Judgment 19/2011

The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investments Limited – Court of Appeal (File No. 432) - 6th July, 2011

Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 – Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999 – appeal against a decision of the Royal Court granting a judicial review of a decision of the Financial Intelligence Service. Appeal allowed.

THE COURT OF APPEAL OF GUERNSEY

The 6th day of July, 2011 before Sir John Nutting Bt QC presiding, James Walker McNeill QC and Clare Montgomery QC

THE CHIEF OFFICER, CUSTOMS & EXCISE, IMMIGRATION & NATIONALITY SERVICE

(Appellant)

-v-

GARNET INVESTMENTS LIMITED

(Respondents)

In the matter of the appeal by Garnet Investments Limited from the Judgment of the Royal Court handed down on the 14th February, 2011;

THE COURT, having on 5th and 6th July 2011 heard Crown Advocate F Raffray for the Appellants and Advocate C H Edwards for the Respondents, this day GAVE JUDGMENT in the terms attached and: -

1. ALLOWED the appeal; andc
2. DISMISSED the Respondent's application for judicial review

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

5 AND 6 JULY 2011

Before: **CIVIL DIVISION**

Between: **Sir John Nutting Bt QC Presiding**
James Walker McNeill QC
Clare Montgomery QC

THE CHIEF OFFICER, CUSTOMS & EXCISE, IMMIGRATION & NATIONALITY SERVICE **Appellant**

and

GARNET INVESTMENTS LIMITED **Respondents**

Advocate Raffray represented the Appellant
Advocate Edwards represented the Respondents

JUDGMENT

Montgomery JA:

1. The Chief Officer of the Guernsey Cross Border Agency seeks leave to appeal the Judgment of Lieutenant Bailiff Newman QC dated 14 February 2011, in which the Lieutenant Bailiff granted an application made on behalf of Garnet Investments Limited ('Garnet'), for judicial review of a decision of the Financial Intelligence Service ('FIS').

2. The decision of the FIS was taken on 29 June 2009. The FIS refused to consent to instructions given by Garnet in relation to its bank accounts held with BNP, Guernsey, under subsection 39(3) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 as modified in accordance with the provisions of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance, 1999, section 1 (2), Schedule 2, paragraph 16, with effect from 1st January, 2000 ('the Guernsey Proceeds of Crime Law'). For reasons set out below we grant leave to appeal.

Background

3. On 13 March 1998 Garnet was incorporated in BVI. According to an affidavit sworn by Hutomo Mandara Putra in support of the application for judicial review, Mr Hutomo is the beneficial owner of Garnet and of a company V Power Limited that in 1994 acquired a 60% shareholding in Lamborghini. Mr Hutomo, who is now in his mid 40's, states that he is unable to provide any further information in relation to the purchase of the Lamborghini shares, notwithstanding the fact that the acquisition of this asset must on any view have been a significant investment for a man who would then have been in his 20's when he might have been expected to be in control of his own business affairs and able to provide at least some account of his own economic activities without reference to others or to documentary records.

4. At the time the Lamborghini shares were acquired, Mr Hutomo's father, Haji Mohammed Soeharto was the President of Indonesia. Mr Soeharto held that office between 1967 and 1998.

This familial relationship has given rise to suspicions as to the circumstances in which Mr Hutomo might have obtained the personal wealth necessary at such a young age in order to make an investment of the size of the Lamborghini investment. His father was unlikely under the Indonesian Constitution to have been in a position to generate lawfully any significant familial wealth and there may also have been limits of propriety affecting Mr Hutomo's ability to develop a significant personal asset base through commercial activities in Indonesia.

5. The shareholding in Lamborghini was sold in 1998 to Audi AG for $48 million. On 22 July 1998 Garnet opened accounts at BNP Guernsey and V Power transferred US48 million to Garnet. In August 1998 £2 million said to originate from Mr Hutomo's personal account with Aspinalls in Mayfair was transferred to the Garnet accounts with BNP and in September 1998 £6 million was transferred from a company called Latona which is said to be the proceeds of a property transaction. In 1999 a company called Motorbike transferred approximately US$ 12 million to Garnet as the result of the sale of an interest in the business of Superbike International Limited.

6. Despite the ostensible coincidence in time between the disposal of various assets, the funds flowing into Garnet and the loss of power by Mr Soeharto, Mr Hutomo denied in his affidavit that the timing was related to the resignation of his father in 1998.

7. Following Mr Soeharto's loss of office in Indonesia, proceedings for corruption were brought against Mr Hutomo and he was convicted of corruption by a Judge sitting in the Supreme Court of Indonesia on 22 September 2000, in what was known as the "Goro" case. The Judge sentenced him to 18 months' imprisonment and fined him IDR (Indonesian Rupiahs) 30.6bn.

8. Mr. Hutomo went on the run, and was later convicted of planning the murder of the Supreme Court Judge who had found him guilty of corruption. On 20 November 2001, the Supreme Court verdict of corruption against Mr. Putra was quashed.

