

BETWEEN

SLAWOMIR RYSZARD BUJAK

Appellant

AND

SOLICITOR-GENERAL

Respondent

Hearing: 31 March 2009

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Appearances: E Orlov with F Deliu for the Appellant
M S R Palmer with M F Laracy for the Respondent

5

CIVIL APPEAL

MR ORLOV:

10 May the Court please, Orlov with my colleague Mr Deliu assisting.

ELIAS CJ:

Thank you Mr Orlov, Mr Deliu.

15 **MR PALMER:**

Tēnā Koutou Katoa, may it please the Court, my name is Palmer, I appear for the respondent with my colleague Ms Laracy.

ELIAS CJ:

20 Thank you Mr Palmer, Ms Laracy. Yes, Mr Orlov.

MR ORLOV:

Thank you, Your Honour. May it please the Court, to begin presenting my submissions at page 1 of – at paragraph 1 of the submissions, I ask five questions which I submit are the primary issues in this case, and I'll deal with
5 them in their order, but firstly to basically set out -

ELIAS CJ:

Mr Orlov, we have read the submissions so you can speak to them and draw out any particular things you want to emphasise but for my part, I have some
10 doubt as to the breadth of the submissions you're seeking to address because I had thought that the question was simply whether the Court of Appeal judgment was correct and it is focused simply on whether the restraining order falls within the terms of the New Zealand statute, so for my own part, that is what I thought you would be addressing whereas your submissions go rather
15 more widely.

MR ORLOV:

Yes Your Honour. I will take that guidance and then deal directly with that point. The reason why I've taken some time to address the property rights
20 issues is, it seems to me a matter that hasn't really been fully dealt with in New Zealand law.

ELIAS CJ:

It's a matter of background though, isn't it, Mr Orlov? It's part of the reasons
25 why there are hoops to go through before the Courts accept the restraining order.

MR ORLOV:

Yes Your Honour and that's precisely why I've actually dealt at such length
30 with it. It seems to me, or, in my submission, that the second Court of Appeal concentrated primarily if not exclusively on the comity provisions whereas the first Court of Appeal which was differently constituted talked about the human rights elements of looking at a restraining order. They took two absolutely different approaches and that's why I've taken time to submit that the first

approach was correct, because the first approach gave due weight to the human rights instruments that underpin common law, and to the property rights instruments which underpin any examination of a restraining order.

5 **ELIAS CJ:**

Ultimately though, it's a matter of statutory interpretation, isn't it? And the matters that you've drawn our attention to, the background of human rights and property sanctity are, they're not directly operative, they are matters of context behind – within which context the statute falls to be interpreted, are they not?
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MR ORLOV:

Absolutely Your Honour, and those matters are raised with this Court simply as a matter of statutory interpretation that the limits of a – as in the *Peniche*
15 case, which was looked at initially by the Court of Appeal and in fact supported and confirmed that the statutory interpretation should be in line with common law rights and human rights rather than giving a wider interpretation. What the second Court of Appeal seemed to be saying is it doesn't matter about the form of the order, the order can be widened, so long as its effect is
20 to assist other nations. What the first Court of Appeal was saying was that no, the order must be strictly observed because it is a fundamental interference with property rights, or rights in general, and therefore, I wanted, in my initial submissions to look at the background of the rights that this order is in fact breaching.
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ELIAS CJ:

I think you can take those as read because we have read your submissions on that, and focus Mr Orlov, on the question of statutory interpretation and you will make the point, of course, that the, as you have done in your submissions,
30 that the Court of Appeal, on its first look where it didn't come to a concluded view, did express some views which you say the second Court of Appeal didn't – when it came back to look at the matter, following the reconsideration by the High Court, didn't seem to go along with. But that's the area really that we have to concentrate on, isn't it?

MR ORLOV:

Yes Your Honour, thank you. So I'll move on then, beginning perhaps with - starting at paragraph 14 then in that case, of my submissions.

5 **ELIAS CJ:**

Yes, thank you.

MR ORLOV:

10 The affidavits that were sworn in support of, beginning at paragraph 12, there is mention by witnesses for the Crown counsel, via affidavit, as to the nature of these orders. They talk about the provisions of the Polish penal code and the second penal code and at paragraph 15, the real intention is set out in the actual Court of Appeal judgment which sets this out as quoted, "In a similar vein, Ms Laracy submitted, if he's convicted of offending, the respondent
15 faces imprisonment, potentially up to 720,000 punitive damages and in compensatory damages. In total, this is equivalent to a fine." Now, the essence of my submissions that I'll move onto is that the proceeds of crime legislation is just that, it's intended and has always been intended to disgorge an accused of the proceeds of his crime, no more. What the tenor of the
20 Polish legislation seems to be doing is restraining property which will serve as security or even seizing property which will serve as security for some undefined penalties and damages. There is no attempt, at all, to define what a benefit has been derived from the offending and anything that was done, was done ex post facto. In other words, the prosecutor, after the second
25 attempt, the first attempt, which is in my learned friend's chronology, was simply saying, "We're seizing the property, give it to us in our Polish Court." In other words, they didn't even understand the purpose –

ELIAS CJ:

30 No, but the Court of Appeal rejected that.

MR ORLOV:

Yes, but it serves as a background as what they were intending to do. The second order, the Court gave an order which was, on its face in my submission, obviously not a restraining order, but not only –

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ELIAS CJ:

Can you just take us to where in the Court of Appeal judgment what you're criticising them for here? Is there a particular paragraph that you take issue with?

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MR ORLOV:

Yes, I'll move –

ELIAS CJ:

15 Come onto it if it suits you better.

MR ORLOV:

If I may, because I wanted to basically set out what, in my submission, the first Court of Appeal judgment correctly stated to be the law in terms of what a
20 restraining order meant. My criticism with the second Court of Appeal judgment is multiple. In the first – my first criticism is they simply reversed the first Court of Appeal judgment without actually giving any full reasons as to why they reversed it with simply saying that comity provided the basis for which they could reverse. So I – rather than – I would say that the entire
25 Court of Appeal judgment of the first constituted Court of Appeal was correct in terms of the definition of the restraining order rather than taking the Court through it if I may take it as read.

ELIAS CJ:

30 Well, I think you should take us to it because the text matters.

MR ORLOV:

First if I may Your Honour I'll then move onto paragraph 30 which now begins the analysis of the Court of Appeal –

ELIAS CJ:

This is the first judgment?

MR ORLOV:

5 For both I sort of move in from one to the other but I'll first speak to the
statutory scheme as I see the first Court of Appeal judgment defined as. First
of all MACMA or the Mutual Assistance in Criminal Matters Act, it's important
to note that MACMA is really an instrument dealing with enforcement of orders
in extradition relating to – so enforcement of orders relating to Commonwealth
10 countries, there is a provision that the Attorney General may in relation to
other countries enforce it but he doesn't have to. The may is very important in
terms of the interpretation of MACMA.

ELIAS CJ:

15 That's why the reference to ad hoc determinations?

MR ORLOV:

Yes and because I think there was a statutory or parliamentary reason and it
should be read into that the Commonwealth systems have a commonality
20 about them that is easy to understand. If a restraining order is restraining
properties from another Commonwealth system it's understand – to
understand their legal and opinions the basis of a benefit et cetera. Foreign
legal systems are completely different in nature to Commonwealth legal
systems and that is why it's treated differently under MACMA. For example,
25 there's an attempt by my learned friend in his submissions to link MACMA to
other UN type of agreements or conventions. In my submission that is an
error because MACMA has its own purpose which is to be limited.

So I deal with section 55 and then I deal with section 2 of MACMA which
30 purposefully creates a very narrow definition of a foreign restraining order. It
states –

ELIAS CJ:

Sorry, what para are you at now?

MR ORLOV:

Paragraph 31. And this is the crucial element of my case. It talks about property that is or maybe tainted or benefits that have been derived. In that sense –

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BLANCHARD J:

Or may have been derived.

MR ORLOV:

10 Oh yes, or may have been derived. Yes.

BLANCHARD J:

Well it's a very significant part of it.

15 **MR ORLOV:**

Yes and I'll deal with the may have been and I understand Your Honours intimation that this creates a wider interpretation of benefit but nevertheless, and I'll refer to New Zealand case law which corresponds to case law which is under the Proceeds of Crime Act which is identical terms of may have been
20 derived benefits or taint which gives the Court a duty to analyse the benefit received from the crime. This is very important because I'll give – I gave a very simple example –

ELIAS CJ:

25 Is your point that it must be linked to the commission of the crime property and that it's not simply security for ultimate payment of fines or something of that nature?

MR ORLOV:

30 Not at all Your Honour.

ELIAS CJ:

No, no, is that your point?

MR ORLOV:

No it's not my point.

ELIAS CJ:

5 It's not your point, all right.

MR ORLOV:

Because otherwise I would be wrong because the Proceeds of Crime allows you to arrest any property as long as a benefit is identified and I'll give my
10 example which I give in my submissions. Let us say a very wealthy man went to Poland and he opened up a small business which then went bankrupt and he sold a house and went back and that man owned two billion in America. Would the Polish Government be able to restrain the entire two billion and freeze all of his assets or could they only restrain what they say was the
15 benefit of the crime. Now there is no attempt in this order to link the benefit or to even define what the benefit was and this is I think fatal to the face of the order and that's what the Court of Appeal in its initial judgment says and I'll deal with that –

20 **ELIAS CJ:**

But where does the Court of Appeal in the judgment which is the subject of the appeal, where does the Court of Appeal err in this respect?

MR ORLOV:

25 It errs and I'll deal with that in more detail. It errs in saying that because the Polish prosecutor said the order was related to a benefit, it must have been so because we must believe what the prosecutor said.

ELIAS CJ:

30 Which paragraph are you complaining about in the Court of Appeal decision?

TIPPING J:

I think you're complaining about paragraph 22 little c.

MR ORLOV:

I'll just –

TIPPING J:

5 As I understand you. Where the Court of Appeal expresses the conclusion that the facts of this case fulfil the definition in section 2(1).

MR ORLOV:

Now I'm just looking.

10

TIPPING J:

That's the start anyway.

MR ORLOV:

15 Yes, the Court of Appeal, the second Court of Appeal, I'll go through all of the paragraphs of the – what I'm appealing. It's basically reversed the first Court of Appeals and said basically that it was a benefit. I'll take the Court to the provisions. I'm just trying to find it in the bundle.

20 **ELIAS CJ:**

Is it paras – I have wondered, it's paragraphs 41 and 42 is it that you particularly take issue with?

MR ORLOV:

25 If I may, if Your Honour, whereabouts is it in the bundle – I'll just find it.

ELIAS CJ:

It's in Case on Appeal Volume 1 dated 12 March, the supplementary bundle of documents.

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MR ORLOV:

Yes.

TIPPING J:

I understood you to have two points essentially. One, that this was more than a restraint. To freeze is to do more than to restrain and that there was no evidence linking the property sought to be restrained with, or sufficiently
5 linking it, with the alleged crime.

MR ORLOV:

Yes, yes Sir.

10 **TIPPING J:**

Is that it in a nutshell?

MR ORLOV:

That's it in a nutshell. There is of course –
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TIPPING J:

So there's the restraint point and the link point?

MR ORLOV:

20 Yes. The first point, the link point, or the second point is the benefit issue, the benefit analysis –

TIPPING J:

Yes, yes, quite.
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MR ORLOV:

And the second point that even if I'm wrong on the first point that –

TIPPING J:

30 Why don't you just take them, whatever those two points you've got, in whatever order you choose and just focus on that?

MR ORLOV:

Yes and that's what – I'm just trying to put the paragraphs which I'm –

ELIAS CJ:

Yes, I think I have caused this but I really would be assisted by your identifying precisely the errors that you say the Court of Appeal has fallen into, where in its judgment you take issue with what they say?

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MR ORLOV:

I have identified that in my submissions and I was trying to – I will deal with that now Your Honour. If we begin with, generally and then I'll move back to my submissions –

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ELIAS CJ:

I would really be assisted if you could take me to the passages in the Court of Appeal judgment that you are challenging because it would help me to keep the target in mind when you develop your submissions.

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MR ORLOV:

Yes, Your Honour. Beginning firstly, paragraph 15 of the judgment of the second Court of Appeal. The evidence that was filed, the further affidavits filed by the Solicitor-General shed no further light on the benefit. They simply talked about bringing money into the country. So, in other words, there was nothing further in terms of what the first Court of Appeal said that could have helped the second Court of Appeal to define the benefit. The only issue which was defined was by the prosecutor simply saying that her order was in relation to a benefit but the problem with that is that the High Court Justice found that she hadn't given him all the evidence is what she had in fact applied for –

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ELIAS CJ:

The Court of Appeal though had further evidence. Surely the evidence of money coming into the country is evidence which, linked with the alleged criminal offending in Poland, establishes a basis for the money perhaps being the proceeds of crime, or reaching the "may" standard?

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MR ORLOV:

Except for two points. First of all Mr Bujak is accused of selling his own assets to avoid bankruptcy and so there was no attempt to say that the assets he brought into New Zealand were actually the proceeds of a crime, none at all. Secondly, the face of the order which the first Court said it was not an order in relation to benefits at all and that evidence that was filed further didn't make the Court order, or didn't perfect the Court order, in any fashion. In other words, the initial Court order had nothing to do with benefits and I'd like to deal with that.

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TIPPING J:

You must accept, mustn't you, that they didn't have to prove that the benefits were derived from the crime, simply that they "may" have been and that's a matter of inference at a pretty low threshold.

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MR ORLOV:

I accept that.

TIPPING J:

20 You say it was impossible to draw that inference?

MR ORLOV:

No, I'm saying something more to the construal of the face of the order. The face of the restraining order was an order in relation to pecuniary penalties that would be seized in order to protect future victims or whatever, that the Court would find had suffered. There was no attempt on the face of the order to define benefit, it wasn't a proceeds of crime order at all. It was an order which was, in my submission, a quasi-administrative, a quasi-penal type of order, that should have been used in a Civil Court rather than such a draconian legislation as the proceeds of crime. It widened the scope of the intent of the proceeds of crime legislation.

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ELIAS CJ:

Are you saying then, and I thought I had asked you at the beginning, are you saying that the evidence indicates only that this money maybe required for penalty reasons?

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MR ORLOV:

Yes, Your Honour. Two things –

ELIAS CJ:

10 It does go beyond that though, doesn't it, at least the Court of Appeal says it goes beyond that.

MR ORLOV:

This is the problem with the Court of Appeal. If I can turn Your Honour to
15 paragraph 18, I'm just trying to identify the paragraphs for Your Honour that I take issue with.

ELIAS CJ:

Yes.

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MR ORLOV:

First of all at paragraph 18, the Court of Appeal is saying, Mr Pike for the Solicitor-General submits that the reasoning of this Court in its decision of 15 August 2007 is wrong and should not be followed and that the High Court
25 erred in its decision –

ELIAS CJ:

That's not part of the Court's reasoning. I want you to take us to the Court's reasoning. Simply reciting things – there maybe a reason why you say it went
30 wrong but –

TIPPING J:

Might be best to move onto 22 Mr Orlov.

ELIAS CJ:

Yes.

TIPPING J:

5 Where the discussion of the Court, of its own reasons, is underway.

MR ORLOV:

Yes, um, what I'm – my submission is, moving onto 22, the Court actually accepts the Crown's argument that it was wrong in its first decision and
10 reverses it. It doesn't reverse it on new facts. There are no new facts which could possibly link to reversible of the decision. It reverses it on principle. It states – and furthermore, it reverses it by an ex-post factor interpretation by the Polish prosecutor that this order which was not on its face a restraining order was but that goes contrary to *Peniche*. The Court of Appeal in its first
15 judgment said that *Peniche* would be followed. In its second judgment it said it wouldn't follow *Peniche* –

ELIAS CJ:

I think you are running together some arguments –
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MR ORLOV:

Yes, I'm running a number –

ELIAS CJ:

25 – and I'm just trying to uncouple. In this, the Court states its conclusion, that it is satisfied that this maybe tainted property and you have a further argument that that is contrary to the earlier decision of the Court of Appeal which of course you can enlarge on shortly but I'm just trying to work out what the basis for this conclusion is. It must be the evidence and it seems to me that
30 paragraphs 41 and 42 explain why, insofar of the restraining order goes further, it falls away but it doesn't compromise the conclusion that the property maybe the proceeds of crime. I see in paragraph 36 also is the reason why they are relying on what the public prosecutor has said and 37.

MR ORLOV:

The public prosecutor has said that even though – this is my submission, the public prosecutor is saying that even though the order on its face doesn't relate to benefit, my opinion is it does. Now because –

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ELIAS CJ:

That's about the form of the order and the Court deals with that by saying, if it goes further than is permitted under our legislation, that part of it falls away but on the point of fact, that the property maybe the proceeds of crime, the Court of Appeal says there is no evidence to contradict what the public prosecutor says. There's the evidence of the money coming into the country, there's the allegation of crime which is yet to be determined. The Court is saying, we are satisfied that it's proper to draw the inference that the public prosecutor has drawn, that this property maybe the proceeds of crime.

10
15**MR ORLOV:**

This is the essence of my argument in that the order of the Polish Court had really nothing to do with proceeds of crimes legislation –

20 **BLANCHARD J:**

How can you say that Mr Orlov? If you look at the form of the order nisi, which was later confirmed by the Court, it clearly relates not only to a fine, and it might well be debatable whether that could be the subject of such an order, but to a claim for repairing property damages at 3.8 million zlotys, now that's plainly reparation.

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MR ORLOV:

Exactly Sir, but the proceeds of crime legislation in the restraining order is not about reparation, it's about linking, and I'll deal with that, linking a benefit to the crime. Now there's a lot of quasi-administrative offences that deal with reparation, but they're not within the contemplation of proceeds of crime. What the second Court of Appeal has done is reversed its own decision in the first Court by extending the meaning of a restraining order, and thus, in my submission, undermining the human rights protections and principles. What it

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is in effect saying is that a restraining order is whatever the Polish government, or any other government, says it is despite its form. Now that is dangerous, because what it does is it undermines and I'll take the Court to cases –

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ELIAS CJ:

Before you do that, I just want to pin down the factual underpinning first, you then have an argument as to whether the form of the order complies but on the facts before the Court, are you disputing the conclusion the Court of
10 Appeal drew that it was not – that the proceeds, that the property may have been the proceeds of crime?

MR ORLOV:

I'm not disputing that because that is a factual assertion. I'm disputing that
15 the order itself was made by a Court absolutely unrelated to any benefit. In other words, the order itself was intended –

ELIAS CJ:

Yes, that's fine, we'll come onto look at that, but you're accepting that there
20 was a factual underpinning which, if the form of the order was appropriate, could have been treated by the Court of Appeal as constituting the property that may have been the proceeds of crime. I'm sorry to have put it in such a complicated way.

25 **MR ORLOV:**

Yes Your Honour, I understand that, with one caveat. I'm saying that in the New Zealand proceeds of crime cases, and I refer to *Huang*, there must be an analysis by the Court of what the benefit could be or maybe. It's not sufficient to just simply freeze property, there must always be a careful analysis of
30 benefit and I give a number of cases, one of them is *Huang*, the other one is a case where a house was arrested when it was used for the manufacture of methamphetamine and the Court was careful to analyse the benefit that was derived from the manufacture as opposed to the value of the house.

ELIAS CJ:

All right. There maybe a question as to what extent the property could be the subject of a restraining order on that argument, but there is some factual underpinning for a determination that the property may have been the proceeds of crime, you're not attacking that?

MR ORLOV:

I am in a sense, Your Honour, because, and I'll take you through those, I had a certain sequence I wanted to follow, but I'll take you through those matters. What – one of the things the prosecutor is saying, is he sold his own assets in order to avoid bankruptcy law.

BLANCHARD J:

I understood that he was facing charges of misappropriating property.

MR ORLOV:

There are an element of charges which are rather confusing and I'll take the Court through that, but Your Honour, one of the – there are charges that he falsely received credit knowing that he was facing some sort of insolvency, the other charge which he explains because there appears to be in the record some confusion between the New Zealand government and the Attorney-General and the Polish government as to what the charges constitute. One of the explanations, which I'll take the Court through, which is the most disturbing here, is that in her own evidence she says, she refers to laws that didn't exist at the time of the crime, bankruptcy laws. Now, Poland was a country which was going to transition from a communist system. Bankruptcy as such, I mean, I'm not certain on the evidence but it was doubtful whether the concept of insolvency or bankruptcy existed at the time, but what's furthermore is that he's charged with avoiding a bankruptcy when there are no creditors that have ever applied and the Polish government –

TIPPING J:

Mr Orlov, I don't understand how you can go behind the Court of Appeal's acceptance of the prosecutor's evidence that this property may represent

proceeds or benefit. It's an assertion, admittedly, but in present circumstances, it can hardly be more than an assertion.

