

HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 17

*on appeal from:[2008] EWCA Crim 530*

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**King (Respondent) v Director of the Serious Fraud Office**  
**(Appellant) (On appeal from the Court of Appeal Criminal**  
**Division)**

**Appellate Committee**

**Lord Phillips of Worth Matravers**  
**Lord Scott of Foscote**  
**Lord Walker of Gestingthorpe**  
**Lord Brown of Eaton-under-Heywood**  
**Lord Mance**

**Counsel**

*Appellant:*  
Andrew Mitchell QC  
Fiona Jackson

*Respondent:*  
David Perry QC  
Louis Mably

(Instructed by The Restraint and Confiscation Unit,  
Serious Fraud Office )

(Instructed by Kingsley Napley )

*Hearing date:*

9 FEBRUARY 2009

ON  
WEDNESDAY 18 MARCH 2009



## **HOUSE OF LORDS**

### **OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**King (Respondent) v Director of the Serious Fraud Office  
(Appellant) (On appeal from the Court of Appeal Criminal Division)**

**[2009] UKHL 17**

#### **LORD PHILLIPS OF WORTH MATRAVERS**

My Lords,

1. Mr King, the respondent to this appeal, is a British subject who has for 30 years been resident in South Africa. He has been charged by the Office of the National Prosecuting Authority of the Republic of South Africa (“the NPA”) with fraud on a very large scale. He was originally arrested in South Africa on 13 June 2002. He was served with an indictment on 29 April 2005, which was amended on 17 March 2006. He now faces 51 counts of fraud, 34 counts of contravening income tax legislation, 234 counts of contravening exchange control regulations, 2 counts of money laundering and 1 count of racketeering. His trial has been adjourned on a number of occasions. He has been granted bail and the return of his passport and has been permitted, on occasion, to travel outside South Africa.

2. This appeal arises out of a Letter of Request sent by the NPA to the United Kingdom Central Authority in London and to the Lord Advocate in Edinburgh dated 9 May 2006 seeking assistance in obtaining restraint orders over property of the respondent. The Letter of Request was referred to the appellant and, on 26 May 2006, the NPA wrote to the appellant varying the terms of the orders sought so as to make it clear that they covered property of a number of companies that were alleged to be “Alter Ego Entities” of the respondent.

3. The introduction to the Letter of Request requested assistance in seeking:

“(a) orders restraining Mr King from dealing with realisable property in (i) England and Wales, and (ii) Scotland, in order to make such property available to be recovered by means of an external confiscation order which will be sought, and (it is anticipated) on conviction granted, in criminal proceedings pending against Mr King in South Africa; and

(b) an order that Mr King swear an Affidavit setting out full details of all assets belonging to him and/or which he has the power, directly or indirectly to dispose of or deal with as his own, wherever located; and

(c) such other investigative assistance as may be appropriate in order to establish up to date factual information in relation to the assets, belonging to Mr King and/or which he has the power, directly or indirectly, to dispose of or deal with as his own, located in the UK.”

4. Paragraph 16 of the Letter of Request requested, inter alia, application for an order which

“(a) restrains Mr King from dealing with such realisable property (as defined in the relevant legislation, and including all property owned by Mr King or which he has the power, directly or indirectly, to deal with as if it were his own, including all assets held by the Alter Ego Entities) as is within the jurisdiction of the Court; and

(b) requires Mr King to swear an affidavit disclosing the full extent of his assets and those of the Alter Ego Entities, wherever situated, and...”

5. The Letter of Request set out in detail the basis on which the NPA contended that the property of the Alter Ego Entities represented property of the respondent. It set out a schedule of bank accounts of these companies which it stated were believed to be “held in England and Wales”.

6. The Letter of Request explained that the purpose of the order sought was to make the restrained property available to be recovered by means of a confiscation order which would be sought in South Africa if and when the respondent was convicted.

7. The Letter of Request exhibited a draft order. This was in a standard form in common use in the Crown Court in proceedings arising out of prosecutions within this jurisdiction. This had been supplied to the NPA by the appellant.

