunction is granted, it was held in *Derby & Co v Wheldon (No 6)* [1990] 1 WLR 1139 that the court had power to order the transfer of assets from one foreign jurisdiction to another as a result of its unlimited jurisdiction *in personam* over the Mareva defendant. As Dillon LJ explained at p1150, the grant of a Mareva injunction is not to be regarded "as a matter of territorial jurisdiction to be exercised court by court throughout the various countries of the world where it may be appropriate" but rather "as a matter of unlimited jurisdiction in personam of the English court over persons who have properly been made parties, under English procedure, to proceedings pending before the English court".

102. A similar approach is adopted by the UK courts to restraint orders under UK POCA. The court has an inherent power to make ancillary orders to ensure that a restraint order is effective, which includes repatriation orders – see *Director of Public Prosecutions v Scarlett* [2000] 1 WLR 515. As explained in *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime,* 3rd ed (2002) at para 17.101:

> "The drug trafficker and other acquisitive criminal alike are tempted more and more by the idea of placing their assets

> outside the jurisdiction. Accordingly, the court has made orders requiring a defendant or even a third party holding realisable property of the defendant to bring it within the jurisdiction.
>
> The issue is not where the property might be located but it is whether the person against whom the order is sought is himself subject to the jurisdiction of the High Court. Thus, a person who has realisable property abroad but is himself within the jurisdiction can be ordered to bring that property back to or within the jurisdiction or face an application to be committed to prison for failing to comply with the repatriation order…
>
> …
>
> Again, like much of the development of the restraint regime the power to order repatriation is not unique to the legislative scheme of restraint within the Acts. In conventional civil proceedings the Court of Appeal first concluded that the jurisdiction of the High Court was not based on the location of assets but more on the unlimited nature of the power of the court to be able to make any orders relating to persons who were properly parties to the proceedings before it."

103. The Respondents accept that such orders can be made in respect of domestic confiscation orders but the rationale of so doing is the same in relation to external confiscation orders – the need to make the order effective. That such orders can be made against domestic criminal defendants also undermines the suggested impracticality of making such orders.

104. As to the possible need for safeguards and the danger of complications which may arise in the foreign jurisdiction, the court retains a discretion as to whether to grant relief and on what terms, including as to any safeguards which may be shown to be necessary. Under article 16(1) of the Modified Law any order may be made "subject to such conditions and exceptions as may be specified". Any order made may be varied or discharged, as may be appropriate. There is also the specific protection provided under article 17(2) that the power of realisation will not be exercised "unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the Court".

(e) Multiplication of effort and expense

105. Mr Cousins placed considerable reliance on the following passage from Lord Phillips' judgment in *King* at para 31-32, which was later endorsed in *Perry*:

> *"*31 Mr Perry submitted that there was good reason why the scope of the Order should be restricted to property within the jurisdiction. If a country wishes assistance from other countries in preserving or recovering property that is related to criminal activity, it makes sense for its request to each of those other countries to be restricted to the provision of assistance in relation to property located within its own jurisdiction. If each country were requested to take steps to procure the preservation or recovery of property on a worldwide basis, this would lead to a confusing, and possibly conflicting, overlap of international requests for assistance. Not only would such multiplication of activity be confusing, it would involve significant and unnecessary multiplication of effort and expense.
>
> 32 There is obvious force in these submissions…"

106. It was contended that similar unsatisfactory multiplication of effort and expense would ensue if restraint orders were to be made in relation to property outside Jersey.

107. There, are, however, considerable practical advantages in being able to make orders in relation to overseas property against a person who is subject to the *in personam* jurisdiction of the court. Such orders can be made and enforced against that person without the need to resort to every jurisdiction in which property may be held. Effective exercise of the *in personam* jurisdiction avoids multiplication of effort and expense.

108. This is a particularly important matter in the context of Jersey's offshore trust business. It 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.

(f) Textual points

109. Mr Cousins contended that the text of the Modified Law has to be interpreted in the light of Jersey's international obligations under the relevant international conventions, the laws of the United Kingdom and Guernsey as interpreted in its caselaw and the presumption against extra-territoriality. For the reasons set out above, the Board does not consider that any of these matters are of great weight in the present case, still less do they justify the reading down of the clear words of article 16(4)(b).

110. The main textual points made by Mr Cousins were:

(i) The definition of "property" in article 1 is subject to the proviso "unless the context otherwise requires".

This is correct but the context of article 16 is that of a clear distinction being drawn between realisable property "in Jersey" in article 16(4)(a) and realisable property generally in articles 16(4)(b) and (c). That context clearly does not "require" a narrower definition of property to be given in article 16(4)(b).

(ii) The explanation for the worldwide definition of "property" is the need to catch property derived from crime before it came within Jersey's jurisdiction.

This is conjecture and it is not clear that such a definition would be needed for this purpose in the context of the Modified Law. In any event, that does not detract from the fact that the statutory definition is of general application.

(iii) Many of the provisions of the Modified Law apply only to property within Jersey.

This is correct but in all the examples given the limitation to Jersey is made express – article 16(8) - orders affecting "immovable property situate in Jersey"; article 16(9)(b) - "removing the property from Jersey"; and article 16(10) - "a police officer may, for the purpose of preventing the removal of any realisable property from Jersey, seize the property". There would be no need for these express references to property in/from Jersey if the Modified Law only applies to property in Jersey.

(iv) Although under article 16(4) the Viscount's duty is to take possession of and, under the court's direction, to manage or deal with realisable property, the Viscount cannot take possession of a physical asset which is overseas and cannot take possession of incorporeal property at all.

For article 16(4) to be effective (wherever the property is situated) possession is best interpreted as including control. The basis of the exercise of the *in personam* jurisdiction is control over the asset by the person in Jersey. As such, there is no reason why the court cannot make an order giving that control to the Viscount.

(v) Under article 17 the Viscount is given no mechanism for obtaining or realising overseas property. This is to be contrasted with article 7 of the 2008 Regulations which makes provision for the taking of steps overseas in relation to the enforcement of domestic confiscation orders.

The exercise of the *in personam* jurisdiction does not require procedures equivalent to article 17. Those who exercise powers of control or ownership are within the jurisdiction and can therefore be made subject to orders of the court which can be enforced against them.

(vi) Article 39, which deals with the registration of external confiscation orders, provides that this may only be done if the court is "of the opinion that enforcing the order **in Jersey** would not be contrary to the interests of justice" (emphasis added).

As the Court of Appeal explained (para 56), this can be read as a reference to the place where the decision to enforce any external confiscation order will be made. In any event, article 39 applies at the registration stage, which is likely to come after interim orders have been made in relation to overseas property enabling the Viscount to take possession of such property in Jersey for the purpose of realisation.