9. On 26 July 2002 Mr Hutomo was sentenced for murder, fleeing justice and illegal possession of firearms. The First Instance Court sentenced Mr. Hutomo to 15 years' imprisonment. That sentence was later reduced to 10 years' imprisonment. He was released from jail in October 2006

10. In October 2002 Garnet issued instructions to BNP directing it to transfer funds totalling approximately €36.46 million from the accounts. BNP refused to comply with these instructions and on 1 November 2002 BNP notified the Guernsey Financial Intelligence Service ('FIS') of those instructions. The FIS refused to consent to BNP acting on the instructions.

11. On 28 February 2003 Garnet issued new instruction to BNP to pay the balance of the BNP accounts, bar US$1 million, to an account in Singapore. BNP refused to comply with this instruction. However in June 2004 following inquiries made in Indonesia by BNP, BNP notified the FIS that it was no longer suspicious of the source of the funds transferred by Motorbike and in due course transferred the Motorbike funds on the instructions of Garnet.

12. On 3 March 2006 Garnet issued proceedings in Guernsey against BNP (the mandate proceedings) in connection with its failure to comply with the instructions given in relation to the funds from V Power connected with the Lamborghini transaction (the Lamborghini funds). On 10 March 2006 BNP sought consent to pay away the Lamborghini funds from FIS. On 14 March 2006, the FIS refused to consent to this.

13. BNP lodged a defence in the mandate proceedings that pleaded, amongst other things, that it was an implied term of the banking contract with Garnet that the accounts would be operated in accordance with the provisions of the Guernsey Proceeds of Crime Law and that BNP could refuse to operate the accounts in any way if to do so might expose the Bank or its employees to the commission of a criminal offence. As part of its defence, in an affidavit sworn by Antonia

Bligh in May 2006, BNP revealed that it had made disclosures under the Guernsey Proceeds of Crime Law to the FIS and that it had sought and been refused consent to act on the instructions given.

14. In 2007 the Government of Republic of Indonesia joined the mandate proceedings as a party since an issue was raised in those proceedings as to whether the funds held by BNP might be subject to a constructive trust in favour of the Government of Indonesia. The Government of Indonesia sought and obtained a civil freezing order in respect of the Garnet accounts on 22 January 2007. This order was in due course discharged on 9 January 2009 by the Court of Appeal (Rowland, Bailiff, Vos and Montgomery, JJ.A.), see *Garnet Investments Limited v. BNP Paribas (Suisse) S.A. and Government of Republic of Indonesia*, [2009-10] GLR 1.

15. On 13 February 2009 Garnet issued fresh instructions to BNP to transfer part of the Lamborghini funds to an account in Indonesia and on 27 March 2009 Ozannes, on behalf of Garnet, wrote to the FIS explaining why the FIS should consent to BNP making this transfer. On 29 June 2009 the FIS wrote to Ozannes informing them that BNP "has been refused consent to make payments requested by Garnet Investments from its account at the Bank." We shall refer to this decision as 'the consent decision'.

16. On 3 July 2009 the FIS confirmed that the consent decision would be maintained, notwithstanding the dismissal of an application made on behalf of the Government of Indonesia for special leave to appeal the discharge of civil freezing order in the mandate proceedings to the Privy Council.

17. On 1 October 2009 Garnet made its application for judicial review of the consent decision. On 14 February 2010 the Lieutenant Bailiff gave judgment in favour of Garnet holding that the decision of the FIS was irrational and disproportionate, constituting an excessive interference with Garnet's property rights and a breach of Article 1 of Protocol 1 to the European Convention on Human Rights.

The purpose of the consent power

18. The starting point for the application for judicial review was the contention that the provisions relating to consent contained in subsection 39 (3) of the Guernsey Proceeds of Crime Law were conferred for the purpose of permitting an informal freeze to be effected on behalf of the police over funds suspected of being the proceeds of crime so that applications might later be made for criminal restraint orders and confiscation of those funds.
19. The Lieutenant Bailiff accepted this central contention, concluding at paragraph 40 of her judgment that the consent provisions served "the legislative object, seen in the Billet d'Etat introducing the legislation, of permitting the law enforcement agencies to pursue those who benefit from crime" by refusing consent to transact so that criminal investigations may be made and action may be taken to restrain the funds under the provisions in the Guernsey Proceeds of Crime Law which allow funds to be restrained.

20. The identification of this purpose led the Lieutenant Bailiff to conclude that, after a period of years, if no criminal proceedings had been started at all and no active criminal investigations were in train that could lead to some form of criminal proceedings, it was irrational and disproportionate for the FIS to refuse to consent to the transaction since there was no realistic prospect of any action being taken by any criminal law enforcement authority that might lead to the funds being restrained or confiscated.