8. On 31 May 2006 Judge Wadsworth QC, sitting in the Crown Court at Southwark, made an order pursuant to the Letter of Request. This order was in the terms of the draft order that had been exhibited to the Letter of Request. Its provisions included the following:

“DISPOSAL OF OR DEALING WITH ASSETS

5. The Defendants must not until further order of the court:

- (1) remove from England and Wales any of their assets which are in England and Wales; or
- (2) in any way dispose of, deal with or diminish the value of any of their assets whether they are in or outside England and Wales.

6. The prohibition against disposing or dealing with assets or diminishing their value includes the following assets in particular:

- (a) the property within the jurisdiction as set out in the Schedule annexed hereto marked ‘D’ or the proceeds of sale if it has been sold;
- (b) the property and assets of the businesses within the jurisdiction as set out in the Schedule annexed hereto marked ‘D’ or the proceeds of sale if any of them have been sold; and
- (c) any money in the accounts within the jurisdiction as set out in the Schedule annexed hereto marked ‘D’.”

This has been described as “the Restraint Order”.

9. The provisions of the order further included the following:

“PROVISION OF INFORMATION

Each Defendant shall serve a witness statement of all his assets wherever located certified by a statement of truth on the Serious Fraud Office within 31 days of the service of this Order as required by the Disclosure Order set out in Schedule C annexed to this Order.”

This has been described as “the Disclosure Order”.

10. The order was made on an application without notice. The respondent applied unsuccessfully to Judge Wadsworth on 23 April 2007 to have it discharged. He then appealed to the Court of Appeal which, on 18 March 2008, allowed his appeal to the extent of substituting an order that related only to property in England and Wales: [2008] 1 WLR 2634. The appellant seeks to reverse the decision of the Court of Appeal.

11. The issue raised by this appeal is whether the Crown Court had jurisdiction to include within the ambit of the Restraint Order and the Disclosure Order property outside England and Wales.

12. Restraint orders, pursuant to requests from the NPA have also been made against the respondent in Guernsey on 9 June 2006 and in Scotland on 29 June 2006.

*The statutory scheme*

13. The power of the Crown Court to make a restraint order is derived from the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) (“the Order”), which was made under sections 444 and 459(2) of the Proceeds of Crime Act 2002 (“POCA”). POCA has replaced restraint and confiscatory regimes under the Criminal Justice Act 1988 (“the CJA 1988”) and the Drug Trafficking Act 1994 (“the DTA 1994”). A separate regime exists in relation to certain terrorist offences under the Terrorism Act 2000.

14. POCA deals primarily, as did the antecedent legislation, with orders arising out of criminal proceedings within the jurisdiction. Section 444 of POCA provides, however, that Her Majesty may, by Order in Council,

“(a) make provision for a prohibition on dealing with property which is the subject of an external request;  
(b) make provision for the realisation of property for the purpose of giving effect to an external order.”

15. Section 447 of POCA deals with “interpretation” and provides:

“(1) An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.

(2) An external order is an order which –

(a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and  
(b) is for the recovery of specified property or a specified sum of money...

(4) Property is all property wherever situated...

(7) Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made.”

16. Part 2 of the Order is headed “Giving Effect in England and Wales to External Requests in Connection with Criminal Investigations or Proceedings and to External Orders Arising from such Proceedings”. Relevant provisions in Chapter 1, which is headed “External Requests”, are as follows.

17. Article 6 provides that the Secretary of State may refer an external request in connection with criminal proceedings or investigations in the country from which the request is made, and which concerns relevant property in England or Wales, to the Director of

Public Prosecutions, the Director of Revenue and Customs Prosecutions or, where the request relates to an offence involving serious or complex fraud, to the appellant. Article 6(7) provides that where a request also concerns relevant property which is in Scotland or Northern Ireland, so much of the request as concerns such property shall be dealt with under Part 3 (Scotland) or, as the case may be, Part 4 (Northern Ireland). Article 8 provides that the Crown Court may make a restraint order if either of the two conditions in article 7 is satisfied.

18. The two conditions in article 7 are as follows:

“(2) The first condition is that –

- (a) relevant property in England and Wales is identified in the external request;
- (b) a criminal investigation has been started in the country from which the external request was made with regard to an offence, and
- (c) there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct.