111. None of these textual points explains or justifies interpreting the words "realisable property" in article 16(4)(b) as meaning "realisable property in Jersey". In his written case Mr Cousins submitted that in context the words "realisable property" should be so interpreted whenever used unless it was expressly added "whether the property is situated in Jersey or elsewhere". Given, however, that this is the definition of property in article 1, there is no need for such duplicative wording. On this reasoning there would also have been no need to add the words "in

Jersey" to sub-paragraph (a) (or elsewhere – see para 110(iii) above). In any event, it does not explain the clear distinction being drawn between sub-paragraph (a) and sub-paragraphs (b) and (c) as to the property to which they were applicable. In oral submissions it was said that article 16(4)(b) should be "read down" in a similar manner as was done in *King* and *Perry*. As already observed, however, that is not possible in circumstances where the applicable definition of property is all property "whether in Jersey or elsewhere" rather than the more generalised wording of property "wherever situated".

(g) Conclusion on the Jurisdiction Appeal

112. For the reasons set out above, the Board concludes that the Court of Appeal, was correct to give article 16(4)(b) its "obvious and natural" meaning. It does extend to realisable property outside Jersey, at least where the persons who can exercise the rights of ownership or control of that property are subject to the jurisdiction of the Jersey courts.

113. This conclusion makes it unnecessary to consider a further issue which Mr Tantular wished to raise if he succeeded on the Jurisdiction Appeal, namely whether the shares in Jonzelle are situated in Jersey, where the share certificates are held, or in the British Virgin Islands, where the share register is located.

5. The Mortgage Appeal

(a) The issue

114. The issue is "whether the Court of Appeal was right to grant a declaration that Credit Suisse, as the holder of a charge over the Singapore Apartment, was entitled to assign its rights under that mortgage to a third party?"

115. It is appropriate to note the limited nature of the issue which arises in the Mortgage Appeal. The issue is confined to the ability of a mortgagee to assign its rights under a mortgage to a third party.

116. The issue in the Mortgage Appeal does not include whether it was necessary for Credit Suisse to seek the approval of the Royal Court for a variation of the *saisies judiciaires* prior to exercising its power of sale. Credit Suisse considered an application to be a necessary prerequisite to the exercise of the power and accordingly brought the application. The Royal Court, in its variation judgment,

varied the *saisies judiciaires*. There has been no appeal from the variation judgment. The issue as to whether it was necessary for Credit Suisse to seek the approval of the Royal Court for a variation of the *saisies judiciaires* prior to exercising its power of sale, is not before the Board.

117. The issue in the Mortgage Appeal does not include the question whether an order could be made against Credit Suisse under article 16(4)(b) of the Modified Law. Article 16(4)(b) enables the Royal Court to prohibit "any specified person" "from dealing with any realisable property held by that person whether the property is described in the order or not." The Attorney General did not seek nor did the Royal Court make any order in either of the *saisies judiciaires* under article 16(4)(b) prohibiting Credit Suisse from dealing with any realisable property held by it. Because the Attorney General did not seek an order under article 16(4)(b) in respect of Credit Suisse, the issue whether it "held" any realisable property did not arise for determination. Indeed, Credit Suisse is not named in either of the *saisies judiciaires*, although both Orders directed the Viscount to give notice of the Order as soon as practicable not only to several named individuals, such as Mr Tantular, but also to "any other person appearing to [the Viscount] to be affected thereby." In accordance with that direction the Viscount gave notice of both *saisies judiciaires* to Credit Suisse.

(b) The facts and the proceedings in relation to this issue

118. The Board has summarised the facts and the proceedings in relation to this issue at paras 1-2 and paras 21-47 above. It is appropriate to briefly recap and to give some further details which are relevant to this section of the judgment. The Singapore Apartment was purchased in September 2005 by Jonzelle for S$7.1 million. The entire issued share capital of Jonzelle is owned by the Jasmine Trust so the Singapore Apartment was indirectly owned by the Jasmine Trust.

119. The purchase price of the Singapore Apartment was obtained from two sources. The first source, which represented 80% of the purchase price, came from a loan from the United Overseas Bank Limited, Singapore, to Jonzelle. The loan was secured by a mortgage on the Singapore Apartment. By 2008, because of a refinancing arrangement, the loan to Jonzelle was from Credit Suisse secured by way of a mortgage dated 24 November 2008 over the Singapore Apartment. This mortgage gave Credit Suisse a power to sell the apartment in the event of default.

120. The second source, representing the balance of the purchase price, was a gift indirectly made by Mr Tantular, through the Jasmine Trust. Accordingly, the net

equity in the Singapore Apartment is realisable property within the meaning of articles 2(b)(ii) and 2(9)(a) of the Modified Law.

121. On 9 August 2013, the Royal Court made the first *saisie judiciaire*. The Board has set out its terms at paras 22-24 above. Para 2 of the *saisie judiciaire* prohibited the Trustee of the Jasmine Trust from dealing with any realisable property. Furthermore, as the Board has stated, at para 117 above, the Attorney General did not seek, nor did the Royal Court make, any order in the first *saisie judiciaire* under article 16(4)(b) of the Modified Law prohibiting Credit Suisse from dealing with any realisable property held by it. The only order made in the first *saisie judiciaire* that could apply to Credit Suisse was a direction to the Viscount to give notice of the Order to "any … person appearing to him to be affected thereby". The only person specified in the order as prohibited from dealing with any realisable property, subject to being permitted to manage or otherwise deal with the assets of the Jasmine Trust under the direction of the Viscount, was the Trustee of the Jasmine Trust; see paras 2 and 4 of the *saisie judiciaire*.

122. On 14 August 2013, Credit Suisse was notified of the first *saisie judiciaire*. This caused the whole remaining balance of the debt to fall due immediately, see para 34 above. On 3 September 2014, the Royal Court made the second *saisie judiciaire* in chambers on an interim basis. On 17 December 2014, after a contested hearing, the second *saisie judiciaire* was reissued by the Royal Court to stay in force until further order of the Court, see paras 31-33 above. Credit Suisse was notified of the second *saisie judiciaire*. On 7 June 2018, Credit Suisse, who wished to exercise their power of sale in respect of the Singapore Apartment, applied to the Royal Court to vary both *saisies judiciaires*, see paras 34-35 above. The Royal Court, in its variation judgment, granted the variation, see paras 36-38 above.

123. On 16 April 2019, members of Mr Tantular's family who were discretionary beneficiaries of the Jasmine Trust and who resided in the Singapore Apartment, applied for a declaration that there was nothing in the terms of the *saisies judiciaires* that prevented Credit Suisse from assigning its rights under the mortgage to a third party, see paras 39-40 above. In the alternative, the members of the family asked that the Royal Court make such variations to the *saisies judiciaires* or give such directions as would enable the assignment to Mr Koswara to take place.