MR ORLOV:

5 I'll explain that Your Honour in two arguments. Firstly, the Court of Appeal should not have accepted the prosecutor's evidence at all to explain what the restraining order meant, when in its first decision, it said the restraining order on its face was not related to benefit.

10 **ELIAS CJ:**

What's the meaning of the restraining order?

TIPPING J:

15 You just don't seem to be able to answer questions. Listen to the question, do you want me to repeat it?

MR ORLOV:

No –

20 **TIPPING J:**

All right, well proceed, but that just is not addressing the question.

MR ORLOV:

25 Well one of the points of appeal, I think it's point four or five is that the Court should not have accepted the Polish prosecutor's analysis –

TIPPING J:

30 Of course it's one of the points of appeal, but it doesn't, in any way, address my question.

MR ORLOV:

Sir, you're saying, how am I going to –

TIPPING J:

How does – how should we go behind the Court of Appeal's acceptance of the Polish prosecutor's assertion, her evidence, that this property may represent proceeds of crime or benefit? If they chose to accept that, when it's
5 corroborated by money coming in, but the threshold of maybe is a low one. I don't understand how you can go behind that for the purposes of this appeal.

MR ORLOV:

Your Honour, I'll explain that. First of all, the Polish prosecutor attempts to
10 explain the restraining order.

TIPPING J:

Well I'm not interested in her explanation. She has said, hasn't she, that a
15 crime has been committed and this property may represent the proceeds of it.

MR ORLOV:

But that's not what the restraining order says. What we're dealing with is the
restraining order, not her interpretation of it.

TIPPING J:

All right, well then in that case, you're not dealing with a matter of fact, you're
20 not seeking to go behind the Court of Appeal's conclusion of fact –

MR ORLOV:

25 No.

TIPPING J:

You're seeking to say there was no evidentiary foundation for that fact in the
order.
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MR ORLOV:

Exactly Sir.

TIPPING J:

Right, well take us to the order then.

MR ORLOV:

5 I'll just move onto –

TIPPING J:

While you are looking, is your point that the order does not purport to be what the Court of Appeal found it to be, is that another way of putting your point?

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MR ORLOV:

Yes, and –

TIPPING J:

15 Well let's look at the order then and see what it says, on its face.

MR ORLOV:

Okay, now the –

20 **TIPPING J:**

And you're referring to what page?

MR ORLOV:

Paragraph 61 of my submissions I set out the order.

25

ELIAS CJ:

Can we go to the volume, is that all right? I just want to mark it up.

MR ORLOV:

30 I'll just look for the –

ELIAS CJ:

Is it number 4 in the supplementary case on appeal?

MR ORLOV:

Sorry Your Honours, it's just that the bundle was produced in some haste by my assistants and I set out the actual terms of the order in paragraph 61 of the submissions.

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ELIAS CJ:

I would note to check it –

TIPPING J:

10 Surely you must keep a key to your case, you must surely know where it is. Presumably it's a translation of a Polish document.

MR ORLOV:

15 Volume 2, page 288, supplementary case on appeal. It's supplementary case on appeal volume 2, page 288.

ELIAS CJ:

This is the Court endorsement of the matter is it?

20 **MR ORLOV:**

Yes that's the decision which forms the basis of the Polish application for a restraining order.

ELIAS CJ:

25 And you refer to it in which paragraph of your submissions?

MR ORLOV:

I refer to it at paragraph 61. Now –

30 **TIPPING J:**

Is this the passage at the foot of page 288? Decided to and then I ground?

MR ORLOV:

Yes, yes Sir. The decision is to secure the fine which suspects Slawomir Bujak is likely to be sentenced to and claims for repairing property damages by seizure of funds, seizure of property rights, seizure of et cetera, imposing compulsory mortgage. Now one of the issues is that, and I go back to this very important, the initial Court of Appeal held that on its face this was not a restraining order.

ELIAS CJ:

10 Hang on a moment. Claims for repairing property damages, that must be a reference to the deforcations which are alleged and as the Court of Appeal said, well insofar as its for securing the fine, it doesn't have effect under our system but in terms of repairing the property damages, it does.

MR ORLOV:

15 Again it goes back to benefit. The property damages are not necessarily a benefit. Someone for example could have set fire to a house but that's not proceeds of crime legislation.

ELIAS CJ:

20 No but it must be referring to the crime?

MR ORLOV:

25 Well the Court of Appeal in its first judgment said it clearly it did not. The Judge following the Court of Appeal in its first judgment –

ELIAS CJ:

Well before you get to that though, what's your response on the terms of this decision?

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MR ORLOV:

Well the response is twofold.

ELIAS CJ:

I mean these provisions of the Polish Penal Code presumably there's something which indicates that those are to do with the deforcations referred to in the judgments?

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MR ORLOV:

Your Honour if I can – I can answer that but only by going back to my submissions as to the intent of the whole Polish Legislative Scheme which I deal with which is a – on the terms of the actual translation of the Polish law itself, appear to be quasi-administrative, quasi-civil and penal sanctions all mixed up together which have nothing to do with proceeds of crimes benefits whatsoever. In other words they're enforcing –

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TIPPING J:

15 Can you take us sooner, or as soon as is convenient, to the affidavit of the prosecutor to see exactly what she said about all this because the Court was surely entitled to rely on a qualified prosecutor from Poland as to what this was about?

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MR ORLOV:

No Sir, my submission is the Court wasn't.

ELIAS CJ:

Well anyway, apart from that take us to what she says?

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MR ORLOV:

I accept that she says that ex post facto that this was related to benefit, I'm not arguing –

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TIPPING J:

Can we just have a look at it?

ELIAS CJ:

Is it at 286, is this – and yes 286 refers to securing against the fine and repairing the damages he has caused by the crimes he is charged with as they come from crimes and are proceeds from crime.

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MR ORLOV:

Yes but that's –

ELIAS CJ:

10 And earlier she set out, although it seems it's upside down, what the offending consisted of.

MR ORLOV:

15 Yes except that the Judge found and I'll – in relation to the High Court Judge found that she hadn't put all of the evidence before him is really what the application before the Polish Court actually was. She in fact gave evidence ex post facto is what it meant but my, and I'll deal with that later, is that –

ELIAS CJ:

20 It doesn't matter, does it, because the Court of Appeal in its turn, the second Court of Appeal, was seized of the question of whether the restraining order should be registered.

MR ORLOV:

25 Well the Court of Appeal had already ruled –

ELIAS CJ:

30 Well leaving that argument aside, which you can come onto, but as far as the Court of Appeal and the second judgment was concerned, it was seized of the question and it was entitled to act on the evidence before it at that time?

MR ORLOV:

Well Your Honour if an order clearly states on its face that the whole language of the order has nothing to do with proceeds of crime legislation and then a prosecutor comes and says, well it actually is, the prosecutor –

5

ELIAS CJ:

Where do you get that first – what substantiates that first submission that you make, that it has nothing to do with the crime?

10 **MR ORLOV:**

I'll deal with firstly the judgment of Clifford J –

ELIAS CJ:

No. I'd just look at the evidence that the Court of Appeal had before it? See, I mean she starts at 280, doesn't she, setting out misappropriating property.

15

TIPPING J:

Well actually on page 286 under the words in capitals, "BANK OF NEW ZEALAND" she says, "Considering the findings made during the investigation..." reference number so and so, "...it is indisputable that the money was proceeds from the crimes that the suspect is charged with."

20

MR ORLOV:

Well that's precisely the point. This comes after the –

25

TIPPING J:

I can understand – but for that I could understand an argument that it was speculative as to whether or not the money represented by the house came from the crimes and you couldn't just simply secure it for fines and reparations. But here she expressly says, in her opinion, it's indisputable that the money was proceeds from a crime. That's the money that came into New Zealand and went into the house, isn't it?

30

MR ORLOV:

But she's saying, what she says is not necessarily and in fact not what the order meant.

5 **TIPPING J:**

Well never mind what the order means. She is saying, isn't she, that this money represents, in her opinion, the proceeds of the crimes he's charged with.

10 **MR ORLOV:**

But as I go through, Your Honour, one of the proceeds of the crime or the crimes he's charged with is avoiding bankruptcy and selling his own assets. The question is can selling your own assets be a benefit.

15 **BLANCHARD J:**

He's charged with a lot more than that.

MR ORLOV:

Yes but –

20

BLANCHARD J:

He's been charged with embezzlement.

TIPPING J:

25 And conversion of property isn't it?

BLANCHARD J:

So the fact that one of the crimes might be outside the reach of this, and I'm not saying it is, is immaterial.

30

ELIAS CJ:

Because it may well have been his property which was itself acquired with the proceeds of crime.

MR ORLOV:

But it goes back to, I have no doubt that the prosecutor is saying that ex post facto that this is a proceeds of crime application but as it stands on its face, and as the Court of Appeal –

5

ELIAS CJ:

What do you mean ex post facto? Looking at it, at the time the Court of Appeal was deciding it, the second – the decision under appeal, this was evidence before the Court of Appeal.

10

MR ORLOV:

Except the Court of Appeal was deciding on her interpretation of the order not on the –

15

ELIAS CJ:

Yes but that's a different point.

MR ORLOV:

– actual face of the order.

20

ELIAS CJ:

That's a different point.

WILSON J:

25

Apart from any questions of interpretation, was there any evidence before the Court of Appeal which was in conflict with or in answer to this expression of opinion by the prosecutor?

MR ORLOV:

30

Well, the answer to that is of course no because the – in my submission, the Court of Appeal was wrong to even look at the Polish characterisation of what the order was, it had to look at what it had already decided the order meant and was –

TIPPING J:

She's not characterising the nature of the order here, she's saying that the money that came to New Zealand was the proceeds of the crimes that he was alleged to have committed. It is a completely different point from how you
5 characterise the order. You may have a point about the order but you can't get behind that because there's no other evidence.

MR ORLOV:

I deal with that at paragraph 44.5 of my submissions Sir, if I can turn to them
10 and 44.5 onwards.

TIPPING J:

This is the effect of the order?

15 **MR ORLOV:**

Yes Sir.

TIPPING J:

Right.

20

MR ORLOV:

Justice Clifford states that – this is already the second hearing, so I begin at 44.3, “That he entered New Zealand with substantial amounts of cash.” Now, it's quite, it's a matter of fact and I've mentioned it in my background, that he
25 was a wealthy man with a wealthy company, with very large assets. “There is no attempt –

BLANCHARD J:

Where is the evidence about that?

30

MR ORLOV:

Well, the evidence is in the prosecution itself, that this is a – that he owned Bujpol and Bujpol had a number of trucks and matters – I unfortunately didn't

argue the case in the Court of Appeal and didn't put in and obviously didn't have the opportunity to put in his finances –

BLANCHARD J:

5 Yes but the only evidence that we have, suggests that Bujpol was a vehicle for committing fraud. You can't extrapolate from the material we have that he was a wealthy man with independent assets. If he wanted to put that case up, he should have put it up.

10 **MR ORLOV:**

Well Sir, to answer that, I've been very much restrained in what I could put before you by what's already been before the Court of Appeal but I did send my submissions to my learned friends to see if they opposed any of the facts and they haven't and the facts are set out in the background, where it talks
15 about –

ELIAS CJ:

That's submission. That's why we are really asking you to take us to the facts before the Court Mr Orlov.

20

MR ORLOV:

Um –

ELIAS CJ:

25 No, you still have to come onto your argument about the interpretation of the Polish order and your argument that the Court of Appeal had already, well, was really, I think you have to argue was functus, if you are going to say that it was bound by the preliminary decision. So, you are going to have to argue those but on the facts, is there anything more that you want to say to us?

30

MR ORLOV:

Yes Ma'am. I want to – at 44.7 and I'm dealing with the decision of Justice, of the High Court Justice –

ELIAS CJ:

Clifford, yes.

MR ORLOV:

5 That, this is really the essence of what appears to me to be the problem with this case, where he quotes, "In the present case, the public prosecutor found that by December 1998 the respondent had disposed of all of his assets in Polish by selling real estate, vehicles and company shares." In other words, the money that he owned legitimately beforehand –

10

ELIAS CJ:

Well, who says that it was legitimate?

MR ORLOV:

15 Well, there's no, there's no accusation that everything he acquired and owned – in fact the accusation and I'll take the Court through to that, is that he, in order to avoid bankruptcy, disposed of his own assets.

TIPPING J:

20 I think you are muddying the only decent points you may have by all this collateral business. I can understand your argument about the terms of the order. Why don't you just develop that because I'm not saying I agree with it but I can understand the force of it which I understand to be, that securing fine and providing facility for reparation, is not within the ambit of the statutory
25 definition of a foreign restraining order.

MR ORLOV:

Yes Sir, that's exactly what I'm saying –

30 **TIPPING J:**

Well, why don't you just get on with it on that basis?

MR ORLOV:

Yes Sir, I appreciate that. I'm just trying to answer the questions of the Court as they arise –

5 **TIPPING J:**

You are your own worst enemy in my view.

MR ORLOV:

10 So, I deal with that and then to answer Your Honour's question, to direct the Court on that issue, at paragraph 30, I move on from paragraph 30 to talk about the intention of MACMA is directly related to either tainted property or a benefit. Since the first Court of Appeal judgment said and the Crown appeared to concede that there was no tainted issues, we only deal with the benefit issue.

15

TIPPING J:

Surely the Crown doesn't concede that this wasn't, or accepts that this wasn't proceeds of crime?

20 **MR ORLOV:**

No, no Sir –

TIPPING J:

It's tainted property and/or a benefit surely?

25

MR ORLOV:

Well, the Crown in front of Clifford –

TIPPING J:

30 Never mind what happened – I don't understand the Crown in front of us to be accepting that this wasn't tainted property. It is saying either it was, or might be, or it comes under the benefit, or both?

MR ORLOV:

Well that goes to my functus argument. If the Crown had conceded that in front of Clifford and it wasn't argued –

5 **BLANCHARD J:**

Justice Clifford please.

MR ORLOV:

Justice Clifford, sorry Sir. If the Crown conceded that in front of
10 Justice Clifford, they couldn't then reargue it in the Court of Appeal, they were stopped.

ELIAS CJ:

Well, that's a different point.

15

MR ORLOV:

Yes but I mean, they go on from each other –

TIPPING J:

20 Look, we've got clear evidence that it at least may be tainted property.

ELIAS CJ:

The Court of Appeal has accepted that it was, or that it – to the proper standard.

25

TIPPING J:

Why is it that the order itself on its terms doesn't allow for its registration against that factual background?

30 **MR ORLOV:**

That needs to again go back to the form of the order as it was found. I want to go back to the very principle of benefit which I want to deal with in the proceeds of crimes cases to explain that point –

TIPPING J:

Before you come onto benefit, there is clear evidence that it was proceeds, or might be proceeds. Why can't we just – because if it satisfies that, never mind benefit, surely? What I can't understand, well I think I can understand what you're driving at but it needs you to articulate why, despite that clear evidence, the order on its terms cannot be registered because of what it specifically says. It's a sort of semantic point, rather than a merits point.

MR ORLOV:

Sir, it's only proceeds – the only evidence that it's proceeds is because the Polish prosecutor says it is. The Polish prosecutor accuses him of selling his own assets to avoid – there's no link between the money he brought into New Zealand, no actual link, no attempt to link, the money he brought into New Zealand and the actual crime. She just says, it must be. That –

15

McGRATH J:

That's because of the timing factor, isn't it?

MR ORLOV:

Yes but there is no argument that – selling one's own assets –

TIPPING J:

Look you're – you don't seem to be able to distinguish between the facts and the legal effect of the Polish order. It's the latter that I'm asking you to address.

25

MR ORLOV:

Yes Sir but the legal effect of the Polish order –

TIPPING J:

For New Zealand purposes?

30

MR ORLOV:

For New –

TIPPING J:

Why is it that on its terms, despite the facts, it is incapable of registration?

5 MR ORLOV:

Firstly Sir, there's a number of reasons. Firstly, the Polish order as read, refers to the Polish, she refers to a number of Polish clauses which I define in my submissions, all talked about relating to securing penalties for victims and things like that. In other words, it's not proceeds of crime legislation at all.

10 That's my first argument. So, the purpose of the Polish order as it then was, and as it's read, is really to secure a form of compensation for whoever it is that they are compensated, maybe even the government itself. It's not to disgorge the profits of a crime.

15 ELIAS CJ:

But on its face, it says it is about bringing back, repairing property damages and then when you go back to what the prosecutor says, she's making it clear that by repairing property damages she's talking about the money lost through the crime.

20

MR ORLOV:

Well, there's a number of provisions which I'll refer Your Honour to that she does refer to, I'll just turn to them, but none of them have anything to do with proceeds of crime legislation. I want to go back to the issue. The proceeds of

25 crime legislation is a very narrow, criminal legislation designed to stop organised crime, drug crime, and serious fraud in relation to the profits made or benefits from the crime. Anything else is outside that legislation.

ELIAS CJ:

30 We're not really dealing directly with that legislation, we aren't, are we. We're dealing with the mutual assistance legislation which treats registration as though it is under the Proceeds of Crime Act.

MR ORLOV:

Except this is where the *Peniche* case comes in, the character of the order, the formal character of the order is absolutely important to its – the ability to register it. If the order, on its face, doesn't appear to deal with benefits, then –

5

ELIAS CJ:

Or tainted property.

MR ORLOV:

10 Or tainted property, but the tainted property unfortunately in the first Court wasn't argued and therefore it wasn't – the tainted property was conceded in the first case by the Crown. I mean, that's the way I read the –

McGRATH J:

15 Mr Orlov, can I just ask you to look at paragraph 32 of your submissions where I think on the point the Chief Justice just raised with you, you refer to the Mutual Assistance Act making specific reference to the Proceeds of Crimes Act. Now I appreciate it does that in relation to registration, but it doesn't – or where does it otherwise do it in relation to the character of tainted
20 property and benefit? Because that's what I understand your argument to be.

MR ORLOV:

Yes Sir. It refers to it, but the benefit is defined by the cases of – under the Proceeds of Crimes Act because it's in fact mirror legislation.

25

McGRATH J:

You've said in paragraph 32 that the Mutual Assistance Act makes specific reference to the Proceeds of Crime Act. Now is that the case or are you saying that you can get to linkage via the case law?

30

MR ORLOV:

It is, I think it does refer to it Sir in a number of provisions, but it's a mirror legislation, it enacts its terms and purposes.

McGRATH J:

It's a domestic law measure as the Chief Justice has pointed out. I'm not sure why, unless there is a specific bringing it to apply, we should be looking at the Proceeds of Crimes Act more generally.

5

MR ORLOV:

The orders Sir are registered under the Proceeds of Crimes Act, my learned friend may –

10 **McGRATH J:**

I've acknowledged that already but what I'm suggesting to you is that, contrary to what you say here, that there's nothing that invokes the Proceeds of Crimes Act in the Mutual Assistance Act in relation to the character of tainted property or benefit.

15

ELIAS CJ:

I don't have that Act here, the Proceeds of Crime – the Mutual Assistance Act.

McGRATH J:

20 I think it's here.

TIPPING J:

It seems to me, Mr Orlov, if I could try and assist, that looking at paragraph 31 of your submissions where you set out section 2 of the MACMA. All that's
25 necessary is that it has to be an order made under the law of a foreign country in respect of property that is or maybe tainted property, against, in respect of an offence against the law of Poland, and that restrains a particular person from dealing with property. The issue is simply whether this order of Poland is in respect of property, i.e. the New Zealand property, that is or maybe tainted
30 property as defined, which it clearly is, and that it restrains your client from dealing with the, it says here person but it must mean property I think, isn't it as simple as that? Provided you can tick each of those concepts as applying, it's a registerable order. I can understand your point that restraint doesn't include seizure, but that's not the present enquiry, we're coming onto that.

