

ROYAL COURT  
(Samedi Division)

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Judgment reserved: 28th November, 1994.  
Judgment delivered: 16th January, 1995.

Before: The Deputy Bailiff, and  
Jurats Bonn and Hamon

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Representation of the Attorney General in the matter of the United States District Court for the Northern District of Illinois and the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1991.

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Crown Advocate C. E. Whelan for the Attorney General.

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JUDGMENT

THE DEPUTY BAILIFF: This is an application by the Attorney General, acting on behalf of the Government of the United States of America, for the registration of an external confiscation order pursuant to the Drug Trafficking Offences (Designated Countries and Territories) (Jersey) Regulations, 1991 (to which we shall refer as "the 1991 Regulations").

The brief history of the matter is that on 15th May, 1992, Travis Swords, a male citizen of the U.S.A., was questioned and searched by Customs Officers on his arrival at Jersey Airport. He was found to be in possession of 35 gold bars, each weighing 1 kilogram. Travis admitted to the officers that he had control of a further 30 gold bars which lay in the vaults of the Trustee Savings Bank in St. Helier. The Customs Officers established that the 65 gold bars were the property of a resident of the U.S.A., namely Michael Ira Hershman. On 15th June, 1992, the Attorney General was notified by the U.S. Department of Justice that criminal proceedings were in train against Hershman in the U.S. District Court, Northern District of Illinois, Eastern Division, in respect of drug trafficking offences. The Attorney General was also informed that the gold bars in question were the proceeds of Hershman's drug trafficking. The Attorney was requested to take the appropriate steps to restrain the gold bars. On 16th June, 1992, the Attorney General accordingly applied for, and was granted, a *saisie judiciaire* which remains in force. The criminal proceedings in the United States resulted eventually in the

conviction of Hershman for drug trafficking offences. In the meantime, ancillary proceedings were taken by the U.S. Government with a view to obtaining an order of forfeiture of the 65 gold bars. After a contested hearing, the gold bars were found to represent the proceeds of drug trafficking and on 25th August, 1993, a forfeiture order was made by U.S. District Judge Charles Kocoras. The short point for determination by this Court is whether that forfeiture order, made after civil proceedings *in rem* against the 65 gold bars, falls within the term "external confiscation order" as defined in the 1991 Regulations.

The 1991 Regulations were made by the States on 7th May, 1991, pursuant to Article 18 of the Drug Trafficking Offences (Jersey) Law 1988, ("the Law"). Regulation 2 provides that in relation to a designated country the Law shall apply, subject to the modifications set out in the second schedule to the Regulations, to an external confiscation order made there. The third schedule to the 1991 Regulations sets out the relevant provisions of the Law as so modified.

We turn therefore first to Article 18(4) of the Law as contained in the third schedule to the 1991 Regulations. That paragraph provides:

*"(4) On an application made by or on behalf of the Government of a designated country, the Court may register an external confiscation order made there if-*

*(a) it is satisfied that at the time of registration the order is in force and not subject to appeal;*

*(b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and*

*(c) it is of the opinion that enforcing the order in the island would not be contrary to the interests of justice."*

We are satisfied that the U.S.A. is a designated country under the 1991 Regulations and that this is an application made on behalf of the Government of that country. We have received a certificate dated 12th October, 1994, signed by a senior trial attorney, Office of International Affairs of the U.S. Department of Justice, confirming that the forfeiture order is final and not subject to appeal. It is clear, therefore, that sub paragraph (a) is satisfied. It is also clear from the face of the order that Hershman received notice of the proceedings against the gold bars and indeed made a claim for ownership of them. We can, therefore,

be satisfied that the requirements of sub-paragraph (b) are fulfilled. As to sub-paragraph (c), we have no doubt that it would not, subject to the determination which we have to make, be contrary to the interests of justice if the order were to be enforced in the island.

We turn now to the question of whether the forfeiture order made after civil proceedings *in rem* is an "external confiscation order" as defined in the 1991 Regulations. Article 3 of the Law, as set out in the third schedule to the 1991 Regulations, provides:

*"Article 3*

*External confiscation orders*

- (1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connexion with drug trafficking or their value is referred to in this Law as an "external confiscation order".*
- (2) In paragraph (1) the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.*
- (3) A person against whom an external confiscation order has been made, or a person against whom proceedings which may result in an external confiscation order being made have been, or are to be, instituted in a court in a designated country, is referred to in this Law as "the defendant".*

It is true that in this jurisdiction proceedings *in rem* are rare and are certainly not available, at present, to pursue the proceeds of drug trafficking or any other serious crime. However, it is clear that the phraseology employed in paragraph (1) above is extremely wide; -"an order ... for the purpose of recovering payments or other rewards received in connection with drug trafficking ...". Furthermore, paragraph (2) provides that it includes an order "however described". It is plain in our judgment that this language was employed so as to accommodate the widely differing procedures of other jurisdictions designed to curb the menace of drug trafficking and to penalize the concealing or laundering of the proceeds of this pernicious activity. It matters not whether the proceedings in the foreign jurisdiction are civil or criminal, provided that the resulting order has the purpose of "recovering payments or other rewards received in connection with drug trafficking".