124. The Board notes that the family did not confine the declaration they sought to an assignment by Credit Suisse to Mr Koswara. Rather, they sought a declaration that there was nothing in the *saisies judiciaires* that prevented Credit Suisse from assigning its rights under the mortgage to a third party, and that is to any third party.

125. The family's application led to the RC's mortgage judgment and to the CA's mortgage judgment, see paras 41-46 above.

126. The Court of Appeal granted a declaration that:

> "the saisies judiciaires imposed upon the realisable property of Mr Robert Tantular do not prevent Credit Suisse assigning *to a third party* its rights under the credit facility dated 9 June, 2008, and the legal mortgage secured on the property 26 Cuscaden Road, Singapore dated 24 November, 2008." (Emphasis added).

On foot of that declaration, Credit Suisse would have been free to assign to any third party, including to Mr Koswara.

127. The Board notes that the Attorney General, in opposing the grant of a declaration before the Royal Court or the Court of Appeal, did not rely on the submission made before the Board that it would be inappropriate to grant a declaration that Credit Suisse could assign to *any third party* as that would permit Credit Suisse to assign to a third party intent on aiding and abetting a breach of the *saisies judiciaires* or on frustrating the effect of the *saisies judiciaires*.

128. In the event Credit Suisse did not assign its rights to a third party. Rather, in or about December 2020, it sold the Singapore Apartment and on 5 March 2021 remitted £2,491,099.85 to the Viscount, being the net proceeds of sale after discharge of the mortgage; see paras 43 and 59 above.

129. The Attorney General sought and obtained leave from Her Majesty in Council to appeal against the Court of Appeal's mortgage judgment.

(c) The Royal Court's variation judgment

130. The Board has set out the reasoning of the Royal Court in respect of its variation judgment at paras 36-37 above. As the reasoning in the variation judgment was relied on in the RC's mortgage judgment, it is appropriate to consider the reasoning in some further detail.

131. The Royal Court addressed first whether a mortgage over foreign real property, such as in the present case, falls within article 16(5) of the Modified Law. It concluded that it did not. First, it held that "[a] mortgage is not a hypothec, which is an expression clearly limited to a hypothec under the Loi (1880) Sur La Propriété Foncière". Second, it held that "the expression 'security interest' is clearly intended to refer to a security interest over intangible moveable property created pursuant to the Security Interests (Jersey) Law 2012 or its predecessor the Security Interests (Jersey) Law 1983". Accordingly, the Royal Court concluded that "the whole of the property is caught by the saisies …". As the whole property was caught by the *saisies judiciaires*, the Royal Court held that it was necessary to consider a variation under article 16(6) to permit Credit Suisse to exercise its power of sale.

132. It is not clear what the Royal Court meant when it stated that "the whole of the property was caught by the saisies". Did this mean that the whole property vested in the Viscount under article 16(5) as there were no hypothecs or security interests? That meaning gains some support from para 18 of the variation judgment which refers to the power under article 20(1) of the Modified Law, when property has been realised by the Viscount, for the court "to direct that the bank should first be paid out of the sale proceeds with only the balance (reflecting the offender's equity in the property) being applied towards satisfaction of any external confiscation order". However, another potential meaning is that the part of property which was caught by the *saisies judiciaires* was the equity in the property so that exercising the power of sale would be dealing with that part of the property. This meaning also gains some support from para 18 of the variation judgment that "[what] is intended to be caught by a saisie and to be available for confiscation in the event of registration of an external confiscation order is the equity in the asset".

133. The Royal Court having concluded that a variation application was necessary, gave the following reasons at para 19 for its decision to grant the variation:

> "It follows that, in our judgment, the starting point where the court is satisfied that the application is being made by a bona fide, arm's length third party with security over foreign property which is subject to a saisie, should be that the saisie should be varied so as to allow the secured party to enforce its security in accordance with its terms. We see no reason not to adopt that approach in the present case. Jonzelle is in default. The Bank has been seeking to recover its money for some time. It should now be permitted to realise its security over the Property in accordance with such rights as it has under the documents creating the mortgage and Singapore law."

Accordingly, the variation was granted.

(d) The RC's mortgage judgment

134. The Board has set out the reasoning of the Royal Court in respect of its mortgage judgment at paras 41-42 above. It is appropriate to consider the submissions before the Royal Court together with its reasoning in some further detail.

135. The central case put forward on behalf of the family in support of a declaration was recorded by the Royal Court, at para 13 as being:

> "… the Mortgage does not form part of the realisable property of the Settlor and, [Advocate Hanson] said, the Bank is free to dispose of it as it wishes. It can do so without reference to Jonzelle or to the Court."

Advocate Hanson distinguished an assignment of the mortgage to a third party from the exercise of the power of sale under the mortgage. He submitted that an assignment of the mortgage was not prohibited by the *saisies judiciaires* as the debt owed by Jonzelle to the Bank and the rights under the mortgage which secured the debt were not realisable property. However, Advocate Hanson is recorded, at para 14 of the judgment, as accepting that:

> "The [variation] application by the Bank to the Court last year was required because the Bank intended to exercise its powers of sale over the Property which did form part of the realisable property of the Settlor."

It is not clear from the judgment as to whether Advocate Hanson was accepting that the entire property formed part of the realisable property or whether he was accepting that the net equity in the property after the discharge of the mortgage was the realisable property. His acceptance could be explained on the limited basis that the Bank, on a sale of the property, would sell all the property and would receive from the purchaser the entire proceeds of sale, part of which would represent the net equity in the property after the discharge of the mortgage. Accordingly, Advocate Hanson's acceptance might have been informed by the proposition that the Bank by selling the property and acquiring the proceeds in respect of the net equity was dealing in realisable property.

136. In the alternative to a declaration, the family sought a variation of the *saisies judiciaires* to enable the assignment of the mortgage from Credit Suisse to Mr Koswara to take place. The case put forward on behalf of the family in support of a variation was that Mr Koswara wanted to help out his old friend Mr Tantular. Accordingly, he was willing to assist the family by taking over the credit facility, by paying all monies owed by Jonzelle to the Bank in exchange for an assignment of the rights under the mortgage. Furthermore, that Mr Koswara had indicated a willingness to be flexible in terms of repayment of the monies owed so that an assignment would prevent an immediate forced sale and save the home of family members at least for a limited period.

137. In opposing the declaration, the Attorney General is recorded as submitting, at para 23, that the mortgage gives the Bank and therefore any assignee, the right to sell the property and, at para 25, that an application to vary the *saisies judiciaires* would be required where a party proposes to take any action which will or may materially affect the realisable property held under restraint.