(3) The second condition is that –

- (a) relevant property in England and Wales is identified in the external request;
- (b) proceedings for an offence have been started in the country from which the external request was made and not concluded, and
- (c) there is reasonable cause to believe that the defendant named in the request has benefited from his criminal conduct.”

19. Article 7(4) provides that in determining whether the conditions are satisfied and whether the request is an external request within the meaning of the Act, the court must have regard to the definition in subsections (1), (4) to (8) and (11) of section 447 of POCA.

20. Article 8(1) provides that if either condition set out in article 7 is satisfied, “the Crown Court may make an order (‘a restraint order’) prohibiting any specified person from dealing with relevant property which is identified in the external request and specified in the order.”



21. Article 8(4) provides that if a restraint order is made, the court, “may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.”

22. Article 8(6) provides: “Dealing with property includes removing it from England and Wales.”

23. Article 12 confers a power of seizure of any property which is specified in a restraint order to prevent its removal from England and Wales. Article 15 provides for the appointment of management receivers in respect of any property which is specified in the restraint order.

24. Chapter 2 of Part 2 of the Order confers on the Crown Court the power to give effect to external orders as defined in section 447(2) of the Act. Article 18 echoes article 6 in that it is a precondition to the exercise of the relevant powers that the external order “concerns relevant property in England or Wales”. Chapters 2 and 3 provide for the order to be registered and then enforced. Enforcement is carried out by appointment of enforcement receivers, who are given powers to take possession of, to manage and to realise the property. These powers have to be exercised with a view to satisfying an external order that has been made against a defendant.

*The decisions below.*

25. Judge Wadsworth held, because the draft order exhibited to the Letter of Request had requested an order that “The Defendants must not...in any way dispose of, deal with or diminish the value of their assets *whether they are in or outside England and Wales*” (emphasis added), that it was the intention of the NPA to seek a worldwide order. He held that he had jurisdiction to make the order because the condition imposed by article 7 of the Order, that relevant property in England and Wales should be identified in the request, was merely a “gateway” to the exercise of his jurisdiction. Once through the gateway, article 8 gave him the power to make an order prohibiting the respondent from dealing with relevant property identified in the external request. That was the respondent’s assets whether in or outside England and Wales, as specified in the draft order. The definition of property in section 447 as “all property wherever situated” confirmed that the request sufficiently identified the property to be covered by the order.

26. The Court of Appeal founded the relevant part of its decision on the natural meaning of articles 6, 7 and 8. It held that, read as a whole, the effect of these provisions was to provide a scheme for the making of an external order that was restricted to property in England and Wales.

*Suggested aids to interpretation*

27. Before turning to consider the words of the Order itself I propose to deal briefly with a number of extrinsic matters that the parties submitted were of assistance in interpreting it.

28. Mr Andrew Mitchell QC for the appellant drew attention to the aims of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which the United Kingdom became a signatory in 1988. These include depriving persons engaged in illicit traffic of the proceeds of their criminal activities. He emphasised that in ratifying the European Convention on Mutual Assistance in Criminal Matters in 1991 the United Kingdom had undertaken to afford *the widest measure of mutual assistance* in proceedings in respect of offences. Furthermore, the United Kingdom had, a year later, ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime, which required co-operation with the other Parties *to the widest extent possible* for the purposes of investigations and proceedings aimed at the confiscation of instrumentalities and proceeds.

29. Mr Mitchell submitted that these obligations had been recognised by Orders in Council made under the CJA 1988 and the DTA 1994. These enabled external restraint orders to be made on a world wide basis. It would, he submitted, be extraordinary to conclude that Parliament, when enacting POCA, intended to narrow the scope of the legislative powers to investigate and recover criminal assets.

30. The Orders made under those two Acts simply extended the scope of each Act to embrace the making of orders pursuant to external requests. Mr David Perry QC for the respondent challenged the submission that these Orders had extra-territorial effect. Your Lordships did not encourage the pursuit of a lengthy satellite argument on this issue for the Order made pursuant to POCA is very different from the earlier Orders. The Order does not simply apply the provisions of POCA

to external requests. It sets out its own provisions. These in many respects mirror those of POCA but in some significant respects do not.