But if you tick all, it's made under the law of a foreign country, it's made by a Court or other judicial authority, it's made in respect of property in New Zealand that is or maybe tainted property, tainted in respect of an offence against Polish law and it restrains, that's the second argument, does it
5 restrain from dealing? Now until you get to the restraining point, I can't see any capacity to argue it.

MR ORLOV:

Well, Sir I can only turn to the reasoning of the Court of Appeal, the initial
10 Court of Appeal.

TIPPING J:

Well never mind the Court of Appeal's reasoning, how can you escape from the confines of that analysis?
15

MR ORLOV:

Well it involves going back to the *Peniche* principles and the human rights principles that underpin it and some of the case law that –

20 **TIPPING J:**

It's a matter of statutory interpretation of a New Zealand statute, it involves essentially whether the New Zealand property is or maybe tainted property, that's the first step. Then the second step is whether the Polish order restrains. There's really two simple steps.

25

MR ORLOV:

Except Sir the Polish order, one has to look at the actual, rather than looking at its – this is where perhaps my submission is not directly that it is or is not in relation to tainted property, that the form of the order and when it was made
30 had nothing to do with tainted property or benefits.

TIPPING J:

Never mind the form of the order, isn't it whether it, the order, is in respect of property that maybe tainted?

MR ORLOV:

The key again, I'm asking the Court to adopt an extremely formalistic approach to the order which is guided by the cases.

5 **BLANCHARD J:**

Why should we? Why should we adopt a formalistic approach?

MR ORLOV:

10 And I've explained that in my analysis of the human rights in Magna Carta, because if that is not taken, that means all orders, irrespective of what they deal with, will be registered as a matter of form and the Court will be asked to be a rubber stamp.

TIPPING J:

15 I think even King John would have had difficulty with this argument.

MR ORLOV:

20 Well, the Magna Carta was used against King John Sir, that's precisely the point.

TIPPING J:

Oh, is it?

MR ORLOV:

25 In a sense. You see Sir, the issue really is that a foreign government with a completely different legal system based on some accusations which are highly suspect, in other words, selling one's own assets to avoid the law that didn't exist and I'll come to that, arrest a man's property forever in perpetuity until it finishes its criminal proceeding, we don't know when, there are no provisions
30 really under MACMA to vary the order in any way I can see, there are no provisions for compensation as there would be in civil remedies of injunction. So even if this man is innocent of the charges and even if the charges are not capable in law of being charges, the Court really doesn't have the ability to look behind all of that because there is no ability to question the Polish

procedures, so asking the Court, which is what the Attorney-General has asked to do, to be a rubber stamp, in other words, the order can be what is exactly what the first Court of Appeal said is an unattractive argument.

5 **McGRATH J:**

Well, the question was put to you and you're responding to it, but I'd just like to come back to the statute. I hear what you say in terms of principles of interpretation that have to be applied, but for my part, you've certainly not persuaded me that the Proceeds of Crimes Act has anything to do with the
10 substantive provisions that, as you claim in your submissions at paragraph 32, I think you may want to come onto some other basis, but it's really, if, in the end, as the Court of Appeal said, this case has to be determined by deciding whether the conditions for registration in the New Zealand statute, which is the Mutual Assistance statute, are satisfied, and as I say, I can't see that the
15 Proceeds of Crimes Act helps you with that until you get to the formal incorporation of it in relation to registration.

MR PALMER:

Your Honour, if I just may assist the Court just very briefly about His Honour's
20 points. I think I'll just refer Your Honour to the definition of "tainted property" in the Mutual Assistance Act which does say that it has the same meaning as in section 2(1) of the Proceeds of Crimes Act, it's that definition of it.

McGRATH J:

25 Thank you.

ELIAS CJ:

I don't have the, I'm sorry Mr Orlov I just want to ask Mr Palmer the – I don't have the Mutual Assistance Act before me and I'll get it at the morning
30 adjournment, but what other cross-references are there to the proceeds of crimes?

MR PALMER:

There are a number of definitional cross-references Your Honour.

ELIAS CJ:

Right.

MR PALMER:

5 And there are references in after the point at which foreign restraining order is registered as a link back into the Proceeds of Crimes Act.

ELIAS CJ:

I see, thank you. Thank you Mr Orlov.

10

MR ORLOV:

Sorry, I apologise to the Court. I assumed that – I should have put that in.

ELIAS CJ:

15 No, I intended to bring it down, it was my fault.

MR ORLOV:

20 So this is why in essence, and I just want to go back to whether the restraining order, go back to – I now move onto paragraph 35 of my submissions which becomes the essence of the – what I'm arguing is basically interpretation of acts and treaties in line with human rights instruments. Now at paragraph 35 I quote from a book which deals with mutual assistance in criminal matters and the abuse that can be entailed by insufficient protection of fundamental human rights I quote that there.

25

Now there's a House of Lords decision, *R v Horseferry Magistrates Ex Parte Bennett* which is in the bundle of authorities which I'd like to turn the Court to, volume 1(2), which talks about the importance of protecting human rights especially of residents and citizens in such mutual assistance requests. It's at
30 PQ of volume 1(2).

BLANCHARD J:

Why are we not being given a copy of the official report?

ELIAS CJ:

I haven't got it at all, that PQ.

MR ORLOV:

5 It's at O.

ELIAS CJ:

Yes.

10 **BLANCHARD J:**

Mr Orlov why are you providing the Court, contrary to our rules, with this version, which is not even identified?

MR ORLOV:

15 Sir because I was briefed very late and I gave it to my assistants to compile the bundles –

BLANCHARD J:

You cannot blame your assistants, you must take responsibility.

20

MR ORLOV:

Yes Sir. I appreciate if I may supply the actual official version in due course.

ELIAS CJ:

25 Look this case is well known to anybody who practices in the human rights field. Why is it relevant in this case?

MR ORLOV:

30 The relevance is that the Court should not sanction any departure from protocol or procedure which has the effect of diminishing the right. Now if we act on the presumption or at least of what I've talked about, the right to property or the rights to pre-possession of property –

ELIAS CJ:

Which are not contained in our Bill of Rights Act.

MR ORLOV:

5 Which are not, I accept, but which I've said out the principles that the Crown
doesn't seem to argue with in terms of the main protections of rights. To allow
a government simply to use the Court of New Zealand as a rubber stamp to
register any orders that it wants, which will affect property rights possibly
forever or for a long time, which could have the effect that it has here of
10 basically limiting access for justice freedom to deal with his property, is a very
serious matter.

ELIAS CJ:

But our legislation plainly doesn't have that effect because the Court has to
15 exercise a determination. It doesn't simply rubber stamp a request.

MR ORLOV:

Well, that is what –

20 **ELIAS CJ:**

So the question really is whether the Court of Appeal was right to accept the
application on the evidence presented to it?

MR ORLOV:

25 Yes, yes, Ma'am and that is my point. The initial – and if one reads the initial
Court of Appeal decision and then Justice Clifford – he was bound by that
decision. He says because of *Peniche* and other factors, in human rights
factors, this is clearly not a restraint under the proceeds of crimes legislation
which was contemplated. This is a form of other restraint. It's some sort of
30 quasi-criminal civil remedy to do something which we're not sure of what it is.
That is why – but the fact that the prosecutor has later, once again, gone back
to the same Court and said, well no, I think that this order as I interpret it is a
restraint and the Court said well, the second Court of Appeal is basically
saying, well it doesn't really matter whether it's a restraint in total. It doesn't

really matter whether it could be construed as a restraint, let's read it down even if it's not because of the principle of comity.

ELIAS CJ:

5 I don't read the Court of Appeal as reading down the statutory criteria. They came to the determination that the property on the evidence available to the Court of Appeal maybe the proceeds of crime.

MR ORLOV:

10 They came to that determination only, Your Honour, because the prosecutor said that's what the order meant. But if one looks at Justice Clifford's judgment, and I'll deal with that later, he says the prosecutor did not give him all the necessary paperwork of what was filed in the court. That is one of the reasons he didn't accept her as an expert on what the order meant. The
15 second issue is, if you need an expert to explain the meaning of an order, which on its face is clearly not a restraining order under the proceeds of crime legislation, then that suggests that there is a problem with the order and if we allow – the danger of the second Court of Appeal is basically saying, well anything maybe proceeds of crime. As long as the foreign government asks
20 us to do it, we'll do it. That is the way I read the second Court of Appeal because it puts comity above all other principles. But the first Court of Appeal, and I'll go to the *functus officio* argument later, is saying human rights principles are very important. This is not a restraining order under both the *Peniche* decision because it's a seizure but more fundamentally it doesn't on
25 its face discuss benefits of criminal offending. In my submission the Court of Appeal, the first Court of Appeal, was correct because if one looks at the whole civil code that is pleaded by the prosecutor, it talks about all sorts of civil proceedings which had nothing to do with proceeds of crime.

30 **TIPPING J:**

Could you just simply articulate what feature of the definition of foreign restraining order was not satisfied or what one or more features were not satisfied in this case. Don't elaborate, just say what wasn't satisfied.

MR ORLOV:

It wasn't a benefit Sir.

TIPPING J:

- 5 There's no reference to benefit in the definition of a foreign restraining order set out in your submissions. Well there is but it doesn't have to be a benefit, it can be tainted property.

MR ORLOV:

- 10 No but it certainly wasn't tainted property. In terms of tainted property it certainly wasn't tainted property because A, tainted property –

TIPPING J:

- 15 I didn't ask you to elaborate. The first point is, one, it wasn't shown to be tainted property?

MR ORLOV:

It wasn't on its face tainted property.

20 **TIPPING J:**

Not shown to be tainted property, right? What's the second?

MR ORLOV:

It wasn't a benefit.

25

TIPPING J:

Tainted property.

MR ORLOV:

- 30 It wasn't in relation to tainted property.

TIPPING J:

Not shown to be a benefit and then the third is it did more than restrain?

MR ORLOV:

It seized, yes.

TIPPING J:

5 So are those the three points?

MR ORLOV:

Yes.

10 **TIPPING J:**

Did more than restrain?

MR ORLOV:

Yes Sir.

15

TIPPING J:

Not shown to be tainted property, not shown to be benefit, did more than restrain?

20 **MR ORLOV:**

Yes. It's intention and effect was to secure future penalties, awards, damages, I'm not sure which way to characterise them under Polish law, both civil and criminal for future alleged victims, or possibly for the government –

25 **TIPPING J:**

Wasn't there sufficient evidence from which the Court of Appeal could conclude that your client's property maybe tainted property and if not, why not?

30 **MR ORLOV:**

Yes Sir, I'll answer why not. The word taint suggests the property that has been –

TIPPING J:

There's a definition of tainted property, so why did it not fulfil that definition?

MR ORLOV:

5 Because it was not, in essence, property used for, or part of, a crime. It was his own property.

TIPPING J:

10 Wasn't it potentially the proceeds of the crime because that's what the prosecutor said it was?

MR ORLOV:

Well, that's what the prosecutor –

15 **TIPPING J:**

That's a non starter. Now, what's your argument on benefit?

MR ORLOV:

20 Well sir, the prosecutor may have said it was but the order didn't say it was and it's the order we're looking at –

TIPPING J:

Would you move for my benefit, to benefit?

25 **MR ORLOV:**

Yes, moving to benefit and I'll move to the case law on benefits, the New Zealand case law which talks about benefits. It goes back to this issue that I've addressed earlier, a benefit is something that is derived from the crime itself. So, the question is, if a man sells his own assets is that a benefit,
30 can it be a benefit and he is accused –

TIPPING J:

I understand that point and why does it do more than restrain?

MR ORLOV:

On its face, it's a seizure and that's the *Peniche* case –

BLANCHARD J:

5 In order to restrain, you often have to seize.

MR ORLOV:

Sir, I refer – the initial, this is the problem where the complexity of the arguments are interwoven. The initial Court of Appeal said it was a seizure.
10 That was a finding of fact. It was also a finding of law under the *Peniche* case, that a seizure is not allowed under the MACMA and therefore will be struck down. The second Court of Appeal, there was *functus officio* –

BLANCHARD J:

15 That can't be right, with respect. If for example, you have an item of movable property, the only way of restraining it is to seize it.

MR ORLOV:

Not really Sir. Just recently was involved in a Proceeds of Crime Act where
20 the Official Assignee simply made an order that the Porsche was not to be sold and registered that and the Porsche was still in the possession of the –

BLANCHARD J:

Well, the Official Assignee may have been a good chap in that case but it will
25 often be necessary actually to seize property in order to restrain.

MR ORLOV:

Well sir, my point here, I do want to argue the *Peniche* case in detail but my point here is double. Firstly, the *Peniche* case was found to be the law by the
30 Court of Appeal. If the Crown wanted to appeal it, it should have gone to the Supreme Court but it didn't, yet the Court of Appeal reversed its on judgment in its own case, it reversed the law. Now, that is a double jeopardy type of argument –

BLANCHARD J:

So, you are moving onto double jeopardy now?

MR ORLOV:

5 Well, I'm answering Sir, your point on whether it can be a restraint or not.
That's my first argument. My second argument is that the MACMA talks about
restraint and it's very important not to allow foreign governments to have more
powers than was in the legislation. In other words, to read in the
Human Rights protections, so therefore if something purports to seize one
10 must not forget that the original request of the Polish government was for the
money to be sent to the Polish Court.

TIPPING J:

I would be helped by some attention to *Peniche* because frankly, it seems to
15 me that this is and has always seemed to me, that this was really the key
point in the case. Whether or not we should interpret seizure – restraint
allowing seizure. I'm not necessarily disagreeing with my brother Blanchard
but to me, this is the important point in the case, none of this other stuff.

20 **TIPPING J:**

What is it about the *Peniche* case that you – it's on tab A as I understand it, in
volume 2. Is there a passage in *Peniche* that we would be helped by, in
favour of your argument? What passage in *Peniche* do you rely on?

25 **MR ORLOV:**

Yes Sir, I'll just look at the bundle of authorities by the Crown, they have the
original *Peniche* case –

TIPPING J:

30 Is this not the right *Peniche* case that's in your bundle?

MR ORLOV:

Yes Sir, they've got, it's at 11.

TIPPING J:

It's volume 2, tab A.

MR ORLOV:

5 It's at 11 of the Crown's bundle which is respondent's bundle of authorities, tab 11.

TIPPING J:

Is this the first instance decision of *Peniche* –

10

MR ORLOV:

Yes Sir –

TIPPING J:

15 – and then the other ones, the appeal decision, right?

MR ORLOV:

Yes sir. The appeal simply confirmed the first and I'll turn to Sir, it's a Supreme Court of Victoria decision that, The Mutual Assistance in
20 Criminal Matters Act which appears to be similar or if not identical to the Proceeds of Crimes Act. At 439, if I can read from that, at page 439 at paragraph 5, "A foreign restraining order is defined by section 3 of the Mutual Assistance in Criminal Matters Act, as an order made under the law of
25 a foreign country restraining a particular person or all persons from dealing with property, being an order made in respect of an offence against the law of that country."

TIPPING J:

That's the same as ours, isn't it?

30

MR ORLOV:

Yes Sir, I believe it is. Now, at paragraph 8, "The substance of the order itself provides as translated proceed to carry out the seizure of properties, corporations, bank accounts, vehicles, investments and other kind of financing

or stock exchange transactions which have been done, et cetera and generally resources, rights and assets of any natural located in this territory, or any other alias he could use.” Now, at paragraph 10, His Honour states, “I accept that an order that property seized may have the consequence by

5 controlling possession, that is more difficult for persons to deal with the property but clearly there is a real distinction between an order calling on appropriate authority to seize property and an order directly restraining a particular person or all persons from dealing with the property.” Now, at paragraph 12, “But it seems to me that one cannot utilise either the purpose of

10 the seizure order or the purpose of the legislation as a whole to extend what is otherwise a clear definition.” In other words, in my submission, what *Peniche* is saying and I’ll just, at paragraph 12, “It is necessary in applying the provisions of the Act which after all has serious consequences, to be satisfied that the particular definition is in terms complied with and I do not think that it

15 has been.” In my submissions –

TIPPING J:

You have omitted the important reasoning leading up to that conclusion which is in 11, where he says, His Honour says, “Restraining doesn’t necessarily

20 involve obtaining physical possession, whereas seizure does.” That’s the crucial step in his reasoning, I suppose.

MR ORLOV:

Yes but the crucial step Sir, is that he is looking at the form of the order. He is

25 taking an interpretation, in my submission, that goes in line with the Human Rights instruments that I’ve mentioned, Magna Carta, et cetera –

TIPPING J:

I don’t think he’s looking at the form of the order, well, he is in a sense but if

30 the order permits seizure, why shouldn’t it permit the lesser form of restraint for our New Zealand purposes because seizure, I would have thought, necessarily includes the concept of restraint?

MR ORLOV:

What Sir, he's – what I submit he's saying is that the order shouldn't be read down by the Court. If it's on its face defective, it shouldn't be followed. The Court –

5

TIPPING J:

Well, there's nothing defective about it, it's simply that on one view it doesn't comply with our legislation but it's capable of being read to comply.

10 **ELIAS CJ:**

This case is simply because the form of the order was quite defective, it wasn't directed to a particular person. It was a roving request to seize property, whereas this order presumably is directed at a particular person?

15 **MR ORLOV:**

I'm not sure that I read the order as actually not being directed at a person in the *Peniche* case Your Honour. It seems to be –

ELIAS CJ:

20 Well, he says at 9 which does seem to be quite important to his reasons, "It does not in terms restrain a particular person or all persons from dealing with any property." So, it's too general, whereas this –

TIPPING J:

25 With respect, I think he's foreshadowing his distinction between restraint and seizure.

ELIAS CJ:

Ah.

30

MR ORLOV:

Yes Ma'am, I'd support that. In other words, she's saying that because it's wider, it's seizing. He is saying, it's inappropriate for the Courts to extend what is clearly a draconian measure. I go back –

ELIAS CJ:

What is being sought here?

MR ORLOV:

5 It's being sought that the restraining order, as it's termed, is set aside by the Court as ineffective.

ELIAS CJ:

No, no, I mean, what here it is –

10

MR ORLOV:

Here it's to seize everything that he owns.

WILSON J:

15 Seizure to provide security though isn't it? You have to read it as a whole don't you?

MR ORLOV:

20 Well the same with the *Peniche* case, Sir. The purpose was obviously to provide security but the issue is that – the issue really is, will this Court allow an extension of the power of a foreign state on the territory of New Zealand by simply allowing any order that it wishes to be registered by reading it down, or is it important to balance the human rights elements, which is what *Peniche* is saying and which is what the first Court of Appeal is saying.

25

TIPPING J:

I think this is the one point of principle in this case and it's a bit of shame we haven't been concentrating on this from the start.

30 **BLANCHARD J:**

If the foreign government is content that the order be read down and in a read down form it is acceptable under New Zealand law, why shouldn't it be registered?

MR ORLOV:

Because Sir, it will basically make the function of the Courts in these things, which already is a limited function, into a rubber stamp function.

5 **BLANCHARD J:**

Well that's not correct because the Court would be astute to make sure that the terms on which the order was registered were appropriate terms and didn't go beyond what is provided for in MACMA.

10 **ELIAS CJ:**

Where are the terms of the order that the Court of Appeal made?

TIPPING J:

Just permitting registration.

15

ELIAS CJ:

So it is just the –

TIPPING J:

20 It's the bottom of page 288 where we were a little while ago, the precise order that's been registered authorises seizure rather than restraint, I think that's the point that's being made and the counter argument is, well, if that's not technically on, why can't we register it in a more benign form that is on but wholly within the purpose of the order?

25

MR ORLOV:

If I may turn the Court to the reasons why –

ELIAS CJ:

30 It might be sensible for us to take the morning tea adjournment at the moment, so we'll adjourn for 15 minutes thank you.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.50 AM**ELIAS CJ:**

Thank you.

5

MR ORLOV:

May the Court please, to move on perhaps to summarise the essence of my argument, the – and I'll deal with the case law on that as I make this argument. The proceeds of crime legislation in the MACMA which incorporates it, is dealing with a very narrow point of law. It's dealing with, or in fact, disgorging profits made by a crime, either via tainted property used for the committance or benefits received. Anything else, for example, securing compensation to victims or securing damages is not within the proceeds of crimes legislation. If the orders which have the real purpose of securing or seizing property for victims are used under the guise of restraining orders, that is an extension of their power and it is an extension of their purpose and something the Court should not be permitting.

