



## Enforcement of Foreign Confiscation Orders vs Property Law Orthodoxy

Service area / [Dispute Resolution and Litigation](#)

Location / [Jersey](#)

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The Royal Court of Jersey has struck out an application by the Attorney General to enforce a Danish confiscation order in the sum of £1.9 million in respect of the Jersey realisable property of Mr Rosenlund (AG v Rosenlund [2016] JRC 062). The assets in Jersey were comprised in the Mingo Trust, which Mr Rosenlund settled on 18 October 1988.

The Attorney General's original argument that Mr Rosenlund, as a beneficiary of the trust, was "beneficially entitled" to the assets of the trust was rendered untenable by the Royal Court's judgment in AG v Tantular 2014 (2) JLR 25. The Attorney General then advanced a novel argument that Mr Rosenlund had made an indirect gift of the trust assets of the Mingo Trust in November 2008 upon the then trustee retiring and exercising its power to appoint the current trustee. That "gift", alleged the Attorney General, was Mr Rosenlund's realisable Jersey property and could be confiscated in satisfaction of the Danish order under the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 (the "Modified Law").

Mr Rosenlund and the trustee made a joint application to strike out the Attorney General's case.

### Background

The Mingo Trust is a standard discretionary settlement, which was settled under Jersey law. The discretionary beneficiaries are Mr Rosenlund, his wife and three children.

On 12 November 2008 the then trustee retired and appointed a Guernsey trustee in its place. The governing law of the Mingo Trust was changed to Guernsey law a number of days later.

It was common ground between the parties that the criminal conduct for which Mr Rosenlund was convicted, namely tax fraud, commenced in 1997. This was significant as it was only gifts made after the commencement of criminal offending that could be deemed to be the defendant's realisable property. As the Mingo Trust had already settled as long ago as 1988, the bulk of the trust property was thus excluded from being Mr Rosenlund's realisable property.

As no substantial gifts had been made by Mr Rosenlund, either directly or indirectly after 1997, the Attorney General alleged that Mr Rosenlund procured the retirement of the previous trustee and the appointment by that trustee of the new trustee, which amounted to an indirect gift of the trust fund to the new trustee by Mr Rosenlund, and which could be confiscated as his realisable property.

### The modified law

Article 2(1) of the Modified Law provides as follows: "In this Law, "realisable property" means:

- In relation to an external confiscation order in respect of specified property, the property that is specified in the order;
- In any other case:
  - a. any property held by the defendant;
  - b. any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Law; and
  - c. any property to which the defendant is beneficially entitled"

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The Modified Law does not define “gift”, but rather restricts relevant gifts to those made by the defendant after the conduct to which the external confiscation order relates. If this criterion is satisfied, the Modified Law confers discretion on the Court to consider whether in all the circumstances it is appropriate that the Court take the gift into account in assessing the defendant’s realisable property.

Article 2(10) extends the definition of gift to include circumstances 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.

The Attorney General argued that despite whatever meaning the courts may have attributed to the word “gift” in other contexts, under the Modified Law “gift” was to be equated with “transfer”. Accordingly, it was argued that the transfer of the legal interest in the trust fund from the former trustee to the incoming trustee was an indirect transfer by the defendant. The Attorney General submitted that the new trustee had obtained something of value as a result of the transfer but no value was provided to the old trustee, and therefore the transfer between the old and the new trustees was a gift.

The Attorney General urged the Court to consider statutory context and policy reasons for the Modified Law when exercising its discretion pursuant to Article 2(9). The Attorney General argued that the gift provisions in the Modified Law serve to prevent convicted criminals from dissipating their assets to avoid financial orders and are the only mechanism by which the authorities can obtain assets which are held by people who are not parties to criminal proceedings.

### Decision on the strike out application

The Royal Court rejected the Attorney General’s arguments and agreed with the position of Mr Rosenlund and the trustee that it was simply not possible for a change of trustees in relation to a validly created trust to constitute an indirect gift for the purposes of the Modified Law. Accordingly, the Attorney General’s application was struck out.

The decision in *AG v Tantular* [2014] (2) JLR 25 established that Mr Rosenlund, as a discretionary beneficiary, was not to be deemed beneficially entitled to the assets of the Mingo Trust for the purposes of the Modified Law. In that case the Court observed:

“the arguments put forward on behalf of the Attorney General in this case would require the Court to overthrow fundamental principles of the law relating to trusts and there is no indication whatsoever, let alone irresistible clearness, that this was the intention of the legislature...