21. We agree that the issue as to the purpose of the consent provisions lies at the heart of this appeal. Section 39 of the Guernsey Proceeds of Crime Law provides:

Assisting another person to retain the proceeds of criminal conduct

39. (1) Subject to subsection (3), if a person enters into or is otherwise concerned in an arrangement whereby –

(a) the retention or control by or on behalf of another person (called in this Law "A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the Bailiwick, transfer to nominees or otherwise), or

(b) A's proceeds of criminal conduct -

(i) are used to secure that funds are placed at A's disposal,

(ii) are used for A's benefit to acquire property by way of investment,

knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represents in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a police officer a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a police officer any matter on which such a suspicion or belief is based -

(a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if -

(i) the disclosure is made before he does the act concerned and the act is done with the consent of the police officer (and in this case the person doing the act shall incur no liability of any kind to any person by reason of such act), or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it, and

(b) the disclosure -

(i) shall not be treated as a breach of any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or contract or otherwise, and

(ii) shall not involve the person making it in any liability of any kind to any person by reason of such disclosure.

(4) In proceedings against a person for an offence under this section, it is a defence to prove –

(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct,

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (l)(b), or

(c) that –

(i) he intended to disclose to a police officer such a suspicion, belief or matter as is mentioned in subsection (3), in relation to the arrangement, but

(ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a).

(5) In the case of a person who was in employment at the relevant time, subsections (3) and (4) shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a police officer.

(6) A person guilty of an offence under this section shall be (a) on summary conviction, to imprisonment for a term not exceeding 12 months, a fine not exceeding level 5 on the uniform scale, or both, or (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years, a fine, or both.

(7) No prosecution shall be instituted for an offence under this section without the consent of Her Majesty's Procureur.

22. Sections 38 and 40 of the Guernsey Proceeds of Crime Law establish offences of concealing or transferring proceeds of criminal conduct (s. 38) and acquiring, possessing or using the proceeds of criminal conduct (s 40). These sections contain provisions materially identical to subsection 39(3) providing that a person who makes a disclosure to a police officer and has the consent of that officer will not commit an offence under the sections if he performs any act to which consent had been given.

23. We consider that the overall purpose of sections 38, 39 and 40 of the Guernsey Proceeds of Crime Law is clear. It is to create extremely wide ranging 'all crime' prohibitions on money laundering.

24. In the case of the section 39 offence the mental element of suspicion may be sufficient on its own to give rise to criminal liability if any person, with that suspicion, is party to any arrangement involving the proceeds of crime. This means that in the context of most banking arrangements, when a banker becomes suspicious and is unable to determine the legitimacy of the funds with which he is concerned, he is at risk of incurring criminal liability should he continue to deal with the funds.

25. The width of the section 39 offence is clearly intended to have a powerfully dissuasive effect on money laundering activity and to restrict the ability of money launderers and criminals to introduce the proceeds of crime into the financial system of Guernsey or to facilitate the transfer of such proceeds out of Guernsey.

26. In our judgment, in the context of this very wide ranging offence, the consent regime in subsection 39(3) of the Guernsey Proceeds of Crime Law serves two purposes. First the existence of the consent regime provides a strong incentive to persons who are suspicious of funds to report those suspicions before any transaction is effected. Unlike other parts of the United Kingdom (see for example ss 330-332 of Proceeds of Crime Act 2003 (POCA)), Guernsey does not have a general offence of failing to disclose possible money laundering.

27. Second, the consent regime gives the police the operational freedom to grant relief from criminal liability in circumstances where it is considered to be in the interests of law enforcement so to do. Thus consent may be granted to avoid a suspected criminal becoming aware of the suspicions that are harboured in relation to him. This objective is also reinforced by the existence of offences in connection with tipping off (see section 41). Consent may also be granted so as to permit a controlled transfer to take place so that funds can be traced for investigative purposes.

28. It has been argued on behalf of Garnet that part of the purpose of the consent regime was to provide for the temporary freezing of funds through the refusal of consent. However the argument by Advocate Edwards on behalf of Garnet does not appear to us to be a tenable analysis as a matter of fact or law.

29. Any funds reported to the police or the FIS for the purpose of seeking consent are in effect frozen, not by virtue of any refusal of consent, but by virtue of the ordinary operation of the criminal law which in the absence of consent will make the person seeking consent unwilling to transact for fear of punishment.

30. As was explained by the Royal Court in *Gichuru v. Walbrook Trustees (Jersey) Limited* [2008] JLR 131 at 137-138, any person (such as a banker) concerned with funds in relation to which he has a suspicion will find himself on the horns of a dilemma. "On the one hand, [the bank] has its customer demanding that it make payment in accordance with the mandate. On the other hand, it has a suspicion that its customer has been engaged in criminal conduct and, if it makes the payment, it will clearly facilitate the retention or control of the money by its customer.