Now, this is intimated in the case of *Bennett*. I refer to that at paragraph 36 and I know the Court is very well aware of the principles of *Bennet* but I'd just like to point out why these principles are analogous to this case. This is in PQ of my bundle, or after O, whichever way you – this is *R v Horseferry ex parte Bennett*. Now, I'd like to read from the last passage of that. In my submission, this case is authority for the proposition that extradition or criminal proceedings, and the restraining order is in fact part of such a proceeding, in the sense, should not be in any way extended to create the possibility of the legality, even though the Act was not illegal on the foreign government soil. So in this respect if the purpose of the order was in accordance to our laws contrary to the Proceeds of Crimes Act, in essence, the Court should not be an instrument of extending what is, in effect, an abuse of the process of the Court. I'd like to read that at the second last page.

In common – the second paragraph of the second large page of the decision, "In common law jurisdictions closest to our own, the opinion expressed by

Woodhouse J in the New Zealand of *R v Hartley*, in which he described the issues basic to the whole concept of freedom in society has already been cited by my noble and learned friend, cited the relevant passage from his own judgment and added, 'It is not always easy to decide whether some injustice
5 involves the further consequence that a prosecution associated with it should be regarded as an abusive process and in this regard, the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution.'"

10 And then at the second part, last paragraph, "Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is the process of law, to use Lord Devlin's phrase, that is the issue. It is not something limited to the
15 conventional practices or procedures of the Court system, it is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular process that are used within the machine. It maybe that the shorthand phrase abuse of process by itself does not give sufficient emphasis to the principle that in this
20 context, the Court must react, not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general." This is my point to this Court, the essence is that this case represents the widening of an order which was never a proceeds of crime
25 order, in its first place.

BLANCHARD J:

Well actually, it involves a narrowing of an order.

30 **MR ORLOV:**

Yes Sir, I mean in a sense that if the Court gives it liberal interpretation, the second Court of Appeal judgment, it's in effect giving power which was not intended by Parliament to a foreign government.

BLANCHARD J:

And how would the registration of the order do that?

MR ORLOV:

5 Because it would allow the foreign government to arrest assets of citizens world-wide on the basis of –

BLANCHARD J:

10 Well never mind about world-wide, it would allow the Polish government to arrest assets of citizens in New Zealand, is that what you're saying?

MR ORLOV:

Yes Sir.

15 **BLANCHARD J:**

And is that an argument that there would be no controls under the Proceeds of Crime Act in New Zealand if the order was registered?

MR ORLOV:

20 Yes Sir. In other words, my argument is that what the purpose of the order is clearly, and I will turn the Court to the findings of Justice Clifford and the initial Court of Appeal, the purpose of the order was clearly not proceeds of crime, at all.

25 **TIPPING J:**

Can I just test that by inviting you to look at page 289 of the case, the second page of the order.

MR ORLOV:

30 Sir, which case is this?

TIPPING J:

288 of supplementary case on appeal, volume 2, where we looked at the bottom of page 288 but if one turns over the page to 289, one sees that in

relation to real estate, all the order does is to allow the imposition of compulsory mortgage. So insofar as the realty is concerned, there isn't a seizure which you're emphasising, there is imposing what is called here a compulsory mortgage. That's not seizure, that's just charging the property, the real estate with the contingent obligation.

MR ORLOV:

I agree with you Sir, but my point is two fold in relation that the first point I was making was not the seizure issue, it was more fundamental. It was to do with the nature of the order. The nature of the order –

TIPPING J:

Yes, I understand all of that but looking at this seizure point, surely the seizure point doesn't run at least as far as real estate is concerned because it doesn't authorise seizure with real estate.

ELIAS CJ:

Well anyway, one couldn't seize real estate.

TIPPING J:

No. So I just don't understand what the force of your point is, on the ground, Mr Orlov, on the merits of what is wrong with the form of this order in relation to realty.

MR ORLOV:

Because the order Sir is not related to the benefit.

BLANCHARD J:

That's another point. I thought we'd moved onto this question of seizure.

MR ORLOV:

No Sir, I haven't, I'll deal with that later, it's – I want to really address the Court on benefit because that is the essence of my argument that it's not a proceeds of crimes order.

TIPPING J:

We've been round and round and round that mulberry bush. We're now hearing you on this third leg which is the seizure of restraint point. Now, in terms, this order is a restraint so far as realty is concerned, it's not a seizure.

5

MR ORLOV:

Well Sir to answer that, does that suggest then that we can simply give it effect by only reading down that part of it?

10 **TIPPING J:**

No, no, it's not a matter of reading it down, that's what it says.

WILSON J:

Doesn't that confirm that the order as a whole is directed to the taking of security?

15

MR ORLOV:

I'm merely following the *Peniche* case in that the order is wider than what was intended under the –

20

BLANCHARD J:

Well I must signal to you that I am not comfortable with the *Peniche* case, with respect to the Judges there, it seems to me that their approach was a little bit naive. I can see no abuse, despite the fact that the original order may have been in terms which was too wide, in registering it in a local jurisdiction on a more limited basis, I can't see that's an abuse at all. It's a vastly different proposition from what the House of Lords was talking about in *Bennett*.

25

MR ORLOV:

Well that argument is to be read Sir in relation to my argument that the species of the order was totally unrelated to proceeds of crime. I want to move on –

30

BLANCHARD J:

Well that's a different argument.

MR ORLOV:

5 Well absolutely Sir but I keep moving from one to the other –

BLANCHARD J:

Yes, and that's not helpful.

10 **MR ORLOV:**

I'll, if I may Sir, move to the intention of proceeds of crime, I think it'll be helpful to now turn to the judgment of Justice Randerson in relation to proceeds of crime legislation in New Zealand as to what the effect is, that's at bundle T, it's the second case in bundle T.

15

ELIAS CJ:

What's the proposition you're taking us to this case for?

MR ORLOV:

20 The proposition is relating to that the Court must make an analysis of benefit and a serious one at that, in relation to the intent of the legislation. It's at T, the second decision in T, the reserve judgment of Justice Randerson, in *Wong*. That's at bundle of authorities volume 1(2).

25 **ELIAS CJ:**

What's it under, tab?

MR ORLOV:

It's after tab T, it's the second case after tab T.

30

BLANCHARD J:

This, I apprehend, is a case which involves a post conviction situation, is that correct?

MR ORLOV:

Ah, yes Sir, it does but the principles are relevant, highly relevant to what a restraining order is and how it should be looked at.

5 **ELIAS CJ:**

I'm sorry, I can't find under tab T –

McGRATH J:

So, what volume are we looking at?

10

MR ORLOV:

Sorry, it's bundle of authorities volume 1(2), part 2 and there are two cases in T, it's the second case.

15 **ELIAS CJ:**

Oh.

MR ORLOV:

It's the High Court of New Zealand, Randerson, Justice Randerson case.

20

BLANCHARD J:

Is this our friend Mr Wong?

MR ORLOV:

25 Yes Sir.

BLANCHARD J:

What's happened in that case, if I may ask?

30 **MR ORLOV:**

Mr Wong represented himself during the trial and he's now been acquitted of all I think except for one charge. My learned friend did the number of cases, he's now appealing on the basis of a number of procedural errors. He was acquitted on everything except one charge which was rather unusual because

he was representing himself. So, um, it may actually be before Your Honours again at some stage, unfortunately. Has the Court been –

ELIAS CJ:

5 Yes, we've found it.

MR ORLOV:

Yes, if I may turn firstly to paragraph 4, the essential issues in looking at the proceeds of crimes legislation and their effect. The four questions asked by
10 His Honour, "Was a benefit derived and if so, what was the value of the benefit?" To move on, at paragraph 13, if I may turn Your Honour – there was argument that the value of the benefit should be at least defined by some sort of accounting evidence. Now –

15 **BLANCHARD J:**

But this is after the event, when the Solicitor-General is attempting actually to confiscate the property.

MR ORLOV:

20 Yes Sir –

BLANCHARD J:

It's a vastly different situation at the earlier stage, when the legislation recognises that there may not be any sort of absolute proof which would be
25 sufficient at the later stage.

MR ORLOV:

I accept that. I just want to address the Court on the actual statutory framework which is addressed at 40 His Honour. In other words, what is the
30 purpose of this whole mechanism, this whole legislation? I think that is very important to the issues here because – I go back to my point that the mechanisms in Poland are vastly, they've got nothing to do with identifying a proceed of a crime at all, they've got to do with compensating victims and they are quasi-civil and I'll address the Court on that shortly.

At paragraph 40, “The Act establishes two key mechanisms: forfeiture orders under ss 15 to 23 and pecuniary penalty orders under ss 24 to 29. Forfeiture orders are concerned with the confiscation of specific identifiable assets which
5 have been used to commit or facilitate the commission of an offence, or assets which represent the identifiable proceeds of the offence. In contrast, pecuniary penalty orders are designed to recover any benefits derived by a person from the commission of a serious offence...”

10 I’m dealing with the second issue here. Even though, so – at paragraph 41 the policy is discussed, “The policy of the Act therefore is twofold. First, a person who is engaged in criminal activity should be required to disgorge what in common –

15 **ELIAS CJ:**

I’m sorry, why are we looking at this?

MR ORLOV:

Because Your Honour, the actual legislation in Poland has nothing to do with
20 that, at all. The legislation in Poland is –

ELIAS CJ:

We’re not concerned with forfeiture orders or pecuniary penalty orders.

25 **MR ORLOV:**

But it deals with benefits Your Honour and I’m dealing with, at paragraph 4 –

ELIAS CJ:

In respect of those orders.

30

MR ORLOV:

Yes but this is the ultimate outcome of restraining the property –

ELIAS CJ:

Yes, I understand that.

MR ORLOV:

In other words, if the property is restrained to compensate victims, that's not
5 part of it. The property is restrained for the simple and very narrow point of
either disgorging the benefits or removing the property used to commit the
crime, the taint. This is where it's important because the Polish orders have
nothing whatsoever to do with that, at all. They have to do with securing
property to compensate victims. Now, I keep going back to the bankruptcy
10 issue because –

ELIAS CJ:

That's probably to return property, taken through the crime.

15 **MR ORLOV:**

Well, actually, no Ma'am because the Polish prosecutor – and I've got that in
my – makes it quite clear, that he sold his own assets to avoid paying possible
creditors that had never applied.

20 **BLANCHARD J:**

Where is that?

MR ORLOV:

Um, I'll just – 44.7 of my submissions and 44.8 but I'll actually be taking you
25 further through that evidence because it's very, very important to my argument
and 44.6.

ELIAS CJ:

Where do we find it in the prosecutor's request?

30

MR ORLOV:

Yes Ma'am, I'll just deal with that. Case on appeal, volume 1D. I'll just turn to
that in a second. Now, if I can take you through what appears to be the
evidence of the Polish prosecutor. It begins with 1D and goes onto 1HI and I'll

take you through each of those pages to explain what appears to me to be and appears on the face of it, to be the statutory scheme in Poland and what they are trying to achieve.

5 **ELIAS CJ:**

Is this back at 280 and so on, 278?

MR ORLOV:

Yes, it begins at 296.

10

ELIAS CJ:

296?

MR ORLOV:

15 Yes, after D in case on appeal volume 1, it's the statement of the public prosecutor 2005.

ELIAS CJ:

Oh yes.

20

MR ORLOV:

She talks about – I just want to take the Court through that, through each of the points and the essence of my argument, I want to stress this, is that the Polish, the entire Polish statutory scheme that she refers to is completely
25 outside the proceeds of crimes legislation or intent, it has nothing to do with disgorgement of proceeds of crime or benefits or all that has to do with is - she refers to various proceedings including civil proceeds of compensation of victims and things like that. So I want to go through that to demonstrate, if I
may.

30

ELIAS CJ:

Page 296?

MR ORLOV:

I begin with page 296, first of all at paragraph 3 she talks about amending her original decision on security of property and the Court may note in my learned friend's bundles, the original request was for the money to be seized and sent
5 to Poland.

ELIAS CJ:

Yes.

10 **MR ORLOV:**

Then she goes on, this is at paragraph 3 of the same, the last paragraph of this page, "When the fine or obligation to compensate for damages are not decreed with a final judgment or the claims for compensating for damages are not awarded, and the suit for these claims should not be filed in civil
15 proceedings within three months of the date of the decision becoming final –"

ELIAS CJ:

Well that's a backstop is it?

20 **MR ORLOV:**

What she appears to be saying is that again there's no mention of the word or nature of benefit, proceeds of crime, or taint in this proceeding. I want to move on then to E, the next bundle.

25 **ELIAS CJ:**

Well hang on a moment. Here, it seems that there can be a fine or disgorgement ordered in the criminal proceedings but she's seeking that the order shouldn't be discharged for three months afterwards to allow any civil claims to be brought.

30

MR ORLOV:

Ma'am, this is the issue between fine and disgorgement. You see, the issue is, there are many administrative and quasi-administrative, including quasi-criminal proceedings in the form of fines that a government can take

against people, but that is not within the contemplation of the Proceeds of Crimes Act. What she's referring to here is quasi-civil or quasi-criminal proceedings and I want to take the Court through why I say that.

5 At paragraph, moving on, E at page 298 where she attaches the excerpts of the codes. The article she referred to again, are not proceeds of crimes legislation. I want to go through each of them. Article 291(1), obligation to compensate for damages or sanction imposing a payment to the wrong or to the public purse can be ordered. The next paragraph, section 2, 292(2),
10 securing of potential forfeiture of objects shall be conducted through seizure of moveable property, debt claims and other property rights and through imposing ban on selling, such a ban shall be disclosed, et cetera, if necessary receivership of real estate or enterprise that the defendant can be appointed. Article 293, a decision to impose security shall be issue by
15 a Court and in preliminary proceedings by a public process shall specify the scope and way of imposing such security.

Now, if we move onto the next page, 299 –

20 **ELIAS CJ:**

What are you inviting us to take from this?

MR ORLOV:

That the whole legislative scheme has nothing to do with benefits or taints as
25 proceeds of crime, it's to do with compensating, sometimes in what appears to be quasi-civil proceedings.

ELIAS CJ:

If you're compensating – if you're making an order for compensation of victims
30 –

MR ORLOV:

Well I want to answer Your Honour on that, that's precisely the point and I'll give an example. Let us say that a man in the New Zealand proceeds of

crimes jurisdiction had caused his creditors to lose their money but hadn't actually received any money from them, in other words, he made negligent acts or he made acts which were considered criminal, but he hadn't got a benefit –

5

ELIAS CJ:

Well negligent acts would probably not be considered criminal.

MR ORLOV:

10 Well it appears in the Polish jurisdiction, and I'm about to turn to that, that they are, but let us assume that he made it, or a clear example, he burnt a house down, the person lost everything they owned under the house, the proceeds of crime legislation cannot be used to arrest this man's assets for burning down the house. The proceeds of crimes legislation can only be used to get
 15 back what he obtained from the crime. The Polish law, which she refers to, is actually a compensatory mechanism, not a proceeds of crime mechanism and it is exactly why *Peniche* and all the other cases say that the Court should be very careful to limit the scope of what in fact is such a draconian order that it is unknown to the law, apart from in this respect. There is no doubt the
 20 proceeds of crime legislation is used against drug dealers and serious criminals to disgorge profits from running away, it's an effective and powerful tool and there's no argument it should be used, but when it is used in proceedings such as this for different purposes, this is when it becomes dangerous because it allows foreign government to basically do what it wishes
 25 on the territory of another government and expects the Court to act as a rubber stamp for its orders, even if they don't comply with form. This is my submission, that these orders simply do not comply with form and because they do not, they should be struck down.

30 Now, here is Article 747 which she refers to some at 299, which is her expert - this is my point, it says, "Security of financial claims takes place by way of, one, seizure of moveable property, encumbering real property, imposing a ban, encumbering a vessel...", this is civil jurisdictional issues, security of financial claims.

Now, let us move on, I would like to move onto 284 which is at F, which is where she talks about the alleged crimes that he's committed. If we move to the bottom of 284, the things he's accused of, A) selling his own car, selling
5 two truck-tractors owned by someone else but it's not quite clear, the next paragraph at 285, he sells his own real estate property, he sold his own buildings –

ELIAS CJ:

10 Well he sold buildings and he sold cars but you, I'm not sure what twist you're putting on it by saying "his own."

MR ORLOV:

Well it goes back to the nature of proceeds of crime, I find it difficult, in my
15 submission, philosophically to see how selling one's own property can be a proceed of a crime as the legislation intends, but I want to turn the Court to page 286 at the bottom as to what, really, the Polish government is asking the New Zealand government to do. It says, "The suspect is likely to be punished for the acts specified above with a fine at the maximum of 720 zlotys and can
20 be obligated to repair damages. The Court is obliged to award the obligation to repair damage if the wrong lodged is a request to that effect." Now, there's no attempt, at the bottom they talk about the money he brought in, but there's no attempt to link that in any way to the crime. The bottom, Slawomir Bujak answers with his entire property for the damages caused with the crimes he is
25 charged with, therefore all of Slawomir Bujak's assets revealed in New Zealand should be secured against the fine he is likely to be punished with and repairing the damages he has caused by the crimes he's charged as they're proceeds of crime.

30 Now, I move onto the additional information which was given, which is at G, if the Court turns to, if it may turn to G, which is marked at 6 at the top. This was referred to in the extradition proceedings and the Crown hasn't objected, so I've put this in because it's very important because it characterises what, in

effect, Mr Bujak is being – one of the major charges against Mr Bujak and I want to quote from the top of that –

ELIAS CJ:

5 Page?

MR ORLOV:

This is after G.

10 **BLANCHARD J:**

Sorry which page?

MR ORLOV:

15 It says 68 on the right-hand corner but it's G, it's the first page after G, of the same bundle I'm referring to, I'm just reading forward through it. So, we've covered –

BLANCHARD J:

If we're in the same bundle, I have numbers rather than letters.

20

ELIAS CJ:

Yes, so do I.

MR ORLOV:

25 This is the case on appeal, volume 1, dated 11 March 2009 and I apologise to this Court, this will never happen again. My assistants didn't –

ELIAS CJ:

So, G, is it?

30

MR ORLOV:

Yes, yes Ma'am.

ELIAS CJ:

I've got *Frazer v Walker*.

MR ORLOV:

5 So, it's case on appeal, volume 1, dated 11 March 2009 and it's G. Now, the
first paragraph of that, "Taking into account the doubts that New Zealand
authorities have concerning the category referred to in the Treaty to be
applied to the crime described in point 6 of the decision on provisional
detention of Slawomir Bujak. I am sending you additional information on the
10 legal status applicable in Poland. The rules of business activity in the
Republic of Poland are regulated under the business activity law as of
19th of November '99 and of 15 September 2000." Now, what's relevant here
is that these laws which happened after he was charged with a crime, or after
the alleged crime that he is alleged to have committed which is avoiding some
15 bankruptcy issues.

I want to then go to the bottom of the paragraph, this is the – the sentence
begins with, "The law of the Republic of Poland requires that an entrepreneur
who is a natural person running a business activity upon obtaining a permit
20 and being registered, if such an entrepreneur has ceased to pay his debts on
a constant basis, be deemed bankrupt. Announcement of bankruptcy can be
demanded by the debtor himself, as well as by each of his creditors. In the
case of Slawomir Bujak's enterprise, neither he nor any of his creditors
applied to the Economic Court for deeming Bujpol bankrupt. However, the
25 penal liability under article 300 of the Polish Penal Code shall be borne by
anyone who, running their business activity facing either insolvency to their
creditors or bankruptcy, reduce their assets in any way as referred to in this
regulation, to avoid satisfaction of their creditors claims in the future. The
liability of Slawomir Bujak as a natural person, not a company, for the debts to
30 his creditors that had been made as part of running, Bujpol covered all his
personal assets." Now, that is a rather vague and wide statement but
certainly not within the proceeds of crime because the liability covers all his
personal assets, there's no attempt to link the crime to the benefit.

ELIAS CJ:

They are talking about fraudulently obtaining goods, for his own benefit.

MR ORLOV:

I don't mean, Ma'am, I don't mean the charges. I mean, there can be a
5 number of charges and I'm not – of course it's impossible virtually, as all the
law states, to go behind the charges or their genuineness but the form and the
intent of the order of restraint. In other words, I'm attempting to point the
Court to the difficulties in trying to say that these are proceeds of crimes
applications. In fact, they would probably be better characterised as
10 receiver's applications to seize assets, in terms of civil jurisdictional issues –

WILSON J:

What about over the page, page 69, look at the first paragraph there,
"Fraudulently obtained, goods which he then sold thus increasing his property
15 and showed no intention of settling his liabilities." Doesn't that clearly connote
criminal rather than civil conduct?