138. In opposing the variation of the *saisies judiciaires*, the Attorney General relied on the third affirmation of Mr Cahyo Rahadian Muzhar, the Director General of Legal Administrative Affairs in the Ministry of Law and Human Rights of the Republic of Indonesia, dated the 16 May 2019. Mr Muzhar stated, at para 16 of his third affirmation:

> "16. The prospect of Credit Suisse assigning the credit facility and mortgage secured on the Cuscaden Property to Mr Koswara is a matter of grave concern to the Government of Indonesia. In view of Mr Koswara's long-standing friendship with Mr Robert Tantular and his willingness to be 'flexible' in his dealings with the Beneficiaries, the Government of Indonesia does not consider it unreasonable to suspect that Mr Koswara is no more than a nominee or 'front man' for Mr Robert Tantular and his family and that Mr Koswara could seek to, or will at the very least be in a position to, hinder or even thwart the restraint and confiscation process in respect of the Cuscaden Property."

He continued by stating at para 20 of his third affirmation that:

> "20. Although the Beneficiaries assert that Mr Koswara should be allowed to replace or simply 'step into the shoes'

> of Credit Suisse, the differences between Credit Suisse and Mr Koswara could not be more clear-cut. Credit Suisse is a regulated global financial institution acting at arm's length to Mr Robert Tantular and the Beneficiaries, which has scrupulously sought to comply with the *saisies judiciaires*, and which can be expected to preserve the net proceeds of the sale of the Cuscaden Property after discharge of the mortgage. In contrast, Mr Koswara is a 'family friend' of the Tantulars, who has no regulated status, and who wants 'to help an old friend out' by being 'flexible' in his dealings with the friend's family (i.e. the Beneficiaries). Given that Mr Koswara is resident in Indonesia … there would be significant difficulties in bringing enforcement proceedings against him should he breach the *saisies judiciaires*."

139. In relation to the application for a declaration, the Royal Court's mortgage judgment relied on the conclusion in the variation judgment that "the whole of the property was caught by the saisies". The Royal Court's mortgage judgment stated at para 34, that:

> "In its [variation judgment] the Court found … that the saisies extended to the whole of the Property and that for the Bank to exercise its power of sale over the Property would be to deal with it; hence the need for a variation. In our view any assignment of the Mortgage, which brings with it the power to sell the Property, is equally to deal with it. We agree with Crown Advocate Belhomme's submission that to take any action which will or may materially affect the realisable property held under restraint is to deal with the same. Accordingly the saisies do prevent the assignment of the Mortgage and we are unable to make the declaration sought."

The Royal Court declined to grant the declaration.

140. The Royal Court then turned to the application to vary the *saisies judiciaires* to permit an assignment of the mortgage to Mr Koswara. It adopted terminology that it would be unconscionable to do so. The reasons were given in forthright terms, at para 35, as follows:

> "the Court felt able in the [variation judgment] to vary the saisies so as to allow the Bank to exercise that power, because it was a bona fide arm's length third party, and indeed, as Mr Muzhar points out, a regulated global financial institution that would be acting at arm's length to the Settlor and the Applicants. What is now proposed is that this same power will be assigned to Mr Koswara, an old friend of the Settlor, who resides in Indonesia (where the Settlor also resides) outside the jurisdiction of both this Court and the courts of Singapore. There has been no disclosure of the communications between the Settlor and Mr Koswara, or between Mr Koswara and the Applicants, or as to the source of the $4.6m that would be used to acquire the Mortgage. The Court has no confidence that it knows the full terms of the arrangements and it is manifest that placing Mr Koswara into that position of power over the Property could be highly prejudicial; Crown Advocate Belhomme described such a possibility as 'unconscionable'."

The Royal Court declined to vary the *saisies judiciaires*.

(e) The CAl's mortgage judgment

141. The Board has set out the reasoning of the Court of Appeal in respect of its mortgage judgment at paras 44-46 above. It is appropriate to consider the submissions before the Court of Appeal together with its reasoning in some further detail.

142. The central case in support of the family's appeal against the Royal Court's refusal to make the declaration was recorded by the Court of Appeal, at para 43, as being that:

> "the saisies restrain any dealing with the property which they specify as being 'realisable property' but that the Bank's interest in the mortgage cannot be so regarded."

143. The Court of Appeal recorded, at para 43, the submission on behalf of the family that "if the Bank's interest in the mortgage constitutes 'realisable property'

which is subject to the saisies the Court should have exercised its discretion to vary the terms of the saisies so as to permit the proposed assignment to take place".

144. In opposing the family's appeal against the Royal Court's refusal to make the declaration, Crown Advocate Belhomme was recorded by the Court of Appeal, at para 44, as relying on the reasoning at para 34 of the Royal Court's mortgage judgment.

145. In opposing the family's appeal against the Royal Court's refusal to vary the *saisies judiciaires*, Crown Advocate Belhomme relied on the reasoning at para 35 of the Royal Court's mortgage judgment.

146. In relation to the appeal against the Royal Court's refusal to make a declaration, the Court of Appeal considered whether the mortgage was "realisable property". The Court of Appeal held, at para 54, that Jonzelle's ownership of the legal estate in the mortgaged property should not be conflated with the legal interest which Credit Suisse as a mortgagee enjoys in the mortgage over the property. The Court of Appeal held that it was inappropriate to "conclude that both the legal estate in the Property and the Bank's interest in the mortgage together constitute 'the realisable property' which is subject to the saisies". Accordingly, it held at para 61, that as the legal interest in the mortgage was not realisable property, the Bank was "entitled to assign its interest in the mortgage over the Property to a third party without prior approval of the Court and without the need for a variation of the terms of the *saisies judiciaires*". The Court of Appeal concluded that the Royal Court should have granted the declaration which the family sought, and it proceeded to make that declaration.

147. The Court of Appeal went on to record, at para 62, that if they had held that a variation of the *saisies judiciaires* was necessary, they had no doubt that the Royal Court had been correct to refuse to sanction the assignment to Mr Koswara for the reasons set out in para 35 of the RC's mortgage judgment.

(f) The obligation not to aid or abet a breach of, or to frustrate the effect of, a court order

148. The Attorney General did not apply for an order under article 16(4)(b) of the Modified Law against Credit Suisse prohibiting it from dealing with any realisable property held by it. Accordingly, no order was made by the Royal Court against Credit Suisse in either of the *saisies judiciaires*. The primary effect of the *saisies judiciaires* was to regulate the conduct of Mr Tantular and of the Trustee of the Jasmine Trust.

