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Two Jersey Judgments, some two years apart, Tantular & Others v AG [2014] JRC128 and AG v Rosenlund and Another [2016] JRC062 have held that there is no realisable property that can be subject to a seizure order under Jersey's International standard proceeds of crime confiscation provisions in a validly created discretionary trust.

In Tantular, the Royal Court of Jersey held that the Indonesian resident settlor of a Jersey discretionary trust who had been charged in Indonesia with fraud and money laundering and who was also a beneficiary of the trust, was not beneficially entitled to the assets of the trust consistently with fundamental principles of trust law.

Similarly in Rosenlund, the Royal Court held that a transfer of trusteeship of a Jersey trust was not a gift capable of attracting a proceeds of crime confiscation order where the assets of a Jersey discretionary trust of which Mr Rosenlund, a Dane, was a beneficiary, were gifted to the trust by Mr Rosenlund, as settlor, before his criminal tax fraud in Denmark.

As a discretionary beneficiary, Mr Rosenlund was not beneficially entitled to assets in the trust and no confiscation order could ever bite against the discretionary trust's assets, whoever was trustee or whenever they were trustee.

These considerations are matters of statutory interpretation. Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 4th Edition, paragraph 4-090 says: "*consideration, particularly in modern times of the principles concerning equitable estates and interests is entangled with statutory interpretation*" and the Jersey Royal Court in these two cases has followed the consideration given to equitable estates and interests in English law, particularly in Gartside v IRC (Lord Templeman) which held that a beneficiary of a discretionary trust has no entitlement capable of being taxed to any of the trust property unless and until the trustee decides in the exercise of its discretion to make an appointment and then the beneficiary becomes beneficially entitled only to those assets appointed to him. The discretionary beneficiary has a right to be considered as a potential recipient of benefit by the trustee and to have his interest protected by a Court of Equity. Discretionary trusts are subject to the supervisory powers of the Court which were often marshalled to protect the interest of discretionary beneficiaries including against trustees guilty of breach of trust.

As Lord Reid stated in Gartside v IRC:

"It may be a right with some degree of concreteness or solidarity, one which attracts the protection of a Court of equity yet it may still lack the necessary quality of definable extent which must exist before it can be taxed".

The Royal Court was similarly mindful of the Supreme Court's decision in Prest v Petrodle Resources Limited which was about financial provisions on divorce enabling a UK Court to transfer property to a husband or wife to which the other party to the marriage is entitled in possession or reversion. Lord Sumption said that: "*'an entitlement' is a legal right in respect of the property in question*" and a husband had no entitlement to UK realty owned by companies that the husband had complete control of. It was the companies that had the entitlement and the desire to do "*justice between divorcing parties did not entitle the Court to depart from settled principles of property law*". Lord Sumption continued "*... it is axiomatic*



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that general words in the statute are not to be read in a way which 'would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'".

In *Rosenlund*, the Royal Court rejected an invitation by the Attorney General to interpret a gift in the confiscation provisions consistently with what was said by the English Court of Appeal in *R v Richards*. In *Richards* it was said:

"The underlining purpose of the tainted gift provisions of [the Proceeds of Crime Act 2002] is plain. No self-respecting organised criminal would expect to be caught with high value property in his own name readily identifiable, particularly since the enactment of legislation which is designed to strip such criminals of their profits. As a matter of standard practice, he is likely to have taken steps to transfer high value assets to nominee companies, offshore trust or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed or he has served any sentence or imprisonment which he may have had the misfortune to have imposed upon him. Parliament has sought to address that mischief in various ways, including the tainted gift provisions presently under consideration".

Of this the Royal Court said that while the Defendant was on the run, he had transferred five properties that he owned to a friend. The criminal use of offshore trusts and nominees in this context *"was premised upon those assets being the criminal assets in the first place"*.

These two cases represent an example of the Royal Court of Jersey applying well defined definitions of rights and interests to the interpretation of statute and is not, as in the example provided by in *R v Richards*, an interpretation of money laundering confiscation provisions that places assets administered in Jersey under the Panama hat.

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