MR ORLOV:

Sir, I'm not saying that the charges are not criminal. I'm saying the effect of
20 the order is not a proceeds of crime order. There's a difference. Foreign
government can bring a person into criminal charges whenever it likes. All
human activity can be subject to criminal penalties virtually, including all
economic activity and all bankruptcy issues. The question is, the character of
the order which is attempting to use what in fact is enforcement, civil or
25 criminal enforcement mechanisms for damages, to use them under the guise
of proceeds of crimes legislation which has a narrow purpose and the purpose
– the reason that all protections were taken out of the proceeds of crimes
legislation is very important. They are designed to arrest and seize clear
proceeds of crime under benefits, et cetera. Not to help governments enforce
30 penalties or other things. This order is not of this nature. It is a different
creature and that's why – to allow this order to become the creature that they
asked it to be, is in fact to allow the diminution of Human Rights standards
under the guise of international comity which is the case as I'm referring too
talk about. For example, when – as the case I've mentioned, *Bennett* when a

man was brought to the jurisdiction by being kidnapped, there was no breach of their laws when he was brought to England but it was the breach of the intent of the law, the process itself which was abused and here it is an abuse. If that applied in the civil jurisdiction or asked the Government to enforce an injunction with a damages undertaken, there would be no problem but the damages undertaking would mean that if they illegally arrested his arrests they would be liable as a government. At the moment, all of his assets have been frozen in perpetuity in New Zealand and there's virtually no –

10 **ELIAS CJ:**

That's not the effect. They are not frozen in perpetuity.

MR ORLOV:

Well until, until the case comes to trial which will probably be a very long time away. It's already been – if one looks at the history, they allegedly started their investigations in 1999, they had a clear police certificate and then suddenly in 2009, we're still here and his assets have been, I think, subject to this whole ongoing arrest procedure and not only that –

20 **ELIAS CJ:**

We are getting a long way from the point of law that we were trying to focus on.

MR ORLOV:

25 Yes. I'll move onto the evidence that there was no analysis of benefit. At the last paragraph it says, "Lack of accounting documentation concerning PW Bujpol makes it very difficult for the prosecution authorities to assess the financial condition of that entity which is a commonly known fact." In other words, there doesn't even seem to be any analysis of what benefit he
30 received, if any and it's not related to benefit.

There's another issue which I won't dwell on but is Bujpol being treated as a company under the insolvency codes of Poland which didn't apparently exist at the time, or is it treated as a private enterprise or a business which

Ms Orlowska seems to be saying it is. In other words, there are serious problems, procedural problems with this whole issue. One of the frauds he is accused of is getting rid of his own personal assets to avoid bankruptcy when there was no bankruptcy in place and when no creditors had applied. Could that possibly be a benefit under the law? I doubt it in my submission but certainly there was no attempt to make it such. I deal with that at paragraph 46 of my submissions. In other words, there's no evidence provided that Mr Bujak was actually subject to any personal bankruptcy issues at the time he allegedly sold his own assets. And in the case I've referred *Huang (Wong)*, the case before that of Justice Asher was very careful to look at benefit again where a house was used to make methamphetamines Justice Asher made it very clear that the benefit should be looked at in terms of the manufacture, no more property should be taken than would be in line with the benefit and that is the intent and has always been of the intent of the proceeds of crimes legislation. Here the Polish government are simply saying arrest everything because he'll face penalties and liabilities in our legal system.

At paragraph 49, I summarise those arguments in relation to the Polish legal system and mechanisms have nothing to do with proceeds of crime legislation, in fact they're not even called that. And that's why MACMA deals with Commonwealth countries who all have enacted proceeds of crimes legislation which is clear, identifiable and deals with what it says, proceeds of crime, whereas Poland is asking this government to simply secure assets for compensation or damages.

The other issue at para – why this is an important issue of human rights, although I understand this Court's reluctance to perhaps identify it as a human rights issue is at paragraph 52, registering foreign restraining orders, there's no time limit. There's a time limit in the Proceeds of Crimes Act, there's no time limits in the foreign restraining orders, and in my submission, it's doubtful whether they can even be varied to help the person pay for his legal fees or his living expenses, although that's arguable.

I would submit that the restraining order at paragraph 54 also reverses the presumption of innocence which is sacrosanct to criminal law jurisdictions in that there is no, on the terms of this restraining order, even on its face, there is no attempt to suggest that he gained a benefit or to quantify it.

5

ELIAS CJ:

Of course, in this case, the benefit isn't really in issue because he's the owner. In some cases, it maybe a very complex matter to decide whether the property is part of the benefit of crime.

10

MR ORLOV:

Yes, well the point – philosophically speaking in terms of the Proceeds of Crimes Act, if a man sells his assets, his own assets, which he gained before any criminal activity –

15

ELIAS CJ:

Well that's the issue. The restraint doesn't preclude determination of that subsequently.

20

MR ORLOV:

Absolutely not Your Honour, but if the restraint is within a legal framework which has – in other words, where restraining – my issue is, or my main submission is that the government of Poland is having a range of proceedings which it refers to in terms of civil and criminal code for compensation for damages and it's restraining property in order to secure those awards, but the key of restraint under the Proceeds of Crimes Act and MACMA is different. So it shouldn't have gone under MACMA, it could have gone under some other comity provision, it could have gone under a civil jurisdiction to apply for a Mareva injunction over his assets via civil, but the Mareva injunction has within it very strong safeguards. You need to prove much more in Mareva, you need to give undertakings to damages, you need to protect property rights, you don't need to do that under the Proceeds of Crime Act, that's why it's so draconian. You can do whatever you want with person's property under

25
30

Proceeds of Crime, as long as it's related to a benefit or a taint of the crime. My point is that this is not.

5 Now, the issue is that the Court of Appeal, I think both in its initial judgment and in second judgment stated that the High Court, this is, I refer to paragraph 55 of my submissions, must determine whether the foreign order falls within the definition of a foreign restraining order. But what does this mean if the Court can read down any order it likes? Then there's no duty to determine whether it falls into a restraining order, and that's the point. The determination is, it must ensure that it is the species of order which it will determine. So the liberal concept of the restraining order not only runs contrary to the bodies of law of *Peniche* et cetera, but it basically, in my submission at para 56, creates a rubber stamp mechanism where the Court says, well, the Polish prosecutor accepts it's a restraining order, it says it is, therefore it is even though on the face, it's not and we'll read it down anyway to cure any defects. If that's the law, then really the Proceeds of Crimes Act has no judicial control, whatsoever. And if there is no judicial control in the Proceeds of Crimes Act, sorry, the MACMA Act, it means foreign governments, for example, let us say, and there was a famous case of that –

20

ELIAS CJ:

I really hesitate to interrupt you, but I'm losing track of where this argument is now going. These are all the background reasons why one must construe the legislation according to its purpose and carefully but you still come back to the terms of the legislation, don't you?

25

MR ORLOV:

Of course, but the – and I'd like to take you through and –

30 **ELIAS CJ:**

Where are we going now, with the submissions? Because I think we have – we understand the three principal attacks you're making here.

MR ORLOV:

In that case –

ELIAS CJ:

5 That is the benefit, I mean, have you finished what you're saying about benefit?

MR ORLOV:

10 Ma'am, basically yes, I just wanted to take you now through to the initial, the initial Court of Appeal decision.

ELIAS CJ:

Why?

15 **MR ORLOV:**

Because I think that clearly sets out the principles that the Court was weighing, and the definition of benefit.

ELIAS CJ:

20 No, but what do you say – what are you taking from the initial Court of Appeal decision which you say we should apply, as opposed to taking us through the history of the matter?

MR ORLOV:

25 I'm – my submissions is that the Court of Appeal decision, the first appeal, was right in principle and Justice Clifford followed it correctly, and in fact, as he was bound to do. And what the second Court of Appeal decision is was basically unclear what it was saying and should not be followed.

30 **ELIAS CJ:**

So what in the first Court of Appeal decision do you say is the correct statement of principle?

MR ORLOV:

If I may take through, this starts at paragraph 71 of my –

ELIAS CJ:

5 Where is it in the Court of Appeal – where do we find the Court of Appeal –

MR ORLOV:

Yes, the Court of Appeal is at page 22 of bundle of authorities bundle 1.

10 **ELIAS CJ:**

Yes.

MR ORLOV:

Now, I'd like – I think it is important in terms of the – so to begin with, have the
15 Court found the – the Court of Appeal deals firstly with the meaning of the
foreign restraining order which at paragraph 21 and 22 it deals with benefits
and taints. The Court then, and I'm turning to paragraph 72 of my
submissions, recognises that both the importance of mutual assistance in
criminal matters, which is at paragraph 13 to 18, but it also looks at the
20 countervailing importance of the principles of natural justice due process in
the Bill of Rights Act.

ELIAS CJ:

What paragraph in the Court of Appeal are we at?

25

MR ORLOV:

Paragraph 26 to 34. Now this is in the context of ex parte, but it also has a
wider reference to the need to recognise principles of natural justice and
rights. At 35, and I want to actually read from that, the Court rejected a rubber
30 stamp role for the New Zealand Courts and it states clearly at paragraph 35,
and I'd like to quote from that because this is one of the passages I rely on,
"The far reaching nature of legislation of the character we're presently
considering has to be recognised. As with Mareva injunctions, Courts have
had to employ common sense strategies to see that on the one hand, the

effectiveness of these necessarily intrusive mechanisms is maintained but on the other hand, the rights of accused persons are not inappropriately infringed.”

5 At paragraph 36, “However the order might have been framed in this instance and we are of course concerned only with the resolution of this particular case, it was important to ensure that the respondent could come into Court and challenge the argument for the Solicitor-General that the only role for the High Court was to ensure the overseas order written submissions still in force
10 at the time of making of the registration, was a very long bow.”

ELIAS CJ:

Well, this isn't the reasoning that you are relying on. So, where's the reasoning that you say states the correct principle?

15

MR ORLOV:

Yes. The reasoning which states – the reason I'm referring Your Honour to those passages is it's –

20 **ELIAS CJ:**

Mr Orlov, we have – you've almost taken up more than half the day and I'm concerned that we should move on. Where –

MR ORLOV:

25 Yes, at paragraph 37 onwards, whether it's a registerable order, at 41 I'd like to summarise what the Court found. “Mr Illingworth submitted, we think correctly, that on their face the Polish statutory provisions are significantly different from the position under the New Zealand proceeds of crimes legislation. They appear to indicate that under Polish law where an accused
30 person faces even the possibility of being fined or required to pay damages, the Courts have authority to impose a charge on the property of the accused in advance, to ensure that the accused does not avoid the potential obligations by disposing of the property –

ELIAS CJ:

But all of this is overtaken by the additional evidence put forward and that's really what you have to meet.

5 **MR ORLOV:**

Well, if, if, ah – I'll move on then to why –

ELIAS CJ:

Where's the statement of principle that you say we should be adopting
10 because all of this is simply reasoning which supports the Courts conclusion that on the material before it, Justice Clifford shouldn't have made the order he made but the Court remitted the case to Justice Clifford so that he could reconsider it.

15 **MR ORLOV:**

With the greatest respect that's quite, in my submission, not what the Court of Appeal is saying. It is saying that, at paragraph 42, that the whole Polish legal scheme is completely different to the proceeds of crimes legislation. No evidence could perfect that –

20

BLANCHARD J:

Why then, did the Court of Appeal at paragraph 53, fourth bullet point on page 35, say that it would be open to the parties to address that very fact when the matter went back to Justice Clifford?

25

MR ORLOV:

Well, that is – if you look Sir, at paragraph 49, that on its face the order is outside the statutory definition of a foreign restraining order –

30 **BLANCHARD J:**

"We consider that as matters presently stand, the appellant's submission is correct." Clearly that was a tentative view and they were sending the matter back to the High Court so that the parties, if they wanted too, could take the matter further and the Solicitor-General did want too.

MR ORLOV:

Well, the issue is –

5 **ELIAS CJ:**

And further evidence was put before the Court.

WILSON J:

And not challenged.

10

MR ORLOV:

Well, it appears to have been challenged in the second appeal, Court of Appeal judgment – but the issue Sir, is the form. If the form of the order, no evidence has actually be led to say that the form of the order –
15 because it can't be, the form of the order was found by the Court of Appeal to be defective. The order was not related to benefits. Now, if the public prosecutor said well, that doesn't matter in any case he did receive a benefit, that does not change the character of the order. That's the whole point. If the order is saying, the nature of the order is to secure a penalty, whether or not
20 he received benefits is irrelevant –

ELIAS CJ:

But the Court of Appeal, in the second case, the case under appeal, said to the extent that it exceeds the scope of the New Zealand legislation, the order
25 falls away but that still leaves a restraining order for property which maybe the proceeds of crime.

MR ORLOV:

Then he has to be framed in that fashion and that is my submission. In order
30 to read down orders with a totally different purpose and effect is to destroy the very limited human rights principles which can be applied. That's the whole point of the first Court of Appeal decision.

ELIAS CJ:

Could the Court of Appeal have specified that in the order, or do you say that the Polish application has to, in its terms, conform with the New Zealand legislation?

5

MR ORLOV:

In my submission, the Polish application has to conform in terms to MACMA and to the proceeds of crimes legislation, otherwise it falls outside it and there are other legal mechanisms for helping Poland, for example the Mareva injunction but that would give protections. That's why this is such a powerful draconian legislation. It is so powerful that the Courts must be careful to restrict its purpose to form and within the human – and that is what the initial Court of Appeal said. There was nothing to change evidentially, that on the face of it, the Polish statutory provisions are significantly different. The prosecutor did not, in any way, change that because it was looking at the face. What the prosecutor said was ex post facto well, we think it was in relation to a benefit and, in my submission, that's because the Polish prosecutor was advised to say that because obviously that would make it fall within the proceeds of crimes legislation. There's various, there's other issues relating to the Polish prosecutor's evidence in relation to being an expert witness. If an expert witness is to give evidence on what the Polish law means, it cannot be the prosecutor because they're interested, that's in breach of the High Court rules. Basically, the whole fundamental principle, that an expert should not be interested in the outcome of the proceedings.

25

There were other problems which I want to turn too which the – Justice Clifford was, in my opinion, understating the position that the prosecutor wasn't being quite –

30 **ELIAS CJ:**

You will have to tell us where you are going with these submissions, you say you are about to turn to other points because Mr Orlov, I am going to invite you to wrap up your submissions before lunch which is in 10 minutes.

MR ORLOV:

Yes, Your Honour, I will deal then briefly with –

ELIAS CJ:

- 5 Are they additional points, or do you just want to take us to aspects of Justice Clifford's reasoning which is supportive of the thrust of your argument?

MR ORLOV:

- 10 Basically, I just want to pick out various points of – that I'll be relying on in my submissions but Your Honour –

ELIAS CJ:

- 15 What are they directed at? You've said, as I understand it in answer to Justice Tipping, that there are three matters that you are raising but it's not - the property is not shown to come within the benefit aspect, it's not tainted property and that it did more than restrain within the meaning of the Mutual Assistance Act?

MR ORLOV:

- 20 Yes, Ma'am. I wanted to wrap up what it was – in essence the first Court of Appeal judgment was stating and I quote that at paragraph 79 of my submissions.

ELIAS CJ:

- 25 Well the first point has been overtaken, and –

MR ORLOV:

- 30 Well the second point, sorry Your Honour, is that Parliament did not intend to, according to the first Court of Appeal, to widen the operation of the enforcement process. If anything, it should be narrowed.

ELIAS CJ:

That's the evidence point and the second point is answered by the Court of Appeal in its second judgment and if you want to convince us that the appeal

should succeed, you really need to attack the reasoning in the second Court of Appeal judgment on that point rather than just take us back to what was said in his preliminary decision.

MR ORLOV:

5 I'll look at the second decision then now, Your Honour, but the principles, and I refer to *Civil Aviation v Heavylift*, that form is extremely important, at paragraph 80 and the case is, if the departure is from form and the Court can simply read down anything it wishes, then what is the role of the Court in these proceedings? Any order, no matter how wide or draconian or how
10 outside the purpose, can be read down, and therefore really, what the second Court of Appeal did was to, in my submission, wrongly put comity as the prevailing principle which it never has been and make that – human rights subservient to that. So what in fact the Court of Appeal, in my submission, is saying without criticising every single paragraph of it, although I can go
15 through to do that, is that in reality it doesn't matter what the form of the order says, we can read it down to help our neighbouring friendly countries and that's it. It doesn't really matter whether it's a Proceeds of Crimes order, as long as it deals with a crime, and as long as it deals with arresting assets, we can read it down. We don't have to analyse whether it's related to a benefit
20 on its face, we don't have to – but, so my submission and unfortunately I'm running these arguments as a joint strand, but first of all, the second Court of Appeal was in effect in terms of pronouncement of law, *functus officio*, so that was the law and that law was correct, it couldn't change –

25 **ELIAS CJ:**

Well it can't possibly have been. It even preserved the order simply sending the case back to Justice Clifford to reconsider it.

MR ORLOV:

30 Except, Your Honour, this is where Justice Clifford made pronouncement that he was bound by the original Court of Appeal to find that it was not a restraining order by the principles, the statutory scheme of Poland, he found the evidence of the Polish prosecutor unconvincing. Now, the Court of Appeal cannot replace a trial Judge's reasoning, unless –

ELIAS CJ:

Yes it can, there's an appeal which the Court of Appeal can consider and come to its own conclusion on.

5 **MR ORLOV:**

It can, but only if the judgment of the lower Court Judge is so absurd or so outside –

ELIAS CJ:

10 Not at all.

BLANCHARD J:

15 It simply can't be right and it's certainly not right in a case which depends on material in the papers. The Court of Appeal can make its own mind up about that.

MR ORLOV:

20 But there must be some error identified in the judgment of the lower Court Judge and the only error was the error of law which the Court of Appeal initially pronounced on in the first place. It did not identify any error in the decision making process of the trial Judge, but simply said he was wrong because the Court of Appeal was wrong. Now, if that circular argument, it goes against the whole principle of res judicata, it goes against the principle of double jeopardy and the other issues relating to the protection of –

25

ELIAS CJ:

Mr Orlov, this is not a case of res judicata, and it's certainly not a case of double jeopardy.

30 **MR ORLOV:**

Well I'm using the principle of double jeopardy, what in fact is happening in this case is that –

ELIAS CJ:

This was an incomplete case which the Court of Appeal sent back to be further considered in the High Court. This is an appeal which has been considered from the second decision of the High Court and we are now
5 concerned with the decision of the Court of Appeal, the second decision of the Court of Appeal.

BLANCHARD J:

And if there had been an attempt to bring the first decision of the Court of
10 Appeal to this Court, we would undoubtedly have said, "This is an incomplete matter, it's premature for these issues to be decided in this Court. Come to this Court the second time around if necessary."

MR ORLOV:

15 Well, if I may, very, very briefly turn to the High Court judgment, from paragraphs, if I can turn to, first of all, paragraph 83 of my submissions, and this is where I deal both with the res judicata issue and in my submission, jointly the argument that Justice Clifford was correct. Firstly, if we deal,
20 paragraph 7 to 17 of His Honour's judgment, which is at A of bundle of authorities, volume 1, he found that, in law, if one looks at paragraph 7 to 17, he was bound by the Court of Appeal. Now, the –

ELIAS CJ:

I must say, this case on appeal is in chaos. You'll have to bear with me while
25 I turn up the judgment. Which is it in?

MR ORLOV:

It's in bundle of authorities, volume 1.

ELIAS CJ:

30 Not the supplementary bundle?

MR ORLOV:

No, it's the actual bundle of authorities, dated 11th of March and Your Honour, I really apologise for, it won't happen again, I can assure.

5 **ELIAS CJ:**

And you want – it was your paragraph 17?

MR ORLOV:

Beginning with paragraph 7, in other words, the characterisation of the initial
10 Court of Appeal's decision by Justice Clifford.

TIPPING J:

I have some sympathy for Justice Clifford because he followed the Court of
Appeal and then was told by the later Court of Appeal that the first Court of
15 Appeal wasn't quite right.

MR ORLOV:

That's my point Sir.