> Accordingly, if it were subsequently to transpire that the money in the account was in fact the proceeds of the customer's criminal conduct, the bank would have committed the criminal offence of money laundering ... As the bank does not know, at that stage, whether the money in the account is in fact the proceeds of criminal conduct, it invariably errs on the side of caution and refuses to make the payment. The result is that the account is informally frozen for so long as the bank has the relevant suspicion and the police do not consent."

31. Although the Royal Court refers to the effect being that of an informal freeze (the same turn of phrase was used by the Royal Court of Jersey in *Ani v Barclays Private Bank & Trust Ltd and The Attorney General* [2004] JLR 165 and *Chief Officer of States of Jersey Police v Minwalla* [2007] JLR 409) it seems to us that this is an observation as to the practical impact of the criminal law on the bank rather than an accurate characterisation of the consent regime as an aid to the freezing of property.

32. We would make the same observation in relation to the use of the word "freeze", by Ward LJ in *R (oao UMBS Online Ltd) v SOCA* [2008] 1 All ER 465 at 468 paragraph 5: "In essence, therefore, SOCA have an initial seven working days to consider the material before them and to decide what action to take. If they do not refuse the bank consent to the operation of the account before the end of that initial notice period, their consent is deemed to have been given. If however, they do refuse consent, then they have a further period of 31 days to continue their investigation. No one may deal with the account and although ... SOCA does not like the word, the reality is that the account is frozen and there is precious little the customer, and his customers, can do about it."

33. Consent provisions have been a feature of substantive money laundering offences created within the United Kingdom since the enactment of the Drug Trafficking Offences Act 1986 (see for example section 24 of that Act). They remain a feature of many of the substantive money laundering offences in force in England and Wales, Scotland, Northern Ireland, Jersey and Guernsey.

34. Consent provisions were a feature of anti money laundering legislation before there was any developed legislative system permitting the restraint of funds during the investigation of crime. Under the Drugs Trafficking Offences Act 1986, for example, a restraint order could only be granted after proceedings for a drug trafficking offence had commenced.

35. This legislative history does not suggest that the consent provisions as they originally emerged were intended to enable the regime of consent to be used informally in aid of the formal systems of restraint or confiscation

36. The only lawful mechanisms for freezing suspected proceeds of crime in Guernsey are the powers conferred on the courts under sections 26(1), 27(1) and 28(1) of the Guernsey Proceeds of Crime Law. It appear to us to be highly unlikely that the consent provisions in the Guernsey Proceeds of Crime Law were intended to confer unregulated and informal freezing powers on the police to be exercised before the courts are involved without any mechanism for review or limitations on the circumstances in which any informal freeze could be imposed.

37. Apart from the questionable legality of such a power, there is nothing in the Guernsey Proceeds of Crime Law to suggest such a power was conferred or intended to be conferred.

38. True it is that in practice the process of reporting suspicious transaction and seeking consent might be used by the reporting institution for delaying possibly difficult decisions as to whether to transact and may also in practice provide a period in which the police may consider whether they wish to commence an investigation or seek any restraint orders, but the practical utility of the hiatus that is created whilst an application for consent is pursued does not mean that this was the sole or dominant purpose of the consent regime and does not support the argument that this was the intention of the legislation.

39. For the reasons set out above we do not consider it was. In our opinion the principal purpose of the consent regime was to provide an opportunity to the police to give an exemption from criminal liability by consent but only where it was in the interests of law enforcement to do so; it was not to create an informal mechanism to be used by the police for freezing funds.

40. It follows that we do not accept the basic premise contended for by Garnet and accepted by the Lieutenant Bailiff as to the statutory purpose of the consent regime to the effect that FIS is "able to deny a person access to their property by refusing to give consent and yet not seek judicial oversight of that refusal by applying for a restraint order."

41. In our judgment, it is not the FIS that is denying Garnet access to its property and preventing judicial oversight, it is the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely BNP.

42. Furthermore for the reasons we set out below the refusal of consent does not preclude judicial oversight by the courts. The legality of any refusal to transfer funds may be challenged by a private law claim brought against the person holding the funds before the Courts of the Bailiwick.

43. We do not consider that the changes made to the statutory regime in England and Wales following the introduction of POCA introducing a so called 'moratorium regime' assist the Respondent or serve to support the analysis of the Lieutenant Bailiff.

44. Under POCA the consent regime in England and Wales provides that an automatic deemed consent will be taken to have been given 31 days from the notification of a suspicion to the authorities.

45. Guernsey has taken the considered and deliberate decision not to replicate these provisions within the Bailiwick. As was pointed out in paragraph 4 of the letter dated 26 June 1997 attached to the Biller D'Etat XVI 1997, 30 July 1997, the Guernsey Proceeds of Crime Law is "based largely upon the current [UK] legislation subject to such modifications as are either desirable or necessary as far as the Bailiwick is concerned."