We have considered whether the reference in paragraph (3) to "a person against whom an external confiscation order has been

made" necessarily excludes an order made after civil proceedings in *rem* from the ambit of an external confiscation order. We have concluded, in the context of the 1991 Regulations as a whole, that it does not have that effect. In our judgment, paragraphs (1) and (2) are not to be construed as being subject to paragraph (3). In some instances, there will be "a person" against whom an external confiscation order has been made; in others, there will not. We see no need, in view of the purpose of the 1991 Regulations as a whole, to take a restrictive view.

We are reinforced in our conclusion by a decision of the High Court in England in re JL and the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 which was drawn to our attention by Counsel for the Attorney General. It appears not yet to be reported but the transcript of the judgment of Judge J is dated 18th March, 1994. The issue in that case was whether a restraint order (the equivalent in some respects of our "*saisie judiciaire*") could be sustained on the basis of civil proceedings in *rem* in the United States. The learned Judge held in terms that the equivalent legislation in England enabled a restraint order to be made on the back of such proceedings.

In the exercise of our discretion, we accordingly order the registration of the forfeiture order made by the U.S. District Court for the Northern District of Illinois on 25th August, 1993 as an external confiscation order.

We further order, pursuant to Article 10 of the Law as set out in the third schedule to the 1991 Regulations, that the Viscount be authorized to realize the realizable property identified in the forfeiture order and held by him by virtue of the *saisie judiciaire* of 16th June, 1992, namely the 65 gold bars, by effecting a sale of the same on the bullion market at prices prevailing at the date of the said sale.

Mr. Whelan withdrew his request for a further order concerning the application of the proceeds of sale. He took the view, quite properly, that the relevant provisions of the 1991 Regulations sufficiently empowered the Attorney General to take the appropriate action which apparently involved some sharing out of the proceeds. This is a matter for the Attorney General and not for the Court. Nevertheless, because the point arose in argument, we add a few words as to the interpretation of Article 11 as set out in the third schedule to the 1991 Regulations, in case they may be of assistance in the future. The relevant part of Article 11 provides:

"(1) Subject to paragraph (2) the following sums in the hands of the Viscount, that is -

(a) *money which has vested in him or come into his possession pursuant to Article 9;*

5 (b) *the proceeds of the realization of any property under Article 10;*

10 *shall, after such payments (if any) as the Court may direct have been made out of those sums, be applied after payment of the Viscount's fees and expenses, on the defendant's behalf towards the satisfaction of the external confiscation order."*

15 It was suggested by Counsel that the words "be applied ... on the defendant's behalf towards the satisfaction of the external  
20 confiscation order" implied an obligation to transmit the proceeds to the requesting country. The words are indeed ambiguous but we do not think that that is the correct interpretation. We say that for two reasons. First, it is clear from the terms of Regulation 6  
25 of the 1991 Regulations that in the reverse situation, where the Attorney General has applied to execute a confiscation order of this Court in a foreign country, it is envisaged that the proceeds stay where they are collected. That is the necessary implication of the words "the amount payable under the confiscation order shall be treated as reduced (our emphasis) by the value of the  
30 property so recovered." It would be a strange state of affairs if money collected in execution of a confiscation order made in Jersey were to remain in the foreign country whereas money collected in Jersey in execution of an external confiscation order was required to be repatriated. The whole basis of mutual judicial  
35 assistance is one of reciprocal treatment. Secondly, if the intention had been that money must be repatriated, it would have been a straightforward matter for the legislature to have stipulated expressly how the proceeds were to be "applied ... on the defendant's behalf". In default of any express stipulation, confiscated monies (which as a matter of general law fall to the Crown) are applied on the defendant's behalf towards the satisfaction of the external confiscation order by paying them to the Crown. What the Crown, through the Attorney General, seeks thereafter to do with them, is a matter, as we have said, for the  
40 Attorney General.

Authorities

Drug Trafficking Offences (Designated Countries and Territories)  
(Jersey) Regulations, 1991.

Drug Trafficking Offences (Jersey) Law 1988.

re J.L. and the Drug Trafficking Offences Act 1986 (Designated  
Countries and Territories) Order 1990.  
(18th March, 1994) Unreported Judgment of the High Court  
of England.