However, there was an indirect effect upon the conduct of Credit Suisse. The Royal Court directed the Viscount to, and he did, notify Credit Suisse of both *saisies judiciaires*. A person, such as Credit Suisse, who is not a party to the proceedings and against whom the court has made no order, can be guilty of contempt of court if either it knowingly aids or abets a breach of the order or it intentionally frustrates or thwarts the achievement of the purpose of the court; see *Attorney-General v Punch* [2002] UKHL 50; [2003] 1 AC 1046 at paras 39–48, 64, 66, 87, 104–105 and 126. The application of those principles in *Attorney-General v Punch* meant that the publishers and the editor of the magazine, who were aware of the terms of an interim injunction against S, were in contempt of court for publishing an article by S containing information which was subject to the interim injunction. The contempt consisted of the intentional impedance or prejudice of the purpose of the interim injunction.

149. Accordingly, a third party knowingly aiding or abetting a breach of an order or intentionally frustrating or thwarting the achievement of the purpose of the court is likely to be in contempt of court. As the order does not bind the third party, this is not because the third party is in breach of the order. Rather, the conduct by a third party is a contempt of court because it interferes with the administration of justice.

150. In the context of frustrating or thwarting the achievement of the purpose of the order, the purpose is the purpose of the court in seeking to administer justice in the particular litigation of which it has become seized; see *Attorney-General v Punch* at para 39. If third parties, such as Credit Suisse, are bound to respect the purpose of an order made in proceedings between other parties, it is essential they should be able to perceive the purpose of the court readily from reading the order; see *Attorney-General v Punch* at para 40. Furthermore, the purpose of the court in making the *saisies judiciaires* means no more than the effect that the terms of the order show it was intended to have between the parties to the application; see *Attorney-General v Punch* at para 40.

151. In this case, the purpose of both *saisies judiciaires* can be readily perceived from reading the orders. The purpose of the court in making both *saisies judiciaires* was to preserve the realisable property of Mr Tantular prohibiting him or the Trustee of the Jasmine Trust from dealing with that property and by the Viscount taking possession of all realisable property situate in Jersey of Mr Tantular. A third party who knowingly aids or abets a breach of the order or intentionally frustrates or thwarts the achievement of the purpose of preserving or prohibiting dealing with the realisable property of Mr Tantular will generally be guilty of contempt of court.

152. The first question which arises is what was the realisable property in the Singapore Apartment? Was it the loan owed by Jonzelle to Credit Suisse, or the mortgage held by Credit Suisse over the Singapore Apartment or was it the net equity in the Singapore Apartment after the discharge of the mortgage? If it was neither the loan nor the mortgage but only the net equity, then Credit Suisse was at liberty to assign the mortgage unless by doing so it knowingly aided or abetted a breach of the order in respect of the net equity or intentionally frustrated or thwarted the achievement of the purpose of preserving or prohibiting dealing in the net equity which was the realisable property.

153. The Attorney General now concedes, in the Board's view correctly, that the debt owed by Jonzelle to Credit Suisse and the mortgage held by Credit Suisse over the Singapore Apartment were not "realisable property" within article 2(1) of the Modified Law. The Board finds that the only realisable property in the Singapore Apartment was the net equity after discharge of the mortgage. Accordingly, the RC's mortgage judgment erred in concluding that "the whole of the property is caught by the saisies …" Furthermore, the Court of Appeal was correct to hold that the Royal Court had erred in conflating the ownership of the legal estate in the apartment with the legal interest that the mortgagee enjoyed in the mortgage over the property.

154. However, an issue which was not raised before the lower courts is whether a transfer of the mortgage by Credit Suisse to a third party would knowingly aid or abet a breach of the order 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. If that issue had been raised, then a declaration in the terms made by the Court of Appeal would not have been made because Credit Suisse could not lawfully assign the mortgage to any third party. The terms of the declaration would permit Credit Suisse to assign the mortgage to a third party even though it was knowingly aiding and abetting a breach of the *saisies judiciaires* or it was intentionally frustrating the effect of the *saisies judiciaires*.

155. The second question is whether Credit Suisse have to apply to the court to vary the *saisies judiciaires* even in cases where it is clear that the assignment will not aid or abet a breach of the order in respect of the net equity in the Singapore Apartment or will not intentionally frustrate or thwart the achievement of the purpose of preserving or prohibiting dealing in the realisable property which is the net equity in the Singapore Apartment. There is a division in the authorities at first instance, in the analogous area of a freezing injunction, as to whether it is necessary for a party in the position of Credit Suisse to apply to the court to vary the order if it wishes to realise its security interest in property, even where its proposed action would not be contrary to the order. In *Gangway Ltd v Caledonian Park Investments*

(Jersey) Limited and Anor [2001] 2 Lloyd's Rep 715, Colman J stated at para 17 that "the bank has adopted exactly the right course in coming to Court to get the order varied …". He described this to be the limit of the bank's duty. However, in *Taylor v Van Dutch Marine Holding Ltd* [2017] 1 WLR 2571 Mann J disagreed that there was always an obligation to apply to the court for a variation.

156. The Board considers that it is not necessary for a bank to apply to the court to vary a *saisie judiciaire* in every case where it proposes to assign a mortgage over property in which the net equity is realisable property. Rather, it was open to Credit Suisse to form an assessment in good faith as to whether the circumstances surrounding the proposed assignment of the mortgage might have interfered with the administration of justice. If an incorrect assessment had been made, then Credit Suisse might have been liable in contempt. As a general proposition this is unlikely to be the position if the assignment of the mortgage is in the ordinary course of banking business from one regulated bank to another. However, that was not this case. The proposed assignment by Credit Suisse was not to another regulated bank in the ordinary course of banking business. Rather, the proposed assignment was to Mr Koswara and, as Mr Muzhar stated, see para 138 above, the differences between Credit Suisse and Mr Koswara could not be more clear-cut.

157. In cases where there is any uncertainty whether an accusation of interference with the administration of justice might be made against a bank in the position of Credit Suisse according to these principles, it may be prudent for the bank to apply to the court for an order varying the *saisie judiciaire*. In this case, it is clear that Credit Suisse was uncertain whether an accusation of contempt of court would be made against it if it assigned its rights under the mortgage to Mr Koswara. Indeed, a substantial case could be made that Credit Suisse knew that it would be aiding and abetting a breach of the *saisies judiciaires* by assigning its rights under the mortgage to Mr Koswara. In those circumstances Credit Suisse was not prepared to assign its interest under the mortgage unless it received the assurance of a court order on an application to vary the *saisies judiciaires*. As the family wished to persuade Credit Suisse to assign its interest under the mortgage, they brought the application to vary the *saisies judiciaires*. The family hoped that if Credit Suisse received the assurance that it would not be in contempt of court, then it would proceed to assign its rights under the mortgage to Mr Koswara.