20 **TIPPING J:**

So I don't really think you're going to get anywhere here, because the issue is
whether the second Court of Appeal was right or wrong.

MR ORLOV:

25 Well I was just dealing with why, first of all, because I want to run both strands
Sir that there's a principle that the Court of Appeal shouldn't overturn its own –

TIPPING J:

Oh for goodness sake, I thought you'd been given a strong enough hint about
30 that.

MR ORLOV:

Yes, okay. Well, on its face Sir, at paragraph 8 of, the Polish statutory provisions are significantly different from the position under the Proceeds of Crimes Act.

5

WILSON J:

But paragraph 7, the Judge used the verb “commented”, these were comments by the Court of Appeal, he makes that clear, doesn’t he?

10 **MR ORLOV:**

Well, he found that the – it was not a foreign restraining order.

ELIAS CJ:

Now, you’re not going to take us through all the submissions and all the recitations, where’s his reasons that you’re relying on?

15

MR ORLOV:

His reasons are, basically the principle of the reasons are at 13 to 15, in other words, we shouldn’t give A the principle is, we shouldn’t give more assistance than what is included in the principles of the Proceeds of Crimes Act.

20

BLANCHARD J:

That’s just another Court of Appeal comment that he is recording.

25 **MR ORLOV:**

And that’s what I’m saying, the second Court of Appeal is wrong in not following that.

BLANCHARD J:

Oh, for heaven’s sake, I thought we’d driven you off that argument. It’s a totally impossible argument when they were expressing tentative views and sending the matter back to the High Court.

30

MR ORLOV:

I know Sir.

BLANCHARD J:

5 You're just wasting our time on this argument.

MR ORLOV:

10 Sir what I meant, perhaps I haven't put it quite as cogently as I would have liked to, is that if a Court is allowed to characterise an order which is not proceeds of crimes as proceeds of crimes and read it down, then there are no protections left of human rights protections.

BLANCHARD J:

15 That's a different argument.

ELIAS CJ:

That's the submission you've already –

MR ORLOV:

20 Sir, it's the same argument as paragraph 13.

ELIAS CJ:

That's the submission you've already directed to us.

25 **TIPPING J:**

The way to argue an appeal you know Mr Orlov is to look at the judgments that's in your favour, then look at the judgment that's against you, at five past 10, and then say why the first judgment is to be preferred to the second, not come at it sort of at this late hour.

30

MR ORLOV:

Sir, I'll summarise the final position is paragraph 15 and 16 of Justice Clifford's judgment which, in my submission, is why the first Court of Appeal decision should be followed.

TIPPING J:

Well I think I know what you say, you keep repeating it. I don't think you've got anything new you can add, quite frankly, because if you had, you'd have said it long ago.

5

MR ORLOV:

Yes Sir. I guess then that the final point is at paragraph 84 of my submissions, I deal with them very briefly because this Court has indicated that it won't accept those arguments but, in my submission, the Court of Appeal, the second Court of Appeal simply without any reasons, reversed its first decision and without any facts. It said it was wrong in law in its first decision, which it could not do in the same case between the same parties, and furthermore the Crown was estopped from arguing that it was wrong because it should have appealed to this Court.

10
15**ELIAS CJ:**

Well we understand the submission that you're making there, I don't think further elaboration is required of it.

20 **MR ORLOV:**

And the final point at paragraph 4 which is at 95 of my submissions, and I want to be very clear to this Court the basis of my argument in this respect, the only way, in my submission that the order could be characterised as a restraining order is if the evidence of the prosecutor was taken verbatim. Now, the trial Judge found that she was not an expert in Polish law because she hadn't been qualified as one. The question of whether someone is an expert of law is a question of fact, generally, for the trial Judge. There was nothing in the Court of Appeal's decision which stated why he was wrong in principle and the principles –

25
30**ELIAS CJ:**

Are you saying that the Court shouldn't have received this affidavit from her?

MR ORLOV:

Yes Ma'am. And the reason why she shouldn't have received it or the Court shouldn't have received it is to be stated in my submissions, but also in the High Court Rules Code of Conduct, in that an expert cannot be witness in
5 their own cause. She was a prosecutor, she wanted to prosecute this man. If she was trying to give evidence as to the nature of the order, which was actually contrary to its form, she would have to be qualified as an expert, in other words, they would have had to call an independent expert witness on the meaning –

10

ELIAS CJ:

All right, we understand that submission also Mr Orlov.

MR ORLOV:

15 Thank you. Now, just turning, I just want to turn to, at paragraph 69 of Justice Clifford's decision on expertise –

ELIAS CJ:

You don't need to explain this argument any further, we understand it and
20 we've read your submissions on it.

MR ORLOV:

In that case, I will move onto the final, which is at paragraph 113.

25 **ELIAS CJ:**

What is that?

MR ORLOV:

Paragraph 113 is other related errors of law which I skim over briefly in terms
30 of the second Court of Appeal.

ELIAS CJ:

Well we've read all of this too. Is there anything you want to develop any further?

MR ORLOV:

Yes, what I just wanted to develop was the principle, basically, of comity as being the sole principle referred to by the second Court of Appeal. Now, in my submission, they've misstated the principle of comity because although the principle of comity allows states to register each other's orders, it doesn't require them to when they exceed the very jurisdiction in which they apply and exceed human rights protections. Comity is subservient to human rights principles.

10 **ELIAS CJ:**

Well I would have thought that really the important point was that it's not necessary to go to those principles, that it's the statute that we have to concentrate on and you've made the submissions that it doesn't conform with our statute.

15

MR ORLOV:

Yes Ma'am, that is my primary –

ELIAS CJ:

20 And that's the principal submission you make.

MR ORLOV:

Yes, and I guess comity by – if something doesn't conform to our statute, making it conform by extending the meaning of the statute is actually wrong.

25

ELIAS CJ:

It's impermissible interpretation.

MR ORLOV:

30 Yes, it's impermissible interpretation and it also runs contrary to the human rights principles which would require narrow interpretation so that's their sense of my argument.

ELIAS CJ:

Yes.

MR ORLOV:

5 May the Court please, thank you for your patience.

ELIAS CJ:

Thank you. We'll take the adjournment and resume at 2.15.

COURT ADJOURNS: 1.06 PM

10 **COURT RESUMES: 2.16 PM**

ELIAS CJ:

Yes, Mr Palmer.

15 **MR PALMER:**

May it please the Court. I have handed up a one page road map to the general structure of the Crown's argument in this case. Your Honours will appreciate that the breadth of the terms of leave to appeal made it difficult to know in advance which particular issues the Court would be most interested in

20 focusing on –

ELIAS CJ:

We are particularly interested in any help you can give us on the legislation and terms of any order and what happens after an order is registered. We
25 haven't, or at least I haven't flicked through the legislation with much comprehension and the inter-relationship between the two Acts?

MR PALMER:

Yes, Your Honour. I think if you have a look at the headings on that
30 one page, I would propose to move directly to number 3 to take Your Honours through a number of the aspects of the scheme and the purpose of the legislative framework and then to focus only on two of the issues which I think

were discussed this morning, being at 6(f) and 6(d) which I think were the two key things that were under discussion. But if there are any other issues on that list as well that the Court would like me to go through, I am of course happy to do so.

5

ELIAS CJ:

For myself, I am interested in whether the Polish Court's order is suitable for registration without further order of the Court refining the matter to make it conform with our legislation?

10

MR PALMER:

Yes, Your Honour and I'll attempt to deal with that in relation to issue 6(f).

ELIAS CJ:

15 Yes, thank you.

MR PALMER:

The two preliminary points there, I will not spend time on. It is obvious I think that the interpretation of this legislation should, and this is an important point in the Crown's submission, take into account New Zealand's international obligations and the arrangements to which we are party. In our submission that is important, the interpretation of this legislation as international background, the scheme and purpose of New Zealand's legislation enacted in that background. My general point here is that it is the Attorney-General, assisted by the Solicitor-General who, on behalf of New Zealand, plays the primary role in receiving, considering and determining whether and how to act on requests from foreign states for mutual assistance. If I could refer Your Honours to the objects provision of the Mutual Assistance Act, section 4.

20
25
30

TIPPING J:

What's the best place to find the Act?

MR PALMER:

Your Honours, if you don't have a copy in front of you, I could refer you to part of the quotation in the respondent's submissions.

5 **TIPPING J:**

Thank you. I've got it on electronically but I haven't got a hard copy in front of me.

MR PALMER:

10 I'm happy to rely on the electronic version Your Honour, I'm sure it would be similar to what I've got.

ELIAS CJ:

What section?

15

MR PALMER:

Section 4. So, the object of the Act is to facilitate the provision and obtaining by New Zealand of international assistance in criminal matters. There's a list of specific things that that is stated to include. Down at paragraph (i) it includes the restraining of dealings in property, or the freezing of assets, "that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed in respect of offences." So, my only point in relation to this is that the restraining of dealings in property is sufficiently significant to the object of this Act, to appear in the object provision.

25

ELIAS CJ:

Section 4(i) makes it clear that you can obtain a restraining order to secure pecuniary penalties.

30 **MR PALMER:**

Yes, Your Honour.

BLANCHARD J:

Is that only after those penalties have been imposed?

MR PALMER:

The restraining order would be able to be imposed before the substantive criminal penalties are imposed. Following that, the foreign country could request registration of the pecuniary penalty order and we'll come to that in
5 legislation shortly.

TIPPING J:

The object here is outward looking but I presume the same purposes apply to foreign states seeking our assistance?
10

MR PALMER:

Yes, Your Honour and the legislation is divided into part 2 which governs requests by New Zealand and part 3 which governs requests to New Zealand. I note that the Attorney-General is the authority to which requests are made
15 and also, in my submission, the primary actor in determining how to respond to requests once they are received.

McGRATH J:

Is that an Attorney-General and no one else provision, or what?
20

MR PALMER:

The legislation is specific in relation to the Attorney-General.

McGRATH J:

25 Yes.

MR PALMER:

Yes. In this case there is an authorisation by the Attorney-General personally.

30 **McGRATH J:**

Yes.

MR PALMER:

Part 3 of the Act. There are a number of provisions at the beginning of part 3 and I'd like to take Your Honour to section 25 which governs how requests are made and how they are dealt with, 25 makes –

5

BLANCHARD J:

Do we have the full statute somewhere?

MR PALMER:

10 I'm told it's not in the materials that have been given to you.

BLANCHARD J:

Well, that's pretty hopeless, isn't it? I think when the appellant doesn't put it in the case on appeal, the respondent needs to do something about that.

15

MR PALMER:

You're quite right.

BLANCHARD J:

20 Even if it's only making sure that the appellant files an appropriate supplementary bundle.

MR PALMER:

25 Yes, Your Honour, I accept that. We do have a copy of the Crown's that we could hand up if that would be of assistance.

BLANCHARD J:

If you're able to do without it yes, that would be of assistance. I should probably have got it at lunch time. Thank you.

30

TIPPING J:

Is the point we're coming too, that the Attorney-General has a kind of filtering role that has to be satisfied of various things and then it goes onto the Court on that hypothesis?

MR PALMER:

Yes, Your Honour, that's the general point. So, at section 25, it's to the Attorney that requests are made. Now, section 25A deals with ad hoc requests for assistance, which this is an example of. In section 25A(2) there
5 are listed a number of matters which the Attorney-General must consider, he is under a statutory duty to consider, assurances by the country entertaining similar requests, the seriousness of the offence, the object to which I've already taken Your Honours and any other matters the Attorney considers relevant. Subsection (3), the Attorney-General may deal with that request
10 accordingly.

If Your Honours would then care to turn to section 27. This is a section which requires that a request shall be refused if in the opinion of the Attorney-General any of a number of matters apply and these are concerned
15 with offences of a political character, discrimination, double jeopardy, military law. Paragraph (f), a general provision in relation to the prejudice of the sovereignty security of national interests of New Zealand and then other provisions as well. In subsection (2) of section 27 –

20 ELIAS CJ:

I wonder what they mean by sovereignty there?

MR PALMER:

Sorry?

25

ELIAS CJ:

I wonder what they mean by sovereignty there? It was just an idle question, it's always an interesting word.

30 MR PALMER:

I'm not aware that it's been interpreted Your Honour, in this context. Subsection (2), relates to matters on a basis of which the Attorney-General may refuse a request. So, the first one shall be refused, the second one is maybe refused if in the opinion of the Attorney a number of other matters

occur if it would not have constituted an offence in New Zealand. There is reference to a death penalty later on and a list of other matters that would sustain the exercise of that discretion. Section 28 is worth just pausing on briefly. If the Attorney-General decides to refuse a request, it gives reasons
5 for the refusal and 29, may impose conditions. So, my overall point here is that there is a significant role for the Attorney-General, assisted by the Solicitor-General, in this part of the Act. Then the remainder of this part of the Act deals with a variety of particular forms of assistance that maybe requested.

10

If I could direct Your Honours to section 55 which of course is the one that we are mainly concerned with. It is worth pausing on the structure of that section, 55(1) enables a foreign country to request with the enforcement of a foreign restraining order. Then, when the Attorney-General is satisfied on receipt of
15 that request of two matters, that it relates to a criminal investigation in respect of a foreign serious offence, these are defined terms, and there are reasonable grounds for believing that some or all of the property to which the order relates is located in New Zealand. The Attorney-General may authorise the Solicitor-General to apply to the High Court for registration of the order.

20 Section 56 then deals with what the Court does –

TIPPING J:

Just before you leave that. There is no suggestion, I take it, that the Attorney-General is the determinant of whether it's a foreign restraining order?

25 He's not given the power to decide that. That has to be a matter presumably for the Court, ultimately, if an application is made for registration. I'm looking at that expression in 55(1). It's a pre-condition that it be a foreign restraining order.

30 **MR PALMER:**

Yes Your Honour. Section 56 engoverns how a Court would approach that. Subsection (1), where the Solicitor-General applies in accordance with an authorisation, the Court shall, if it is satisfied that the order is in force, order

that the order be registered. I don't want to make too much of the word "shall" but it is interesting to contrast it with the provision in section 43.

TIPPING J:

5 Implicitly the Court must be satisfied of two things, mustn't it? One, that it is a foreign restraining order and two, that it is in force.

MR PALMER:

10 Yes Your Honour. I think I would put it that the Court must be satisfied that the order is in force and the order must refer to a foreign restraining order and it must – may lawfully be granted. Just comparing the language here though, this is an obligation on the Court, a duty on the Court, if satisfied of those matters to register whereas with section 43 and 44, which refer to assistance to a foreign country by obtaining a search warrant, the Court is explicitly given
15 a discretion, may issue a search warrant.

TIPPING J:

20 When it says in subsection (3) of 56 "an order, or an amendment to an order" where does the concept of amendment come from or is that just a freestanding proposition? Has that got anything to do with the subsection – the provision in the third term, subsection (2), "shall comply with section 23B?"

MR PALMER:

25 No, no Your Honour.

TIPPING J:

No.

MR PALMER:

30 That's notification of third parties.

TIPPING J:

It does seem to imply though that the Court can amend the foreign order?

MR PALMER:

I think I would point Your Honour to subsection (4). Whether that quite –

TIPPING J:

5 Maybe it's –

MR PALMER:

– empowers the amendment I'm not sure.

10 **TIPPING J:**

No it probably doesn't. It presupposes perhaps that the foreign order has been amended by the foreign authority.

ELIAS CJ:

15 That is the way it reads.

MR PALMER:

Section 57 –

20 **McGRATH J:**

Just before you go on, looking back at 55. Is there any relationship between a foreign confiscation order and a foreign restraining order? I mean is the foreign confiscation order something that is a mature version of the foreign - where the process reaches that stage or is it just a different sort of

25 order?

MR PALMER:

Yes, that's governed by section 54.

30 **McGRATH J:**

Yes?

MR PALMER:

Where the foreign country may request a foreign forfeiture order or a foreign pecuniary penalty order.

McGRATH J:

5 Is that what might happen for example in this case when the final decision –

MR PALMER:

Yes I –

10 **McGRATH J:**

– convicting, if that happens, Mr Bujak is made?

MR PALMER:

15 Yes Your Honour. So in 54(2)(a) the Attorney must be satisfied that a person has been convicted and then the conviction and the order are not subject to further appeal.

McGRATH J:

And at that stage also it can be a pecuniary penalty order?

20

MR PALMER:

Subject to a definition of pecuniary penalty order in section 2.

McGRATH J:

25 I'm just wondering whether the restraining order is more narrow than the forfeiture order maybe. In relation to pecuniary penalty.

MR PALMER:

30 It maybe. I wouldn't like to say it will always be but it would be – you would expect that it would be. In this case there's a temporary restraining order pending determination of the substantive criminal proceedings which would then give rise potentially to forfeiture of pecuniary penalty order.

Section 57 goes to the effect of registration, 57(3), foreign restraining order has effect and maybe enforced as if it were a restraining order made under the Proceeds of Crimes Act. And that maybe a convenient point to turn to the Proceeds of Crimes Act. I'm not sure if Your Honours all have copies of that
5 before you. In the Proceeds of Crimes –

BLANCHARD J:

Just before you do, I was just looking back at the definitions of “foreign pecuniary penalty order” and “foreign restraining order.” Where would a
10 foreign order for reparations fit in?

MR PALMER:

Well Your Honour, if it fits within that definition of “foreign pecuniary penalty order,” it would come up against the last phrase.
15

BLANCHARD J:

That's what I was thinking.

MR PALMER:

20 Which does not include an order by way of restitution. So I would suggest Your Honour that that would depend on the nature of the order that would be in issue, the nature and its terms of such an order.

BLANCHARD J:

25 Does this mean there's a gap though?

ELIAS CJ:

Sorry which section?

30 **MR PALMER:**

This is the definition of ‘foreign pecuniary penalty order.’

ELIAS CJ:

Oh definition.

TIPPING J:

Well there's gap but it seems to be a deliberate gap.

5 **MR PALMER:**

It could be conceived of that way but I think the Crown would argue that it would depend on exactly what the nature of the order was that was issued in a foreign country as to whether it satisfies or not that proviso.

10 **TIPPING J:**

But it would be odd if that sort of compensatory order was expressly excluded from foreign pecuniary penalty order but somehow or other found its way under some other type of order?

15 **MR PALMER:**

Yes.

TIPPING J:

20 There seems to be a clear policy here to exclude, from this jurisdiction anyway, this process, payment of money by way of compensation et cetera.

ELIAS CJ:

For injury.

25 **MR PALMER:**

Well –

TIPPING J:

30 To an injured person. Injured is a very broad concept

MR PALMER:

Yes Your Honour. It's my understanding in some jurisdictions there is the possibility of getting a reasonably easily accessible order that involves payment of money. One of the requirements of this Act is that there should be

a formal judicial process that's gone through in the foreign country yielding an order that would then be appropriately subject to enforcement here. The wording of that proviso perhaps is not as clear as it should be.

5 I would suggest however that the first element of that definition imposing a pecuniary penalty in respect of benefits derived by a person could potentially apply to fines.

McGRATH J:

10 To fines?

MR PALMER:

Fines.

15 **BLANCHARD J:**

Yes but I would be inclined to think that must be right. But there's no provision for prior restraint in anticipation of a fine?

MR PALMER:

20 There is provision if it satisfies the definition of foreign restraining order
Your Honour.

BLANCHARD J:

Yes, but does it?

25

MR PALMER:

Well Your Honour we would argue in the case before the Court here that it does.

30 **BLANCHARD J:**

Do we know the basis upon which Poland would impose fines?

MR PALMER:

With respect to the particular offences here?

BLANCHARD J:

Mmm.

MR PALMER:

5 I'm not sure what Your Honour means about the basis on which it would impose them.

BLANCHARD J:

Well the border that we're looking at does refer to the possibility of a fine.
10 Now is that simply a fine as punishment under Polish law or is it a means of stripping the person concerned of a benefit?

MR PALMER:

Your Honour, what I'd like to do is take the Court to the nature of the offences
15 and the facts –

BLANCHARD J:

Yes well I'm simply flagging that question.

20 **MR PALMER:**

Yes, yes. But I'd like to do that after, with the Court's permission, after going through the rest of the statutory scheme.

ELIAS CJ:

25 I don't know whether I'm just behind but a penalty in respect of benefits derived from the commission of offence must contemplate a penalty by way of restitution except in the circumstances of damages for injury to a person.