46. The reasons for the difference in approach between the moratorium regime under POCA and the consent regime under the Guernsey Proceeds of Crime Law appear readily explicable. There are significant differences between the two jurisdictions and the differences in the regimes appear to us to reflect the different nature of the financial transactions that are of concern in the two jurisdictions.

47. In England & Wales, massive capital flows through the City of London and elsewhere, coupled with onerous reporting obligations enforced by criminal sanctions (see ss 330-332 of POCA) demand that some reasonable measure of certainty and finality is provided to financial institutions who report suspicious transactions namely that, unless the funds are restrained or there is a consent, after 31 days of reporting a suspicion (referred to as the moratorium period) the institution is free to transact.

48. For the well resourced law enforcement authorities in England & Wales 31 days provides a sufficient window of opportunity in which to make enquiries and commence any appropriate investigation or proceedings which may include civil recovery as well as criminal proceedings. Steps may be taken to seek a court order freezing funds either by way of a freezing order in civil recovery proceedings under Part 5 of POCA or criminal proceedings under Part 2.

49. Guernsey by contrast does not have the same level of fast moving transactional business that might be damaged by absence of a deemed consent or that would necessitate a moratorium

period followed by a deemed consent. Its financial system is more concerned with the stable administration of funds through third party managers or trustees.

50. Funds in financial structures in Guernsey are often remote from the originating source of the funds because of the intervention of trust, corporate or other offshore structures (frequently connected with tax planning). This means that there may be limits upon the amount of information available on Guernsey to explain the source of any funds.

51. The Guernsey law enforcement authorities, whilst they are clearly dedicated to the eradication of money laundering, do not always have the investigative resources or access to the levels of information that would allow them to determine the origin of funds or that would make it reasonable to expect that they should be able within a certain period of time to determine whether any particular transaction may or may not involve the proceeds of crime.

52. Guernsey also has a relatively limited range of mechanisms for restraining the suspected proceeds of crime. It will often not be possible for the authorities to reach any clear view as to the origins of suspicious funds so as to be in a position to apply for restraint. There is no power to seek the civil restraint of funds as there is no equivalent to the civil recovery proceedings that are available in England and Wales.

53. The Billet D'Etat XVI 1997, 30 July 1997, introducing the Guernsey Proceeds of Crime Law, referred at p 1095 to the "Island's proper determination to retain and even improve its standing as an international finance centre of repute." At p 1101 the Billet observed that any failure to enact 'all crimes' money laundering legislation in the Bailiwick might result in counter action being taken by territories which have enacted such legislation. Such counter action was said to threaten considerable detriment to the Islands' international reputation and business interests.

54. Given this history and the desire to avoid criticism on the part of the Guernsey authorities, it would be surprising if it had been intended, through the introduction of the consent provisions as a defence to the money laundering, to place any obligation on the Guernsey authorities to consent to a transaction that might result in funds suspected of consisting of 'dirty money' in the form of the proceeds of crime being paid away from the Bailiwick simply because a particular amount of time had elapsed or because no information had emerged to justify any criminal investigation.

55. It seems to us to be consistent with the "continued and reinforced determination [of the States Committee] to deter criminals from attempting to use the Bailiwick for the purpose of laundering the proceeds of crime", see the letter of 23 April 2002 attached to the Billet IX of 2002 at p 716, that the consent provisions should only be used by the police where they consider that the giving of consent is justified by reference to the interests of law enforcement and not merely as a means of short circuiting, after a certain elapse of time, problems caused by the existence of suspicion in r Guernsey where the source of the funds cannot be established.

56. We do not therefore consider it is reasonable to imply into the statutory consent regime in Guernsey any period of time in which consent is to be granted to transact in order to avoid what may in practice be an extended effective freeze, even if we are wrong in our analysis of the purpose of subsection 39(3). In any case where there is a suspicion that has not been dispelled, the police must be entitled to refuse consent whatever period of time has elapsed.

57. This was the view of Tomlinson J in *Amalgamated Metal Trading Limited v City of London Police Financial Investigation Unit and others* [2003] EWHC 703 (Comm) at paragraph 27 when he stated in relation to comparable consent provisions (s 93 A (3)(b)(i) of the Criminal Justice Act 1988 as amended) that there can be no obligation on the police to "justify the withholding of consent ... It seems clear from the section as a whole that the existence of a suspicion is sufficient to ground a proper refusal of consent."

58. The appropriate remedy for a person in the position of Garnet is to bring proceedings against the person or entity holding the funds. This enables the status of the funds to be determined by a court in circumstances where (unlike in public law proceedings) evidential issues may be fully explored and the fund owner and the fund holder are represented.

59. In *Amalgamated Metal Trading* Tomlinson J held at paragraph 27 that the procedure to be followed consequent upon a proper withholding of consent was the commencement of a private law claim to settle the "private disputes between financial institutions and their customers. ... The ultimate substantive question whether the funds are derived from criminal conduct ... only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof."