(g) Application of those principles to this case

158. The Court of Appeal erred in making a declaration that the *saisies judiciaires* do not prevent Credit Suisse assigning the mortgage to a third party, that is to any

third party. Such a declaration would have permitted a transfer that interfered with the administration of justice.

159. The application by the family ought to have been approached on the basis that there was uncertainty as to whether, if Credit Suisse assigned the mortgage to Mr Koswara, it would be knowingly aiding or abetting a future breach of the *saisies judiciaires* for example by the family colluding with the assignee or whether it would be intentionally frustrating or thwarting the achievement of the purpose of the court by putting the net equity in the Singapore Apartment at risk. Accordingly, an application was being made to vary the *saisies judiciaires* to permit an assignment of the mortgage to Mr Koswara. Viewed on that basis there was only one possible outcome to the variation application. Both the Royal Court and the Court of Appeal declined to grant any variation in relation to a proposed transfer of the mortgage to Mr Koswara for the reasons set out in the RC's mortgage judgment at para 35, which was based on the evidence of Mr Muzhar, see para 138 above. The Board agrees with those reasons. Such a variation would have been highly prejudicial as it would have thwarted the purpose of the *saisies judiciaires* of preserving the net equity in the Singapore Apartment.

(h) Conclusion in relation to the Mortgage Appeal

160. The Board concludes that the Mortgage Appeal should be allowed and that the declaration made by the Court of Appeal should be set aside.

7. The Immunity Appeal

161. Following the handing down of the CA's mortgage judgment on 28 October 2019 ([2019] JCA 207), the Court of Appeal gave a written judgment dealing with costs. The Court of Appeal rejected the Attorney General's contention that he was protected from an adverse costs order by the retrospective application of the International Cooperation (Protection from Liability) (Jersey) Law 2018. The Court ordered that the family and the Trustee could recover their costs from the Jasmine Trust and ordered the Attorney General to pay those costs either to the family and the Trustee or to the Trust if the parties had already been reimbursed by the Trust.

162. The Court then turned to the family's application that the Indonesian Ministry should be made jointly and severally liable with the Attorney General to pay those costs. The family submitted that the Ministry should be declared to have been a party to the proceedings before the Royal Court and before the Court of Appeal, being the party on whose behalf the Attorney General had appeared throughout the

proceedings. In the alternative, they asked that the Ministry be joined as a party so that a third party costs order could be made against it pursuant to article 2(1) of the Civil Proceedings (Jersey) Law ("the 1956 Law") and in accordance with the principles for the making of third party costs orders set out in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807.

163. The Attorney General opposed the application, arguing that the international conventions which create the schemes by which one sovereign state can request assistance from another did not envisage that the requesting state would become subject to any rights or obligations in the domestic law of the requested state. The Attorney General indicated that Indonesia wished to claim State immunity. It should not be taken to have waived immunity by making the request to the Attorney General or by anything that had happened in the course of the proceedings.

164. The Court of Appeal considered the terms of the State Immunity Act 1978 as applied in Jersey by the State Immunity (Jersey) Order 1985 ("the Immunity Order"), the relevant provisions of the 2008 Regulations and the Modified Law and the nature and extent of the Ministry's involvement in the proceedings.

165. The Court of Appeal noted at para 89 that the power of the Attorney General to bring proceedings in respect of an external confiscation order depended on a request from the overseas country. It is no part of the ordinary powers and duties of the Attorney General to take notice of external confiscation orders and to seek to use them in Jersey for the purpose of recovering property. They referred to the wording of the Modified Law and the 2008 Regulations which describe the Attorney General as applying to the Royal Court "on behalf of" the government of the overseas country, particularly regulation 6. The Court of Appeal noted that the principal interest in instituting the proceedings was that of the Government of Indonesia through the Ministry.

166. The Court of Appeal said (para 90):

> "In our judgment it is all but incontrovertible that the commencement of this process should be characterised as an institution of proceedings by the Ministry, albeit with the assistance of the Attorney General. As we have indicated, the Attorney General could not have instituted such proceedings on his own mere motion or caprice. Further, as the Conventions make clear, whilst mutual legal assistance may be refused, the relevant circumstances are

> restricted as, otherwise, the likelihood of true mutuality could readily be defeated."

167. Further, they referred to the account given in the Royal Court's judgment in December 2014 (confirming the grant of the second *saisie judiciaire*) describing the actions of the Director for International Law and Central Authority, Ministry of Law and Human Rights, Indonesia, Mr Muzhar. This was a clear indication of the direct interest of the Ministry (para 93):

> "Mr Muzhar and other Indonesian officials came to Jersey in August 2014 for the purpose of the hearing to take place before the Royal Court, gave detailed instructions to the Crown Advocate including as to whether to seek an adjournment and, when it became clear that there were difficulties with the application, engaged in telephone discussion with the Indonesian Attorney General to obtain consent to the making of a supplementary request based upon further information. In ordinary characterisation, the Crown Advocate was giving assistance to the Ministry in the presentation of the applications and the Ministry was directly involved in deciding how the applications were going to be progressed."

168. The Court of Appeal therefore ordered that the Indonesian Ministry was jointly and severally liable for the costs of the family and the Trust. The Attorney General submits to the Board that they were wrong to do so and that there was no submission to the jurisdiction of the Jersey court by the Indonesian Government.

(a) The relevant legislation

169. It is common ground that enforcement proceedings under the 2008 Regulations and the Modified Law are classified as civil proceedings. It is therefore the principles of State immunity applicable to civil proceedings that are relevant in this case. The relevant sections of the State Immunity Act as modified and extended to the Bailiwick by the Immunity Order are as follows:

> "**1 General immunity from jurisdiction**

(1) A State is immune from the jurisdiction of the courts of the Bailiwick except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

2 Submission to the jurisdiction

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the Bailiwick. …

(3) A State is deemed to have submitted –

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken a step in the proceedings. …

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable. …

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; …"

170. The obligation on the courts to respect the immunity of sovereign states was described by Aikens LJ in *NML Capital Ltd v Republic of Argentina* [2010] EWCA Civ 41, [2011] QB 8, para 49. He said that section 1 of the State Immunity Act imposes a duty on all UK courts in imperative terms to give effect to the immunity conferred. An English court is bound to refuse to entertain any proceedings against a state

unless it is satisfied that the state concerned is not immune because it falls within one of the exceptions set out in sections 2 to 11 of the Act.

171. The issue raised by this appeal is whether the Republic of Indonesia is deemed to have submitted to the jurisdiction of the Jersey court because it either instituted the proceedings which resulted in the grant of the *saisies judiciaires* or because it has intervened in or taken a step in those proceedings.

(b) Did the Republic of Indonesia institute these proceedings?