MR PALMER:

30 I would agree that it could include that Your Honour.

TIPPING J:

It's an extremely unfortunately worded definition. It seems to say one thing in one place and then take it away later on.

MR PALMER:

It is lucky that we're not concerned with that definition quite so frontally in this case as with the definition of "foreign restraining order."

5

ELIAS CJ:

But the foreign restraining order is directed to ultimately securing a foreign pecuniary penalty order.

10 **MR PALMER:**

Yes it maybe Your Honour.

ELIAS CJ:

So they hook in don't they?

15

MR PALMER:

They could hook in, in time, depending on the nature of the order that is ultimately granted.

20 **McGRATH J:**

Well don't – I just would have thought there was a symmetry between them in the sense that tainted property and benefits would generally fit within the concept of a pecuniary penalty in respect of benefits derived by a person, would it not?

25

MR PALMER:

I think it does link in, in that way Your Honour. I think it's intended to link in.

McGRATH J:

30 And you've said that seems to be the balance I was looking for earlier and didn't see until you took us to the definitions.

ELIAS CJ:

So if there's a gap it's only in terms of compensation for injury to the person?

MR PALMER:

Yes Your Honour. Depending on –

5 **ELIAS CJ:**

To an injured person.

MR PALMER:

– exactly what the terms of that compensation are and whether it satisfies
10 those words.

TIPPING J:

So that it appears to draw something of a distinction between penalty and
compensation. If the penalty partakes of restitution of benefit it's okay?
15

MR PALMER:

Yes.

TIPPING J:

20 It's fairly subtle I must say but it could have been much better.

MR PALMER:

I agree with Your Honour.

25 **McGRATH J:**

Well it's presumably the intention to provide for what was appropriate in a
fairly robust procedure in the criminal area and then to draw the dividing lines
to where matters must be left to the civil area.

30 **MR PALMER:**

Yes Your Honour.

ELIAS CJ:

Yes.

BLANCHARD J:

Do these definitions mirror something in a convention? Or did we dream up these definitions?

5

MR PALMER:

It does reflect the Australian, the equivalent Australian legislation. I haven't looked in detail about whether those definitions also reflect the wording of the Harare Scheme or the model.

10

McGRATH J:

Is that what was cited by Justice Baragwanath or do you have – just referring to a model?

15

MR PALMER:

That could be the UN Model Treaty.

McGRATH J:

UN Model, sorry, yes.

20

ELIAS CJ:

Which this isn't based on, is it?

MR PALMER:

25

The legislation was enacted in response to a couple of treaty obligations but also in the context of the Harare Scheme model legislation and I –

ELIAS CJ:

The Commonwealth one?

30

MR PALMER:

The Commonwealth one, although I would just point out in response to my learned friend's comments this morning, that this legislation is not limited to the Commonwealth. Clearly it applies much more extensively than that. In

the respondent's bundle of authorities we have provided the text of the UN Convention Against Illicit Traffic and Narcotic Drugs and Psychotropic Substances which is one of the treaty obligations which – one of the conventions that was a relevant enactment of this legislation and the
5 Convention Against Transnational Organised Crime. The Model Treaty on Mutual Assistance is also there and what is commonly known as the FATF, faulty recommendations, the financial taskforce on money laundering.

ELIAS CJ:

10 Do these have any relevance at all?

MR PALMER:

The relevance Your Honour, not to this specific point, I don't think, that we were just discussing. The relevance is, is that it's the international context.
15 The question I was asked was whether there was anything that reflects the direct wording of our –

ELIAS CJ:

Then it might be relevant if ours was derived from any of these instruments
20 but from what you say it isn't?

MR PALMER:

I –

25 **ELIAS CJ:**

Subject to the Harare –

MR PALMER:

I cannot point you to any particular wording that it reflects.
30

McGRATH J:

There was no, as far as the Crown was concerned, there was no – none of these treaties were a direct source of the domestic legislation we're looking at?

MR PALMER:

Your Honour, the Drugs Treaty was one of the international obligations which was a direct reason for New Zealand to enter into its own – to enact its own domestic legislation, yes. And I think that's reflected in the explanatory note
5 which is at tab 1 of the respondent's bundle of authorities.

Perhaps I should turn to the – if I could return you to the Act, the Mutual Assistance Act, and the link to the Proceeds of Crimes Act. The Proceeds of Crimes Act at section 66B. So in general terms the Proceeds of Crimes Act is
10 the domestic legislation governing the proceeds of crime. Section 66B provides that where a foreign restraining order is registered under the Mutual Assistance Act, then this part of the Proceeds of Crimes Act is applicable, so far as applicable, shall apply in relation to the restraining order with all necessary modifications.

15

Then following section 66B there are a number of provisions that relate directly to the management and effect of a foreign restraining order that is registered as such. So section 66C provides that, and this is where the Court now has the primary action here, "The Court may, if satisfied on application by
20 the Solicitor-General that is desirable to do so, by order direct the Official Assignee to take custody and control of the property." And then there's provisions about the Court also being able to regulate the manner in which the Official Assignee may exercise his or her powers.

25 **BLANCHARD J:**

How does the Official Assignee, in practice, take custody and control of land?

MR PALMER:

Your Honour, if I can direct you to section 66G, foreign restraining order made
30 against property, enables the provision of a charge on a property to secure payment to the Crown.

ELIAS CJ:

Well you might want to go further through, but is it the position that on registration the OA enters the frame but his conduct is subject to the supervision of the Court?

5

MR PALMER:

Yes, Your Honour. Also 66H, where a charge is created under 66G, then the Solicitor-General may cause that charge to be registered, for example under the Land Transfer Act which deems notice to be given.

10

McGRATH J:

The charge obviously is an important element of this but taking custody and control presumably would permit a lot more, could enter into possession of property for example.

15

MR PALMER:

Potentially, it could permit that.

McGRATH J:

20 Let it, I think.

MR PALMER:

I'm sorry?

25 **McGRATH J:**

Could let the property here.

TIPPING J:

30 I seem to remember a case where the OA wanted to take possession but the accused was actually in possession and the Court then had to decide whether it was necessary for the OA to take possession for the preservation of the property. It was an allegation that this fellow might trash it or burn it down or something and I seem to remember that the Court felt it had the power to do that but whether it should exercise that power would, of course, depend on

what was established. So, I think the OA can take formal possession, even against an accused in the case of an anticipatory order, but it would be a fairly strong step to take.

5 **MR PALMER:**

It would be and it would have to be – there would have to be power for that to occur but its potential –

TIPPING J:

10 I think the power would be there and if the Court authorised it because there was subjective evidence that the man was going to burn the place down. I think it was an allegation, he had made an allegation he was going to – the Crown wasn't going to get it, he was going to burn it down. You know, one of those cases and I'm pretty certain –

15

ELIAS CJ:

One of those people –

TIPPING J:

20 – it was decided that the Court could kick him out for the preservation of the property.

MR PALMER:

25 Perhaps I can just also make the point that these provisions, in relation to foreign restraining orders, are mirrored in relation to domestic restraining orders also in the Proceeds of Crimes Act, sections 50 onwards –

ELIAS CJ:

30 Does section 64 and 65 apply, of the Proceeds of Crimes Act apply to registered restraining orders under the Mutual Assistance Act?

MR PALMER:

No, Your Honour.

ELIAS CJ:

They don't?

MR PALMER:

5 No because in section 66, it's in the brackets, other than section 64, 65 and 66.

ELIAS CJ:

10 Ah, so are those provisions as to revocation and duration and termination, they are not, there is no parallel in the mutual assistance legislation presumably because it is the foreign order that determines duration, et cetera?

MR PALMER:

15 Yes, that's the reason and as a provision governing revocation in foreign restraining orders, although I cannot point to it right down – cancellation of registration of foreign orders is section 58 of the Mutual Assistance Act. It may also be worth noting section 66D of the Proceeds of Crimes Act. Something has been made of the suggestion that undertakings as to
20 damages cannot be given. This is an explicit provision for undertakings as to damages or costs to be applied for. The overall point here for the Court, Your Honours, is that when a request for mutual assistance is made by a foreign state, that request is considered by the Attorney-General who determines how it should be handled. How it maybe handled can then involve
25 a decision by the Court. The Court, if it registers a foreign restraining order at that point, then the effect of that order comes under the Proceeds of Crimes Act provisions that I've just taken Your Honours through and there are a number of protections and provisions in relation to those orders.

30

McGRATH J:

If any further step is subsequently required following the conviction of a person who is subject to a foreign restraining order, that requires a separate application for the forfeiture law, is that right?

MR PALMER:

Yes Your Honour.

5 **McGRATH J:**

So, the Court could at that stage examine what the outcome was of the overseas proceedings and the nature of the penalty, any penalty that was imposed, whether it was by way of restitution or compensation or what?

10 **MR PALMER:**

Yes, Your Honour and whether it satisfies the definitions.

ELIAS CJ:

The suggestion that you are not pressing, although you have made that the
15 Court has very limited discretion in dealing with applications for registration, is supported by section 58 of the Mutual Assistance Act which also says that the Court shall discharge the order if application is made and which makes specific provision for an application to discharge where the order shouldn't have been registered, or where registration shouldn't have taken place under
20 section 56?

MR PALMER:

Yes, Your Honour.

25 **ELIAS CJ:**

Which suggests perhaps that it is the case that Court is only concerned to be assured that there is a foreign restraint order and that it is in effect?

MR PALMER:

30 That, in my submission, is the effect of the scheme and the purpose of this legislation yes, Your Honour. In relation to that point, I would just conclude by saying that the Attorney-General is of course responsible under the doctrine of ministerial responsibility to the House of Representatives for exercising those functions and if there was a question of the lawfulness of his exercise of those

functions, or her exercise of those functions, then presumably questions of judicial review could be entertained but that is not the nature of the action that is before Your Honours today. That really deals with the –

5 **ELIAS CJ:**

I'm not sure that I would accept, without more, that if the Court was of the view that the Attorney was, or the Solicitor-General was exceeding the terms of the Act, the Court would be warranted in saying well, we will leave it to another place or another time and judicial review application.

10

MR PALMER:

I'm not pressing that point Your Honour.

ELIAS CJ:

15 No.

MR PALMER:

In the context of that legislative scheme and purpose, I don't propose to address the points that my learned friends have made about human rights and property rights values. Your Honours will see from my one page road map that the Crown's simple point is that there is no reasonable basis for concern about human rights and property rights, either in abstract relating to New Zealand's legal framework here, or on the facts of this particular case. I wasn't proposing to go into that any further, unless Your Honours would like me to do so.

20
25

Turning then to the two most specific issues that are before this Court and which were discussed this morning, the first one is summarised in the respondent's submissions at part 4F, page 24 of the respondent's submissions, whether the Polish order restrains dealing property. I've already taken the Court to the **objects (15.00.35)** provision which deals with restraint but Your Honour, I think if I could summarise the Crown's argument here it would be that the Court in *Peniche* really asked, posed the issue wrongly as far as New Zealand legislation is concerned. The question is not whether a

30

foreign order is a restraint or a seizure as one could take from that judgment, the question is whether this foreign order restrains a person from dealing with property in accordance with the definition of foreign restraining order in this piece of legislation.

5

I wonder whether at this point –

McGRATH J:

Where the restraint is, its effect, whatever else its effect maybe.

10

MR PALMER:

Exactly, and the Crown would point to the findings of the Court of Appeal on their second opinion – their second judgment, I'm sorry Your Honours, where it found that whatever else this order did, it was a restraint.

15

I thought that at this point it would be useful to direct Your Honours to some of the aspects of the facts and the Polish order that is under discussion. Page 286 of the supplementary case on appeal, volume 2. At page 286 is the end of the public prosecutor's decision and it is followed by the enforcement clause granted by the regional Court in Wloszczowska. Your Honours have already looked at this page this morning, page 286, the Polish prosecutor considered that it was indisputable that the money was proceeds from the crimes the suspect is charged with and wished to secure Mr Bujak's assets in New Zealand against the fine he is likely to be punished with in repairing the damages he has caused by the crimes he is charged with.

20

25

Page 287 includes a variety of what you might think of as standard form clauses, but it's worth just pausing on the third paragraph. The first paragraph describes how the suspect can lodge a complaint against the decision, secure fines, the third paragraph, the security shall be annulled unless a fine is imposed in a legally valid manner or claim to repair damages are awarded and unless the action for such damages is brought within three months of the date of the award finalised in proceedings becomes legally valid.

30

TIPPING J:

That suggests that that latter process is a civil process, in our terminology because it follows the conclusion of the penal proceedings.

5 **MR PALMER:**

I think it does follow the conclusion of the fine, the process that may lead to the fine. Whether or not it's correct to describe it as civil or criminal, I couldn't say.

10 **TIPPING J:**

No. But of course you've got the fine element anyway.

MR PALMER:

15 Yes Your Honour. And then further down, two paragraphs down, you've got the request for exclusion so that there are a variety of protective safeguards in the Polish regime.

TIPPING J:

20 It says "Unless the Court in civil proceedings...", I don't want to appear like a cracked record, but it probably doesn't matter here in the end because of the fine connotation.

MR PALMER:

25 I suspect that's right Your Honour. I notice that this is a civil proceeding as well. The Polish law is set out on page 259, it's set out in a number of places actually but it's convenient to refer to 259, my understanding is that this document was part of the original mutual assistance request. If I could direct the Court to Article 291, 292, 293, which I'll just leave there for Your Honours to refer to later if you wish. But perhaps the more useful explanation of this is
30 contained in the prosecutor's, what's been called, deposition, which is on page 96 of the same volume.

This is a transcript of depositions from the Polish prosecutor taken in the District Court of Kielce, before a District Court Magistrate where the witness

was warned of her criminal liability for false statements and this, Your Honours, is the document which I have found the most useful in understanding the Polish regime. This was provided – the new evidence that was available to the Court of Appeal in its second decision compared to its first. After some preliminary matters, page 98 is a description of Polish procedure, criminal procedure, decision to formulate accusations and indictment, when someone becomes a suspect. I don't propose to take Your Honours through this detail, and then page 99, paragraph 14, once a Court grants the enforceability clause, and the public prosecutor has issued a decision to seize assets, this is an explanation of what that is for. The purpose of asset seizures is to ensure the enforceability of a future pronouncement of the Court in cases of certain types of penalties and penal measures and to facilitate the successful collection of claims for reparation. Seizure can only involve claims for reparation of a damage caused by crimes against property.

Paragraph 15, a number of instances where assets may not be seized. Over to page 100, paragraph 24, up until the issuing of a judgment with legal force, actions by the executive authority merely have the purpose of securing property for the possible enforcement of a Court judgment with legal force. The next paragraph as well, the decision to seize assets is a provisional decision, pending a final judgment of the Court. Finding as follows, guilty or not guilty.

25 WILSON J:

It seems clear Mr Palmer that when the order talks of seizure, that's not seizure in the sense of forfeiture?

MR PALMER:

30 Exactly, Your Honour. It is however, Crown would argue, it satisfies the definition of restraint and I can point Your Honours to paragraphs on the next page as well, 26. Twenty six is an explanation of the way in which enforcement of a decision to seize assets is carried out in Poland. It talks about 27, encumbrance with a mortgage –

BLANCHARD J:

26(2) appears to be a complete parallel with what is contemplated under the Proceeds of Crimes Act provisions that you were referring us too?

5 **MR PALMER:**

Yes Your Honour.

TIPPING J:

The charge to secure –

10

BLANCHARD J:

Yes, an obligatory mortgage is the same thing.

MR PALMER:

15 And then on 30 the point is re-emphasised again. Under current Polish law the seizure of assets in the context of an enforcement of a decision to seize assets, is not and cannot be construed as a confiscation of assets. The purpose is to prevent the disposal by the accused, the suspect of specific assets as defined in the decision. So that the suspect will not get rid of the
20 assets before the issuing of the Court charge with legal force.

In this document there is then some observations about the circumstances of Mr Bujak and on page 102, paragraph 33, a statement that there was a high probability that Mr Bujak, if the Court finds him guilty, will be ordered to pay a
25 fine and sentenced to penalties in the form of reparations or ordered to pay compensation for the damage caused to physical and legal persons. If that was to occur and if that was then sought to be registered in New Zealand there'd be a whole other process to go through.

30 Page 103 contains other paragraphs which emphasises the same points that I've already taken Your Honours too.

TIPPING J:

This deposition was in support of the Polish ratification if you like. It wasn't brought into being for the foreign dimension, am I right? Or is this document brought into being for New Zealand purposes?

5

MR PALMER:

Yes it was Your Honour.

TIPPING J:

10 It was? Right.

MR PALMER:

I think when the Court of Appeal –

15 **TIPPING J:**

As an explanation of what –

MR PALMER:

Yes.

20

TIPPING J:

Right.

ELIAS CJ:

25 This is the additional material so this came in when? To the second Court of Appeal hearing?

MR PALMER:

Yes Your Honour.

30

ELIAS CJ:

Yes.

MR PALMER:

For the High Court hearing so it was before Justice Clifford and then the second Court of Appeal. So it's dated 21 September 2007. Your Honours, if I can refer you now to the respondent's submissions in relation to the point about the language that is used to describe "seizure" or "restraint".
5 Paragraph 75 of the respondent's submissions goes through a number of the international instruments which forms the context for New Zealand's legislation and isolates some of the different forms of words that are used, "seize", "freeze", "confiscate", "seize restraint". The point is Your Honours that
10 the Crown is arguing that it is the substance of the following order that must be examined for consistency with New Zealand statutory definitions, not the form of the language used and we are not urging a formalistic approach to that question.

15 Your Honours the Court of Appeal in its first decision did appear to be attracted to the *Peniche* authority but I would make the point that it did not rule on that conclusively as the language in that first Court of Appeal illustrates clearly. Secondly, that the major point that the Court of Appeal in its first decision was addressing was whether the High Court should have proceeded
20 by way of ex parte process and procedure. The point about whether there is a point of legality to deal with the satisfaction of the definition of foreign restraining order, in my submission, should be seen in that context.

The second Court of Appeal decision is clearer, having considered the issue
25 and having the advantage of the additional evidence before it, and I would take Your Honours in the second Court of Appeal decision to paragraphs 41 and 42 and 48. This is in the supplementary case on appeal, volume 3. At paragraph 41 the Court said that, "It is quite clear from the Public Prosecutor's evidence that among the effects of the order is to freeze
30 the property and prevent others from dealing with it until further order of the Court. Whatever label maybe attached to it, that is in point of fact a restraint. As we have noted..." and then presumably it, "...is immaterial that the seizure authorised by the Polish order is more intrusive than a mere restraint: to the extent it constitutes a restraint it becomes an order under the PCA..." the

Proceeds of Crimes Act, "...insofar as it exceeds that character it is not given effect under New Zealand law." And we've seen the section which provides for that.

5 So Your Honours in order to make the New Zealand's Mutual Assistance legislation workable, and to achieve its purpose and objects, the Crown's submission is that this order must be interpreted to fall within the definition of a foreign restraining order.

10 Unless there's further questions on that issue I could then –

McGRATH J:

It would be difficult for you to make an argument for that workable interpretation in respect of the subsequent forfeiture orders, wouldn't it?

15 I mean it's the – the strength of the submission really depends on the fact that at this stage we're only concerned with restraining property to prevent the person concerned from dealing with it. Subsequently we'd have to focus on whether it was the – whether the type of order made in the overseas jurisdiction actually fitted what the scheme of the legislation allowed?

20

MR PALMER:

Yes Your Honour but I don't think I'd conceive that it would be difficult in advance of seeing what the form of that order was.

25 If I could then turn to the other issue that may have been the subject of some consideration this morning and that's the question of benefits derived. This is part 6D of the respondent's submissions. The Crown's contention, Your Honours, is that the plain words of the definition illustrate that the Polish order satisfies the definition of foreign restraining order here.

30

TIPPING J:

There is a degree of overlap isn't there between the concepts of tainted property and benefits because if you get money from a crime and put it into

property, that's tainted property, but the property also represents the benefits of the crime?

MR PALMER:

5 Yes Your Honour. There maybe some overlap and perhaps this explains, there was some comment this morning about the Crown's position at the various hearings throughout these proceedings. The Crown argued before the High Court that the second limb, benefits that have been derived or may have been derived by a person from the commission of such an offence, was
10 clearly satisfied. The Crown did not seek to argue that the tainted property definition was also satisfied because it considered that if the second element of that definition was clearly satisfied and that was an easier thing to show. The Court of Appeal, I should point out Your Honours, did find that both limbs were satisfied, but that was not because of a change in the Crown's position
15 of argument.