60. Although the matter was not fully argued before us, we have some doubts as to whether the statement of the Deputy Bailiff in *Gichuru v. Walbrook Trustees (Jersey) Limited* [2008] JLR 131 at 147 to the effect that the burden of proof in such an action will necessarily lie upon the customer is necessarily correct. The location of the burden of proof seems to us to depend upon the precise terms of the contract between the bank and the customer. If the bank's defence is that an instruction would cause it to commit a criminal offence (as opposed to merely being exposed to the risk of committing a criminal offence) the burden would appear to be on the bank to prove that.

61. It follows from what we have said that we do not consider the consent decision in this case was irrational, disproportionate or otherwise wrong in principle. The police were entitled to give little weight to the length of time that Garnet had been prevented from directing the transfer of the Lamborghini funds. Garnet was in one sense the author of its own misfortune in failing to issue its mandate proceedings until 2006 and to progress the proceedings thereafter.

62. Garnet had also failed to provide any further information to BNP or to the police and the FIS as to the circumstances of the acquisition of the Lamborghini funds so as to dispel the suspicions entertained by BNP and accepted by the police. The police were entitled to view the Lamborghini funds as suspicious. In the circumstances the refusal of consent was not only rational but almost inevitable.

Alternative remedy

63. Advocate Raffray on behalf of the Appellant argued that, as a matter of discretion, the availability of a private law action against BNP should have led the Lieutenant Bailiff to refuse to grant any mandatory orders on the application for judicial review in any event even if grounds for a review were made out.

64. We do not agree. Any decision to grant or withhold consent is amenable to judicial review where the decision is irrational, unlawful or involves some procedural impropriety. The fact that there may be an alternative remedy does not deprive an applicant of the right to assert that some reviewable error was made by the FIS or the police in the course of considering consent.

65. The advantage for an applicant in those circumstances is that consent may provide a more expeditious remedy and the applicant may also be able to rely on wider law enforcement policy issues as justifying consent even where his private law claim might fail.

66. In *R (oao UMBS Online Ltd) v SOCA* [2008] 1 All ER 465, the Court of Appeal confirmed that judicial review is available in relation to a consent decision in England and Wales, notwithstanding the existence of a concurrent right to bring a civil claim. The Court granted a mandatory order directing SOCA to consider the application for consent made by UMBS. We see no reason to consider that the result would be any different in similar proceedings brought in Guernsey.

67. The observations by Tomlinson J in *Amalgamated Metal Trading* as to the inappropriateness of commencing proceedings against the police for a declaration cannot be read more widely as implying some limitation on the right to bring an application for judicial review. While it may be that such an application is rarely likely to be successful if the police have made a decision on the basis that there is a subsisting suspicion and no countervailing law enforcement rationale for consent to be given, that does not mean that where appropriate judicial review should not be sought or granted.

Delay

68. Advocate Raffray on behalf of the Appellant also argued that the application for judicial review was not brought within a reasonable time. He asserts that this issue was raised before the Lieutenant Bailiff and she failed to deal with it. In our judgment the issue of delay is not germane in this case.

69. Paragraph 6 of Practice Direction No 3 of 2004 requires proceedings for judicial review to be instituted promptly.

70. The demands of promptness in this case have to be considered having regard to the considerable delays the FIS, the police and the Respondents have experienced in communicating with Indonesia. In our judgment the delay of approximately 3 months between the consent decision and proceedings being issued was not unreasonable in these circumstances and caused no hardship. In our view the application was made sufficiently promptly.

71. No third parties were affected by the elapse of time and in any event, since the police have an ongoing duty to review decisions on consent, no purpose would be served by refusing to hear this application on the grounds of delay since the Respondent would be entitled to litigate the identical issues in a fresh claim for judicial review if its case was otherwise arguable.

Reasons

72. The obligation of the police to provide reasons for any consent decision was debated before us. It was conceded by Advocate Edwards on behalf of Garnet that there was no general duty on the police to give reasons for consent decisions. Rather Advocate Edwards argued that in this case, because all the relevant facts were in the public domain, reasons should have been given.

73. We consider that the concession as to the general duty to give reasons was correctly made. In many instances it will not be possible to give reasons for a consent decision without running the risk of tipping off suspects or revealing sensitive details of the state of police inquires in Guernsey and elsewhere. The Court of Appeal in *R (oao UMBS Online Ltd) v SOCA* [2008] 1 All ER 465 at 477 paragraph 39 pointed out that in the context of consent decisions it may not be appropriate to disclose to the person affected or his legal representatives relevant material by way of reasoning because to do so might alert others or frustrate the purposes of the overall inquiry.

74. There is however no doubt that if the police are able to give reasons there are obvious policy and practical reasons for that to be done. The giving of reasons will allow the persons affected to understand why the consent decision has been made and will put them in a position to take meaningful advice on what remedies may be open to them.