172. The Board holds that the Court of Appeal fell into error in construing article 16 of the Modified Law as providing that it is the Republic or Government of Indonesia who brings the proceedings and that the Attorney General is merely representing that Government in his conduct of the proceedings. That is not what is meant by the provision that the Attorney General makes the application for a *saisie judiciaire* "on behalf of the government" of the requesting state. The fact that the Attorney General can only bring proceedings if requested by an overseas government or that his discretion not to accede to such a request is limited does not mean that the overseas government is effectively the party to the proceedings. The proceedings are brought by the Attorney General on his own behalf, albeit for the benefit of the government that has issued the request. The terms of the Modified Law make clear that it is the Attorney General who brings the proceedings, not the requesting state. For example, article 17 provides that an application may be made to the Court "by or on behalf of the Attorney General" for the Court to empower the Viscount to realise property vested in him; applications to the Court to register external confiscation orders are made by the Attorney General and not the requesting state under article 39 and the requesting state has no entitlement to the monies in the hands of the Viscount: see article 20. When read in this context, the reference in article 16 to the Attorney General acting on behalf of the government of the requesting state indicates only that it is the request that triggers the Attorney General's power to bring proceedings. The Attorney General is not vindicating any legal rights being exercised by the requesting state.

173. Further, the wording of the international treaties pursuant to which assistance can be given, and the case law applying analogous provisions for inter-state assistance in other territories makes this clear. The Palermo Convention which was invoked by Indonesia in this case (although in fact not extended to Jersey until 2014) can be used to illustrate the point.

174. The Palermo Convention (that is to say the UN Convention against Transnational Organised Crime) was concluded in 2000. Article 4 protects the sovereignty of the States Parties:

> "1. States Parties shall carry out their obligations under this Convention 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.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."

175. That establishes at the outset that the cooperation and mutual assistance envisaged by the Convention does not involve giving up any jurisdiction on the part of the requested state or of any sovereign immunity by the requesting state.

176. Article 12 of the Palermo Convention deals with confiscation and seizure of the assets of a defendant in the criminal proceedings in the requesting state. It requires States Party to adopt "to the greatest extent possible within their domestic legal systems" measures to enable the confiscation of proceeds of crime and property, equipment or "other instrumentalities" used in offences covered by the Convention. Those measures must include the identification, tracing, freezing and seizure of such items for the purpose of eventual confiscation. Paragraph 9 states that nothing in article 12 "shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party."

177. Article 13 then imposes obligations on States Party to respond to requests to use the powers that it has enacted pursuant to article 12. It provides, broadly, that a State Party that has received a request from another State Party for confiscation of proceeds of crime shall, to the greatest extent possible within its domestic legal system, submit either the request or the confiscation order to its competent authorities insofar as it relates to proceeds of crime in the territory of the requested State. Paragraph 4 provides that the actions provided for in the article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules.

178. The two leading authorities on the effect of a request for assistance on the sovereign immunity of the requesting state are *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611 ("*Propend")* and *Blaxland v Commonwealth Director of Public Prosecutions* 323 F 3d 1198 (2003) ("*Blaxland*"). Those cases both concern requests for assistance in different but analogous contexts and are, in the Board's opinion, helpful in determining the issue in this appeal.

179. *Propend* concerned a request for mutual assistance made under a Commonwealth scheme by the Attorney General of Australia to the United Kingdom Government. The request sought a court order to search for documents relevant to an investigation being carried out in Australia into the plaintiff company, Propend. Officers of the Metropolitan Police applied for and were granted search warrants by a judge at the Central Criminal Court. Detective Superintendent Sing who was an Australian police officer and accredited diplomat gave evidence on oath at that hearing as to the nature of the offence alleged. The search warrants were issued on 26 October 1993 and executed on 27 October. The Metropolitan Police seized documents from the premises of Propend's solicitors and accountants and gave them to Superintendent Sing. Propend sought judicial review of the decision to issue the search warrants and, pending the hearing of that challenge, Superintendent Sing gave an undertaking to the High Court on 29 October 1993 that he would not remove the documents from the jurisdiction or fax the contents of them to Australia. The judicial review was successful and the search warrants were later quashed in March 1994 at which point the court ordered that all copies of the documents be destroyed.

180. It later emerged that in breach of the undertaking, Superintendent Sing had faxed extracts from the documents to the Attorney General of Australia shortly after giving the undertaking to the High Court. Those copy documents had not been destroyed as ordered by the court in March 1994. The issue before the court was whether Superintendent Sing was immune from proceedings for contempt of court. Laws J at first instance recorded that counsel for the Superintendent had "rightly accept[ed]" that the giving of an undertaking would constitute a submission to the jurisdiction of the court but went on to hold that Superintendent Sing had had no authority from the Government of Australia to waive immunity. On appeal from Laws J's decision, the Court of Appeal held that the judge had been entitled to find as a fact that Superintendent Sing had had no contact with anyone in authority in Australia before he took part in the proceedings. Immunity was later expressly waived by Australia as regards the judicial review proceedings but, the Court held, not in the contempt proceedings.

181. There having been no express waiver by Australia, the Court of Appeal went on to consider whether there had been a loss of diplomatic immunity under article 32(3) of the 1961 Vienna Convention on Diplomatic Relations set out in Schedule 1 to

the Diplomatic Privileges Act 1964. That provided that "the initiation of proceedings by a diplomatic agent … shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim" (see p 630 of the report). Counsel for Propend submitted that Australia had initiated the proceedings by the letter of request for assistance. They argued that the Metropolitan Police had no direct interest in the application for the warrants other than as a matter of international cooperation. The police were "acting as a conduit for the Australian authorities" (see p 658 of the report). The Court of Appeal rejected that argument, holding that the proceedings had been initiated by the Metropolitan Police, see p 659 of the report:

> "The Act empowers the Secretary of State to direct an application to the English courts pursuant to the Australian request. That request, by one government to another, cannot in our judgment amount to the initiation of proceedings for the purposes of Article 32[(3)]. Neither the Superintendent nor his government had power to make the relevant application to the English court. While the Superintendent gave evidence, and may even have acted as advocate, the application was made, as it had to be, by the United Kingdom police, who thereby initiated the proceedings."