...the exercise of the jurisdiction to make confiscation orders involves no departure from familiar rules governing entitlement and ownership.”

In the present case the Commissioner disagreed with the Attorney General’s assertion that the Modified Law gave “gift” a special definition, and rejected the assertion that “gift” and “transfer” were synonymous for the purposes of the Modified Law. The Court found that “gift” is to be given its ordinary

meaning by applying the established rules of entitlement and ownership. The extension of the definition of “gift” in Article 2(10) was to include transfers at undervalue (which would otherwise not be considered voluntary transactions) rather than a wholesale extension to include all transfers of property on whatever basis subject only to the Court’s discretion to exclude gifts from confiscation.

The Court found that the fundamental requirements of a “gift” were not present for the following reasons:

- The property transferred by the previous trustee was property to which Mr Rosenlund had no beneficial entitlement. Accordingly, it was not his property to give away, whether directly or indirectly, at full value or undervalue.
- Secondly, there was nothing voluntary about the transfer of trust assets between the trustees, rather it was an obligation imposed on the outgoing trustee pursuant to Article 34(1) of the Trusts (Jersey) Law 1984 that the retiring trustee was required to surrender all trust property.
- Thirdly, the extension of the ordinary meaning of “gift” in Article 2(10) relates to transfers by the defendant, whether directly or indirectly. Here the transfer was strictly between the outgoing and incoming trustee and, despite whatever influence Mr Rosenlund might have had over the outgoing trustee, he was not beneficially entitled to the assets and so had nothing to gift.

The Court’s decision affirmed emphatically that orthodox principles of property law apply in the context of enforcement of foreign confiscation orders:

“To attempt to use Article 2(10), which extends the ordinary meaning of gift to include transfers by the defendant at an undervalue, to catch a transfer of assets to which Mr Rosenlund has no beneficial entitlement and which are outside the confiscatory regime, is to place upon Article 2(10) an interpretation which it simply cannot bear and to ride roughshod over the familiar rules governing entitlement and ownership. For such a transfer to be caught would require wording which is irresistibly clear. There is no such wording.”

### Decision on costs

Mr Rosenlund and the trustee sought their costs incurred in the proceedings:

- from the commencement of the proceedings to the disclosure of trust information in December 2014 (showing that no substantial transfers of assets had been made by Mr Rosenlund to the trust after the date of commencement of criminal offending), on the standard basis; and
- after December 2014 on the indemnity basis, as the Attorney General ought to have withdrawn the proceedings at that point.

The Attorney General’s position was that, as the proceedings had been brought in discharge of his public functions and acting in the public interest by providing mutual assistance to foreign authorities, he ought not to be exposed to costs orders.

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The Court found, applying previous Jersey authority, that while there was no general principle that costs orders should not be made against bodies performing public functions, those public functions could be taken into account in deciding matters of costs.

The Court declined to make any award for costs against the Attorney General until the Attorney General revised his case on 23 January 2015 to assert that the change of trustee amounted to an indirect gift. This was shortly after the date on which disclosure had been provided to the Attorney General, which showed that there had been no substantial gifts to the Mingo Trust from 1997 onwards. The Court found that there could be no criticism of the Attorney General for having made and pursued the application until this time.

In respect of the costs incurred post 23 January 2015, the Commissioner held: “From that point, the position is more difficult, in that the Attorney General was pursuing a claim that I have found had no possibility of success. ... it cannot be in the public interest for hopeless cases to be advanced by public bodies at the cost of the respondent parties concerned, or for such conduct to be encouraged.”

The Commissioner concluded that whilst in the context of ordinary civil litigation he would have considered the pursuit of a hopeless case as crossing the threshold for indemnity costs, where a party is a public body carrying out a public function this factor weighed heavily enough to limit costs against the Attorney General to standard costs. However, the costs awarded in favour of Mr Rosenlund and the trustee included the costs of a preliminary legal issue which had been determined in the Attorney General’s favour – on the basis that the issue would have been one of the matters to be determined at trial where the Attorney General would have been unsuccessful overall.

The Attorney General has sought and been granted leave to appeal against the strike out judgment and the costs judgment.

Andreas Kistler represented the trustee in these proceedings with assistance from Louise Woolrich and Rebecca Catley. Separately, William Grace acted for the former trustee of the Mingo Trust in relation to all aspects of this matter.



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