75. However a failure to give reasons does not automatically give rise to a decision being quashed even if reasons could and should have been given. In this case the continuing suspicion in relation to the Lamborghini funds and the absence of any explanation of the source of the wealth invested in Lamborghini were an important part of the reasons for the refusal to consent. In our judgment these reasons would have been clearly discernable to Garnet, without need for articulation or elaboration. They were in any event explained in the material filed on behalf of the FIS, see the first affidavit of Mr Waters at paragraphs 23 to 25.

76. In addition the FIS were entitled to consider that their continuing and confidential dialogue with the Indonesian Authorities at the time of the consent decision justified them in announcing the decision without providing reasons.

77. In the circumstances we do not agree with the conclusion of the Lieutenant Bailiff that the failure to give reasons in this case amounted to a procedural impropriety. Even if we are wrong in this, given that the reasons are now understood and provide a proper basis for the refusal of consent, we would not exercise our discretion to grant judicial review on this ground in any event.

Article 1 Protocol 1

78. In the court below and before us, Garnet asserted that the consent decision was in breach of Article 1 of the first Protocol of the European Convention of Human Rights, as applied in this jurisdiction under the Human Rights (Bailiwick of Guernsey) Law 2000; in particular, Section 3.

79. Article 1 of the first protocol provides:
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

80. The Lieutenant Bailiff accepted Garnet's submission. At paragraphs 54 to 56 of her judgment she noted that the term "possessions" was not limited to tangible chattels but included a chose in action: see *Marckx v Belgium* [1979] ECHR 6833/74. Under reference to the decision in *Sporrong and Lönnroth v Sweden* [1982] ECHR 7151/75, (1985) 7 EHRR CD256, she observed that de facto deprivation of the right to enjoy property by prevention from dealing could qualify as deprivation.

81. She then noted that, when considering whether a fair balance had been struck between the rights of the state and the property rights of the owner, a court would look at delays on the part of either party and the duration of the interference. She referred to *Beyeler v Italy* [2000] ECHR 33202/96 and to *Matos e Silvia Lda and Others v Portugal* (1977) 24 EHRR 573.

82. The Lieutenant Bailiff continued by expressing the view that Garnet had lost the right to deal with its property for long enough and an informal curtailment of the right to deal, without court order, was a power to be used carefully, its use to be kept under careful review.

83. Before us, Advocate Raffray submitted that the starting point was the present statutory regime and submitted that under the Guernsey Proceeds of Crime Law, de facto deprivation could only occur when property had been confiscated by the court. The situation was different to that in *Sporrong*, where the expropriation permits were a statutory pre-condition to the exercise of the right to expropriate, a matter clear on the face of the legislation. Section 39(3), by contrast, did not involve the exercise of a power necessarily leading to deprivation of property. A restraint order, on the other hand, was an event likely to be a precursor to confiscation. All that Section 39(3) did was to provide a defence to a money laundering offence under Section 39(1). That was the purpose of the subsection and there was no warrant for reading into Section 39(3) an obligation to apply for a restraint or confiscation order.

84. In any event, within the Guernsey legislative context there could be no deprivation of the right to enjoy property where the owner could avail himself of civil private law proceedings against another party.

85. Further, even if there was deprivation, it was both necessary and proportionate given the need to strike a balance with regard to commercial transactions and the importance of the public interest in matters of this nature.

86. Finally, under reference to the judgment of *Longmore LJ in K Limited v National Westminster Bank PLC* [2006] EWCA Civ 1039 paragraph 25, Advocate Raffray contended that the right which Garnet was seeking to see protected was the right to see a bank mandate performed which was not a right protected by Article 1 of the first protocol. Longmore LJ had said: "As far as Article 1 of the First Protocol is concerned, it must be doubtful whether a right to have a contract of mandate performed is the kind of possession which Article 1 contemplates will be peacefully enjoyed. It is not as if the debt constituted by the account with the Bank has been cancelled or otherwise done away with. All that has happened is that performance of the mandate contract has been deferred by a number of days (7 or 38 as the case may be). But in any event for the reasons we have attempted to give, any such interference with peaceful enjoyment as there may have been was in the public interest and subject to conditions provided for in the 2002 Act. There is therefore no breach of Article 1 of the protocol."

87. In Advocate Raffray's submission, the Lieutenant Bailiff failed to have any or any sufficient regard to that dictum, or properly to apply *Marckx v Belgium* [1979] ECHR 6833/74.

88. For the Respondents, Advocate Edwards submitted that the applicant's argument that the right to see a contract of mandate performed was not the kind of "possession" contemplated by the Convention was misconceived. The property of which Garnet had lost the peaceful enjoyment, by being deprived of access, was the funds held in the bank account. The concept of "possession" was very broadly interpreted and the circumstances here fell within the ambit of proper interpretation.