182. The *Blaxland* judgment is a ruling of the United States Court of Appeals for the Ninth Circuit. Mr Blaxland brought a tort action in the Californian court against two employees of the Australian Government. The facts assumed to be true for the purpose of deciding the sovereign immunity issue were as follows. Mr Blaxland was charged with offences committed whilst he was a director of an Australian listed company. In seeking his extradition, the two employees swore false and misleading affidavits which were included in Australia's extradition request filed with the US Department of State. After that request was received, the US Attorney's office issued a complaint for his arrest pursuant to the extradition treaty between the two countries. Mr Blaxland was kept in prison until his extradition. One charge against him was discontinued before trial and the jury acquitted him of all other charges. The Court considered whether sovereign immunity had been waived expressly or by implication at paras 10 of its judgment onwards. It noted that a previous case had decided that when Argentina had filed a letter rogatory with the Los Angeles court to request assistance in serving papers on a Los Angeles resident in respect of a claim brought against him in Argentina, Argentina had waived immunity for the resident's claims against Argentina: *Siderman de Blake v Republic of Argentina*, 965 F 2d 699 (9th Cir 1992). That case remained good law, but the Ninth Circuit Court of Appeals held that Mr Blaxland's case was different:

> "10 … Here, the Australian government did not itself apply to our courts for assistance but instead invoked its rights under the Extradition Treaty by applying to the executive branch of our government. Australia's invocation of its extradition treaty rights, unlike Argentina's direct engagement of our courts in *Siderman*, cannot constitute an implied waiver of sovereign immunity.
>
> 11. … The power to extradite derives from the President's power to conduct foreign affairs. (citations omitted). Thus, the nation seeking extradition does not directly contact the courts of the requested country. Rather, the foreign government makes its extradition request to the U.S. Department of State. … After the request has been evaluated by the State Department to determine whether it is within the scope of the relevant extradition treaty, a United States Attorney, if so instructed, files a complaint in federal district court seeking an arrest warrant for the person sought to be extradited. Thus, all extradition-related judicial proceedings are initiated and conducted by the U.S. Department of Justice. The executive branch conducts the procedure on behalf of the foreign sovereign. The foreign sovereign makes no direct request of our courts, and its contacts with the judiciary are mediated by the executive branch."

183. The Court in *Blaxland* cited a Canadian authority to the same effect: *Schreiber v Canada (Attorney General)* 2002 SCC 62. The Supreme Court of Canada had concluded in that case that "it would be contrary to the concepts of comity and mutual respect between nations to hold that a country that calls upon Canada to assist in extradition only does so at the price of losing its sovereign immunity and of submitting to the domestic jurisdiction of Canadian courts in matters connected to the extradition request, and not only in respect of the extradition proceeding itself." (see p 1209 of the *Blaxland* Report).

184. In the Board's judgment, the reasoning in those two decisions applies in the present case. The proceedings which led to the grant of the *saisies judiciaires* and the later registration of the Indonesian confiscation orders were instituted and pursued by the Attorney General and only by him. The wording of the Modified Law and the 2008 Regulations does not indicate anything different. The Republic of Indonesia was not a party to the proceedings.

185. The involvement of Mr Muzhar in providing the evidence for the Attorney General's application does not show that the proceedings were instituted by Indonesia. This point was discussed by Laws J in *Propend* (p 639). Laws J noted that the first page of the transcript of the hearing showed the Superintendent was sworn as a witness after short initial exchanges between the judge and another witness. Thereafter the whole hearing had been taken up with what the Superintendent had to say in answer to questions from the judge. Laws J said that Superintendent Sing "as a matter of fact, certainly took over its substantive conduct". Laws J and the Court of Appeal in *Propend* rightly did not regard that as showing that Australia had initiated the proceedings in that case.

186. Although the question does not strictly arise for decision in the present appeal, the same reasoning applies, in the Board's view, to preclude the Royal Court from joining the Republic of Indonesia as a party for the purpose of making a third party costs order against them under the principles set out in the *Dymock* case.

(c) The involvement of Mr Muzhar

187. It is not entirely clear from para 93 of the CA's costs judgment whether they relied on Mr Muzhar's conduct in the proceedings as supporting a finding that Indonesia had "intervened or taken any step in the proceedings" for the purposes of article 2(3)(b) of the Immunity Order or only as they put it, as being "a clear indication of the direct interest of the Ministry".

188. The judgment of December 2014, to which the Court of Appeal referred described the affirmation before the Royal Court from Mr Muzhar explaining the circumstances in which the application for the second *saisie judiciaire* came to be made. In particular, Mr Muzhar explained how it became apparent that the years during which the criminal conduct had taken place had become critical for the application of the first *saisie judiciaire* given in respect of the 1631 proceedings since not all of the assets in the trust had been gifted during those years. It was that realisation which prompted the Indonesian authorities to review the 210 proceedings in respect of which the criminal conduct covered earlier years. Mr Muzhar then described the discussions that had taken place with Crown Advocate Belhomme and the late night phone call to the Indonesian Attorney General's office during which his consent to a fresh request for the second *saisie judiciaire* in respect of the 210 proceedings was obtained.

189. If the Court of Appeal in its costs judgment did treat this as the Republic, through Mr Muzhar, having intervened or taken a step in the proceedings so as to waive immunity, then they were wrong to do so. It would be inimical to the proper

conduct of proceedings under the Modified Law for the requesting State to be at risk of waiving immunity by giving every assistance possible to the Attorney General. The orders made under the Modified Law are draconian in nature and may affect third parties as well as the defendant himself, as these appeals show. It is important that the Royal Court has before it the fullest, most direct evidence of what has happened in the courts of the requesting state before deciding whether or not to make an order. That evidence will usually come from the officials of the requesting state who may well be sent to Jersey to assist and to report back. This does not amount to taking a step or intervening. The conduct of Superintendent Sing in *Propend* said to amount to a waiver was not the giving of evidence as described by Laws J but the giving of the undertaking to the court in lieu of the grant of an injunction as to the handling of the disputed documents.

(d) Conclusion on the Immunity Appeal

190. In the Board's judgment, nothing done by Mr Muzhar amounted to an intervention or step in the proceedings by Indonesia for the purposes of article 2(3)(b) of the State Immunity Act. There was therefore no waiver of immunity either by Indonesia instituting the proceedings for the purposes of section 2(3)(a) of the Act or by intervening or taking a step for the purposes of section 2(3)(b). The Attorney General's appeal against the costs order against the Republic of Indonesia must therefore be allowed.

8. Conclusion on the three appeals

191. In the light of the reasoning above, the Board will humbly advise His Majesty as follows:

(i) The Jurisdiction Appeal should be dismissed. The Board concludes that the *saisies judiciaires* covered the property at issue in these proceedings where that property was situated outside Jersey.

(ii) The Mortgage Appeal should be allowed and the declaration made by the Court of Appeal set aside. The Board concludes that there were circumstances in which it would be unlawful for Credit Suisse to assign its rights under the mortgage of the Singapore Apartment so that the Court of Appeal was wrong to grant a declaration to the contrary effect.

(iii) The Immunity Appeal should be allowed. The Republic of Indonesia did not institute the proceedings leading to the grant of the *saisies judiciaires* and did not intervene in or take a step in the proceedings. It did not waive sovereign immunity and so could not be subject to an adverse costs order.