ELIAS CJ:

Can you just refer to the paragraph reason where you say the Court of Appeal said both were satisfied? Now I'm getting quite confused.

20

MR PALMER:

This is the supplementary case on appeal, volume 3, paragraph 22(c)(1), the Polish order is indeed such an order indeed satisfying both subparagraphs of paragraph A.

25

WILSON J:

Didn't the evidence from the prosecutor really prima facie establish both grounds?

30 **MR PALMER:**

Yes, Your Honour. It is property that is or maybe tainted and benefits that have been derived or may have been derived.

TIPPING J:

I would have thought if you've got, if you own some tainted property, it's almost axiomatic that it will also represent a benefit derived from the commission of the crime.

5

ELIAS CJ:

Well it may though be, could it be property that's been used in the commission of the crime?

10 **TIPPING J:**

Oh yes, it could be, yes.

ELIAS CJ:

So not a benefit directly.

15

TIPPING J:

Well if it was under that limb of tainted property, yes. Yes, sorry I was being a little elliptical.

20 **MR PALMER:**

I will also point Your Honour to paragraph 39 of the Court of Appeal's judgment which makes this point in a little bit more detail. There is substantial evidence that the respondent committed a relevant serious offence and the Polish order was in respect of property that is or may be tainted and constituted benefits that have or may have been derived. Your Honours, just worth pausing on the serious offence point there, the respondent's submissions in paragraph 6 listed, for the sake of clarity, the offences which are alleged to have been committed in Poland, but I should clarify that the last three of these offences do not satisfy a definition of foreign serious offence because their maximum penalty is less than five years. So paragraph 6.6, 6.7 and 6.8, those offences are not the subject of this consideration.

30

McGRATH J:

Sorry, what are you reading from here?

MR PALMER:

Sorry, the respondent's submissions. So the first –

5 **ELIAS CJ:**

Is that an error that you're acknowledging in your submissions?

MR PALMER:

10 No, it's not an error Your Honours. I'm just trying to clarify what the respondent's submissions say in a subsequent paragraph is the offences under Article 284(2) of the Polish Criminal Code and 286(1), the other serious offences, and that corresponds to the offences listed at 6.1 to 6.5 of our paragraph 6.

15 **BLANCHARD J:**

Do you know why the Polish prosecutor included all the material about bankruptcy offences or conduct in a bankruptcy? Which seems to have just muddied the waters.

20 **MR PALMER:**

Your Honour, if Your Honour's referring to some of the material examined this morning, my understanding is that that material, which I think, as my learned friend acknowledged, was put into evidence in this proceeding, relates to the extradition proceedings that are parallel to this. It does not relate to the
25 offences which are relevant here.

BLANCHARD J:

I see.

30 **TIPPING J:**

Your key answer, as I understand you Mr Palmer, to the appellant's restraint/seizure point is that never mind what it's called, if it amounts to a restraint, it qualifies.

MR PALMER:

Yes Your Honour. It satisfies the statutory definition and is consistent with the object and the purpose of this legislation. There are a number of other specific issues which were addressed by my learned friend which I will not necessarily
5 address unless the Court wishes me to do so. The other issues that the Crown has provided argument about are reflected in the respondent's submissions in that part 4, but unless the Court wishes me to go through those, they are –

10 **ELIAS CJ:**

No thank you, Mr Palmer.

MR PALMER:

Then I would simply move to the summary point on my one page road map,
15 which simply is that the Polish order – it is the Crown's case that the Polish order in this case clearly satisfies the requirement of the Mutual Assistance Act as a foreign restraining order, the Court of Appeal is correct to order accordingly that it be registered in New Zealand. May it please the Court, that's the submissions for the Solicitor-General.

20

ELIAS CJ:

Thank you Mr Palmer, Ms Laracy.

MR ORLOV:

25 May the Court please, strictly in reply. My learned friend talks at part 4 of his road map about, that this case is not about human rights and property rights. However, the one thing that appears to have been conceded is that the Proceeds of Crimes Act and the MACMA legislation does not deal with compensation or injury to victims but deals with disgorgements of benefits.
30 Now, what the Polish legislation deals with is compensation and security for that compensation and therefore it's a totally different creature. As such, my learned friend also says that the form is really irrelevant, we must look at the substance –

ELIAS CJ:

But that's about injury, that's the difference.

MR ORLOV:

5 More than that, an injury would, in my submission, include compensation and damages for injury by –

ELIAS CJ:

Consequential loss.

10

MR ORLOV:

Consequential loss, yes. But the issue of – this is the key, the benefit, that's why the Court has to strictly look at the legislation and scheme of the legislation in terms of benefit because otherwise, what the Polish Court is in fact asking to do, is to secure potential damages payments to victims, that's the essence. I just want to turn firstly to what I submit is correct, the decision of Justice Clifford, who talks about Ms Orłowska's evidence, this is in bundle of authorities, volume 1, page 16, at A and I want to start – yes, at paragraph 56 just to begin with. Justice Clifford concedes that as far as Ms Orłowska is concerned, on her evidence, her decision to seize Mr Bujak's property did so on terms that she was concerned in relation to benefits, that's her later evidence. However, at paragraph 57, he says it's less clear, however, that the Polish Court itself did likewise.

25 He states at 58, "The Polish Court's decision as translated and set out in the original case on appeal was in terms that the Court, having considered a motion by the district public prosecutor..." et cetera, and then paragraph 59 is the key provision, "Ms Orłowska's statement did not address itself to the significance of the text of that decision. Furthermore, I was not provided with a copy of the motion referred to by the Polish Court, nor was I provided with any explanation at least in a form that I could understand of the reasons section of the Court's decision, nor in particular of the significance of the various provisions of the Polish code of executive penal procedure and the Polish code of civil procedure that were therein referred to. Finally, as I've

30

already noted, Ms Salmond's admissions that the prosecutor decision and the Court order should be read together were not supported by any Polish material."

5 And at 60, "Given the onus on the Crown and the significance of the registration of a foreign restraining order as commented on by the Court of Appeal, I therefore do not consider that the Solicitor-General has discharged that onus. In my submission, the whole tenor of that judgment goes back to the provisions as they are read on their face and they are clearly
10 not proceeds of crimes provisions."

Now, this is what the second Court of Appeal decision discusses in relation to that point which, in my submission, lacks clarity and logic and I just want to go through some of those provisions. The Court of Appeal decision is at bundle
15 of authorities volume 2, dated the 11th of March, it's at annexure B. I'd start at paragraph 22. Now, the Court said at (a), 22(a), if the Court can, I'll just wait for the Court to find it.

ELIAS CJ:

20 I'm just trying to work out how this arose in the submissions we've heard but however, carry on.

MR ORLOV:

Sorry, Ma'am. I'm, sort of – because I'm in reply. The Crown, in my
25 submission, has stated that the context of what it is, the human rights and property rights issues and what the order is on its face, is irrelevant in a sense because it can be read down, et cetera. However, my submission is that that's precisely the essence of my argument, that because the Court's scope is so limited in terms of whether or not to register the order, as long as the
30 order complies on the face it basically must register it. The fact that the order does not comply on its face and the fact that the Crown to reapply, Poland can reapply, means the Court has a jurisdiction because the Crown is in effect arguing it doesn't have any jurisdiction. Now, also I want to point just to a few matters –

TIPPING J:

You've addressed 22(a) but on the face of it, it looks entirely sound. Having addressed it, are you just not going to say anything about it?

5

MR ORLOV:

Oh, oh, sorry sir, I was about to. I was answering –

TIPPING J:

10 Oh, you were about to, were you?

MR ORLOV:

Yes, 22(a), the Court is absolutely correct in saying that it is unnecessary for this Court to consider the law of the foreign state, however that's precisely what the Court of Appeal in its second judgment did. Instead of looking at the face of the order and the law –

15

TIPPING J:

Beyond the factual issue of whether the conditions of the New Zealand statute are satisfied?

20

MR ORLOV:

Yes but that's what it did do. It took Ms Orłowska's evidence on what the law means and what benefit means and what she intended by the order to supersede the strict formal language of the order which had nothing to do with benefits. That's the –

25

ELIAS CJ:

Are you saying that if the Court, under the mutual assistance legislation, does not have a very wide discretion it must be vigilant to ensure formal compliance, is that what you're saying?

30

MR ORLOV:

Absolutely Ma'am, that's –

ELIAS CJ:

On the face of the order?

5 **MR ORLOV:**

That's precisely what I'm saying because if the order extends beyond the proceeds of crimes jurisdiction to include civil penalties and civil securities because of the Court's limited jurisdiction it is being asked in effect, by reading down, there's no value in defining –

10

TIPPING J:

Surely you're not arguing that the translation from the foreign state must use the very same language as that of our legislation?

15 **MR ORLOV:**

No, absolutely not Sir but –

TIPPING J:

Well, then it is a matter of substance, isn't it, not literally.

20

MR ORLOV:

Not really Sir because if the legislation on its face intends to secure or seize property for the purposes of damages, in other words, to compensate victims of crime –

25

TIPPING J:

This is a point you've picked up from Mr Palmer I think, isn't it?

MR ORLOV:

30 Well –

TIPPING J:

It didn't feature very heavily in your original submission.

MR ORLOV:

Well, not really Sir. That was the essence of my whole submissions from the beginning, that it was a different species of creature. Mr Palmer simply conceded the point that the proceeds of crimes legislation does not cover
5 compensation but the whole process of the Polish proceedings was precisely and only about that and that is my submission. It was like a quasi-civil criminal compensatory mechanism to freeze property for that purpose.

TIPPING J:

10 But was it solely that?

MR ORLOV:

In my submission, it was predominantly that in form and that was enough to strike. Now when the Court says that it's unnecessary for this Court to
15 consider the law of the foreign state, the Court is right but that's precisely what it did do. It used Ms Orlowska's evidence to supersede the natural meaning of the order as Ms Orlowska, as the Court had made it. That is the purpose - that is my precise argument. The natural meaning of the order was not a restraining order and I go back to my original argument. If the Court
20 actually is given the role of considering what a restraining order means but if the Court of Appeal is right, then it can read down or read any way, then there is no function in deciding what it means, it's a rubber stamp argument. It means the Attorney-General can basically say well, we'll read this down, here's a prosecutor's submission that it was really in relation to benefits and
25 you must stamp it, you don't have a role –

ELIAS CJ:

It's not really either/or is it? It's whether the Court has to have evidence which expands the – you say they can't go behind the formal form of the foreign
30 order and they were not able to look at the prosecutor's explanation but why not?

MR ORLOV:

Ma'am, the reason why not goes back to my initial human rights arguments because the importance of this issue, I'm not taking a formalistic approach but an approach of the deep and fundamental values which our legal system has.

5 If the Proceeds of Crimes Act is, as is admitted by my learned friend, simply designed for disgorgements of benefits but if another country asks us to secure all assets to secure potential fines, we're expanding the limits of a jurisdiction which doesn't even allow the Court to look behind the orders. So it's very important that the Court allows those orders to be strictly confined
10 because they are a fundamental interference with property rights. What is clear on the face of the orders, as found by Justice Clifford, is it has nothing to do with benefits or even proceeds of crime. It has to do with compensation and other issues and I've taken the Court to where he found that. I don't think the Court of Appeal has actually said that Justice Clifford is wrong, what
15 they've said is well, even if that's true we'll read it down but –

TIPPING J:

Are you saying in effect, that the definition of "foreign restraining order" must be read in the light of the definition of "foreign pecuniary penalty order?"

20

MR ORLOV:

Absolutely Sir, they are both linked. In other words, a foreign restraining order can only restrain proceeds of crimes which will be the subject of foreign pecuniary penalty order and a foreign pecuniary penalty order is only an order
25 that is related directly to the benefits of the crime. It goes back to my example where for example, a man has broken the law in Poland but he's a multi-billionaire in America. Can Poland arrest all his assets for compensation of victims rather than for the actual benefit he derived –

30 **BLANCHARD J:**

But don't you face the difficulty that the Polish order is also to secure the fine?

MR ORLOV:

Sir, the fine – that’s precisely the point. A fine in Polish law from the face of it is not limited or directed to the benefit. A fine can exceed or even not be related to a benefit. For example, a fine for assaulting someone, there may
5 not have been a benefit but there may be a fine. So, the problem here is that the Polish legislation has nothing to do with the proceeds of crimes –

BLANCHARD J:

It would be an unusual legal system in relation to property crime had the fines
10 unrelated to the benefit, it was achieved by the convicted person?

MR ORLOV:

I agree Sir but the problem with Poland is not only is it an unusual legal system, it’s not quite – because the limited role of the Court in looking behind
15 what the Polish legal – we don’t really know what the Polish legal orders mean. We certainly know that they’re not proceeds of crimes orders but beyond that, we don’t whether they mean – for example, what they mean –

ELIAS CJ:

We know he doesn’t have any assets in Poland, they’ve said that, that he sold
20 up and moved his assets offshore including to New Zealand. Why can’t the Court draw the inference supported by the evidence of the prosecutor that the benefit of his crimes have been – are in New Zealand property?

MR ORLOV:

Because I go back – I guess it goes back to the purpose of the Polish order and its legislation and I’m very clear on this point. In terms of the fact that if
25 the purpose of the Polish legislation is nothing really related to benefit at all, and which it appears on the face, but to compensate victims, then the compensation can exceed in a multiple fold what the actual benefit was, if
30 there was any. And the danger then is that the expansion of the Proceeds of Crimes Act by the Courts to make it available to arrest any property because on common – in terms if one looks at the Insolvency Act it can – and that’s

what seems to be avoiding selling one's own assets to avoid a judgment, can then be used in a quasi-civil by foreign countries to arrest all assets.

ELIAS CJ:

5 But then you're back to the "may" be. It "may" be the proceeds of crime. It "may" be –

TIPPING J:

10 I think I got a glimmer of what you're saying which is that it's a sort of quantum point. There's a capacity to overreach the benefits by freezing property far in excess of what objectively the benefits might be. Is that what you're saying?

MR ORLOV:

15 Absolutely but only part of that Sir. The next thing I'm saying is that – and I'll go back to the nature of the statutory –

TIPPING J:

It is hardly a reply I have to say.

20 **MR ORLOV:**

Well yes Sir it is but that's the reply but there's a second much more fundamental argument to what I am saying. The Court can look at the nature of the statutory scheme in New Zealand, and the nature of the foreign request. Do they match? In my submission no because the foreign scheme is not
25 related to proceeds of crime at all. It's related to compensatory mechanisms. The proceeds of crime legislation was enacted to fight organised crime. It was enacted as a draconian measure to seize and stop assets. It was not intended to be extensive and I go back to this point.

30 At paragraph 26 of the Court of Appeal's judgment where it says it's necessary to look at the character of a foreign restraining order and of a registered order but if the Court, as I was saying, is allowed to simply say well it means whatever the prosecutor say it means, then the Court has no role in determining the character. If it has no role that means every single order

should be registered automatically and read down in light with the legislation even if that order is intended to secure damages unrelated to any proceeds of crimes.

5 I go back to the example of the house burnt down. Under the Proceeds of Crimes Act if a man burnt down a house, rightly or wrongly, he would not be allowed to have his assets frozen because he didn't get a benefit, unless of course he got an insurance payment under the house but that's a different - he wouldn't get a benefit. So to compensate the victims of the
10 burning of the house would not be part of what Parliament intended under the Proceeds of Crimes Act. There might be other Acts to work under. For example as I was mentioning Mareva injunctions, quasi-civil administrative.

15 **ELIAS CJ:**

We do understand this argument. You have developed it.

MR ORLOV:

And at paragraph 27 my submission is the Court is just simply wrong. It does
20 lead to an odd result to read it down where it's saying it doesn't read to an odd result where the Court is reversing its former argument it does and a very odd one at that.

TIPPING J:

25 Do you accept that a foreign restraining order is in effect an anticipation in part of imposing a pecuniary penalty in respect of benefits derived?

MR ORLOV:

No Sir I don't.

30

TIPPING J:

You don't?

MR ORLOV:

In fact what I'm saying is that the restraining order was in anticipation of compensatory orders.

TIPPING J:

5 It may have been in part but surely it forecast the possibility of a pecuniary penalty in respect of benefits?

MR ORLOV:

No Sir and I'll explain why.

10

TIPPING J:

Well can you do it as simply as possible so I can try to understand?

MR ORLOV:

15 Yes as simply as possible. A pecuniary benefit is an action taken by the government –

TIPPING J:

No it's a pecuniary penalty.

20

MR ORLOV:

Yes a pecuniary penalty, sorry Sir, is an action taken under the Proceeds of Crimes Act by the government to disgorge the benefit the criminal has received himself back to the government. A compensatory order is a creature
25 and animal totally different. It's to compensate victims. Now the Proceeds of Crimes Act is not a compensatory weapon. It does not simply contemplate it by the legislation. That's the principle and that is exactly what the Polish government is asking our government to do. To secure assets in order to compensate proposed victims, not the Crown, not the government, not in
30 terms of a pecuniary penalty order, but for some other mysterious reason which Justice Clifford has said, I haven't got sufficient evidence on.

TIPPING J:

I understand. Thank you, that's helpful.

MR ORLOV:

Now what my submission further at paragraph 28 is this sort of approach –

5 **BLANCHARD J:**

Paragraph 28 of what?

MR ORLOV:

Sorry, the second Court of Appeal's judgment. This approach taken by the
10 Court of Appeal was only possible because they've characterised the public
prosecutor's order as an order rather than as an application. Therefore they
should, because it's an order and the public prosecutor says it was because of
benefits, therefore we'll agree with her that it was. But it wasn't an order, it
was an application. She applied to the Court, she gave evidence. It's not
15 quite clear what evidence she gave. It's not quite clear what her application
was, and therefore it was wrong in law to characterise her initial or her further
application as an order. And that was the only way that the Court could in
essence logically or attempt to logically define the Polish Court's order as a
pecuniary penalty or some form of restraining order otherwise it just couldn't
20 inform – be seen to be that.

Now why did they, and this is the essence here. At paragraph 32 of the
second Court of Appeal's judgment, why did they disagree with the
High Court's approach? And at 32 they're saying that because of the material
25 that was supplied through diplomatic channels they couldn't go behind it. Now
my submission is that's wrong in law because initially they said all they need
is the form of the order. They don't need to –

McGRATH J:

30 We did indicate to Mr Palmer we didn't want to hear him on this. It hardly
seems to be a matter of reply.

MR ORLOV:

Sorry Sir, then I won't – so in essence – I go back to what – in my closing and final submission I go back to what this Court may have characterised as a deliberate gap in the legislation in response to my learned friend's, what I
5 submit, concession in terms of the deliberate gap, there is a deliberate gap and this is the essence of my argument. That deliberate gap is made in terms of the very serious considerations to protect property rights that Parliament was clearly looking at and protect other rights and extending scope of orders of this draconian nature would fill the gap in a reverse fashion. In other words
10 in my submission the Court is a bastion of protecting civil liberties not eroding them and my learned friend is asking the Court to actually support the erosion of these liberties by making the Court into a further rubber stamp of executive action which is clearly in conflict of extradition proceedings and restraining orders, something that the Court should be very vigilant to avoid.

15

Now, in terms of the harm and my final answer is that had the Polish government wanted to perfect its order, there is nothing in the legislation stopping it from reapplying 100 times to perfect the order –

20 **ELIAS CJ:**

They have to have it formally right.

MR ORLOV:

Yes, yes, they have to have it formally right and the reason they haven't
25 Ma'am, is because they can't. Their legislation is not proceeds of crimes legislation, they don't have the ability to perfect but what they are doing is they are holding property for years on the basis of a totally different legal system and intention. Now, in a Mareva injunction sense, they might have been allowed to do that. I also dispute my learned friend's argument that damages
30 can be applied for under the MACMA scheme. I haven't been able to find a provision under MACMA which allows damages by foreign government to be given undertakings but I stand to be corrected on that. Under the Proceeds of Crimes Act possibly but not under the MACMA. That means a

foreign government can hold property indefinitely, without redress. As the Court pleases.

ELIAS CJ:

- 5 Thank you Mr Orlov. Thank you counsel. We will reserve our decision in this matter.

COURT ADJOURNS: 3.51 PM