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 world wide 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. Mr Perry buttressed them by reliance upon the well-established canon of construction that requires clear language if an Act is to be given extra-territorial effect.

33. Mr Perry drew the attention of the House to a clear Home Office statement in the Explanatory Memorandum to the Order to the effect that the Order relates to property within the United Kingdom. While this is not a legitimate aid to the interpretation of the language that Parliament has used it does counter Mr Mitchell's submission that it would be extraordinary to conclude that Parliament had intended to restrict the scope of the Order in this way.

#### *The natural meaning of the Order*

34. The peripheral matters that I have been considering lend support to what I find to be the clear meaning of the relevant provisions of the Order. The object of a restraint order is to preserve relevant property that may be needed to satisfy an order for the recovery of specified property or a specified sum of money – see the definitions in section 447 of POCA. Jurisdiction to make an external restraint order only arises where the external request “concerns relevant property in England or Wales” – article 6. The relevant property must be “identified in the external request” – article 7. The Crown Court may then make a restraint order which prohibits “dealing with relevant property which is identified in the external request” – article 8. The Order then makes

provision for the seizure of any property which is specified in the Order to prevent its removal from England and Wales – article 12, and for a receiver to take possession of such property – article 16.

35. These provisions are echoed by those which relate to enforcing an external order. The order must concern relevant property in England or Wales – article 18. Enforcement takes place by appointment of a receiver in respect of realisable property where the external order is for the recovery of a specified sum of money and in respect of the property in question where the external order is for the recovery of specified property – article 27. The powers that article 28 permits the court to confer on the receiver include powers that are expressly to be exercised within the jurisdiction.

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. In this respect there is a significant distinction between POCA, which deals with domestic orders, and the Order, which deals with external orders. Section 74 of POCA provides that if the prosecutor believes that there is realisable property situated in a country outside the United Kingdom he can ask the Secretary of State to forward a request for assistance in restraining dealing with the property or in realising the property. Had it been intended that external restraint orders or external orders should take effect outside the jurisdiction the Order would surely have made provision similar to that in section 74 of the Act.

37. What is there that weighs against these conclusions? Mr Mitchell submitted that the requirement that the external request should concern relevant property in England and Wales was a gateway that gave access to a worldwide jurisdiction, but I can see no logic in this proposition. I can see no reason why the existence of property of the respondent in this jurisdiction should justify a request from South Africa for this country to attempt to procure, on South Africa's behalf, a worldwide restraint on the respondent's property. Mr Mitchell founded much of his submission in respect of the interpretation of the Order on the definition of property in section 447 as "all property wherever situated". Whether property bears that meaning must depend, however, on the context in which the word is used. Where the Order expressly or by implication refers to property in England and Wales it necessarily refers only to property there situated.

38. In summary, there is no reason not to give the provisions of the Order their natural meaning and good reason to give them such meaning. I would uphold the decision of the Court of Appeal as to the scope of the Restraint Order. Contrary to the view of Judge Wadsworth, I do not believe that the NPA had any intention that the Letter of Request should seek assistance in relation to property outside the United Kingdom. This dispute has arisen because the appellant supplied for their use an inappropriate form.

*The Disclosure Order*

39. The Disclosure Order was made pursuant to article 8(4) which provides that the court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective. It follows, as Mr Mitchell conceded before the Court of Appeal, that if the Restraint Order must be restricted to property within England and Wales there can be no justification for a worldwide Disclosure Order.

40. For these reasons I would dismiss this appeal.

**LORD SCOTT OF FOSCOTE**

My Lords,

41. I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Phillips of Worth Matravers and am in complete agreement with the reasons he has given for dismissing this appeal. I, too, would do so.

**LORD WALKER OF GESTINGTHORPE**

My Lords,

42. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I am in full

agreement with it, and for the reasons given by Lord Phillips I would dismiss this appeal.

### **LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

43. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I am in full agreement with it, and for the reasons given by Lord Phillips I too would dismiss this appeal.

### **LORD MANCE**

My Lords,

44. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Phillips of Worth Matravers. For the reasons he gives, with which I agree, I too would dismiss this appeal.