89. Further, Advocate Edwards submitted that the Lieutenant Bailiff was correct in her application of *Sporrong*. It was a question of fact and degree as to whether there had been a de facto deprivation of possessions and, where consent had been refused under Section 39(3), the reality were that the financial institution would not deal with the funds. The effect was that the continued refusal of consent by FIS had directly deprived Garnet of its right to the funds, in respect that it had no access to them.

90. It was no answer for FIS to submit that there was no deprivation where a person could still avail itself of an effective remedy before the Court in independent civil proceedings. In reality there was no effective remedy as the bank would continue to comply with the FIS refusal.

91. In any event, continued refusal of consent was neither necessary nor proportionate. The government of Indonesia had not made any proprietary claim to the funds; the funds had not been held to be the proceeds of criminal conduct; no allegation of corruption had ever been established for a court against either Garnet or Mr. Hutomo; no criminal proceedings against either of them were under way; and the FIS had had ample opportunity to apply for a restraint order in respect of the funds under the 1999 law.

92. We take the view that neither in the submissions made to the Lieutenant Bailiff, nor in her decision nor in the submissions before us was this point considered in the detail and clarity afforded to other arguments. The issue, however, is important, and we deal with it as carefully and succinctly as we can.

93. It seemed to us that, properly understood, the argument which found favour with the Lieutenant Bailiff was to the effect (a) that Section 39 should be read and given effect to in a way compatible with the convention rights: Section 3 of the 2000 Law, (b) that the construction placed upon Section 39 by the applicant – permitting an almost definite continuance of no consent – would be inconsistent with Article 1 of the first Protocol and (c) that even if the

applicant's construction was correct and not incompatible with Convention rights, the manner in which the applicant was acting was disproportionate in the whole circumstances and constituted the act of a public authority in a way incompatible with a convention right, as prohibited by Section 6 of the law. We did not understand the applicant to dispute that it was a public authority.

94. The first two lines of argument, which can be taken together, depend upon a resolution of the issue as to whether or not the circumstances which have given rise to these proceedings can be said to come within the terms of Article 1 of the first Protocol.

95. As the Lieutenant Bailiff indicated in paragraph 54, the term "possessions" is not limited to tangible assets. Since the decision in *Marckz v Belgium*, there have been numerous decisions of the Strasbourg Court determining what falls within the concept of possessions (in French: biens). Whilst the decisions have proceeded very much on a case by case basis, it seems correct now to indicate that almost any right which has an economic value falls to be included in the notion. Such rights have included a licence to extract gravel, a licence to operate a bonded warehouse and a right to fish on rivers: see *Fredin v Sweden* (1991) 13 EHRR 784, *Rosenweig v Poland*, Judgment 28 July 2005 and *Baner v Sweden* (1989) 60 DR 128.

96. In the circumstances before us we are of the opinion that, as a matter of national law, sums standing to the credit of a customer in a bank account are not part of the property of the customer. They have been taken by the bank on an improper loan (that is a loan where the subject matter of the loan may be consumed), and no debt arises until a demand for payment is made: see *Joachimson v Swiss Bank Corporation* [1921] 3KB 110. However, the right under the contract between banker and customer undoubtedly has an economic value where the account between banker and customer stands to the credit of the customer. We are therefore of the opinion that the right to demand payment of money under a contract between banker and customer is a right with an economic value and, therefore, a possession for the purpose of Article 1 of the first Protocol.

97. Turning to the requirement of deprivation, we agree with the submission made by the present respondents in the court below and reflected in paragraph 54 of the Judgment, that, even where the person remains vested in the right in question, the Court should look behind appearances to investigate the realities of the situation complained of in order to ascertain whether the situation amounted to a de facto expropriation: see *Kopecky v Slovakia*, Judgment 28 September 2004.

98. However, as the present respondent submitted below, a de facto deprivation occurs where the applicant has no means whatsoever of dealing with the property: *Matos e Silvia Lda and Others v Portugal* (1997) 24 EHRR 573. Further, the decision in *Handyside v UK* (1976) 1 EHRR 737 shows that temporary seizures do not constitute deprivations of property and one example of a temporary seizure not amounting to deprivation is a provisional property confiscation in criminal proceedings: see *Raimondo v Italy* (1994) 18 EHRR 237.

99. In our opinion, the present circumstances do not amount to a deprivation as that concept is understood under Article 1 of the first Protocol. Garnet has not been put in the position of having no means whatsoever of dealing with its property, namely, the right to demand payment under the banking contract. The ability to enforce that contract is a matter of civil law. Put simply, only if the bank can establish a relevant defence will Garnet fail to obtain repayment of its funds. Doubtless the bank would defend the proceedings, but the existence of the lack of consent under Section 39(3) would not be relevant as a defence to that claim. The parties would be joined on an issue or issues as to whether or not the funds were tainted and it seems to us likely as we have indicated above that the burden of proof – to the civil standard of balance of probabilities – would be upon the bank to show that the funds were indeed tainted. Even if Garnet lost that action, they would not lose the funds. Assuming that there were no further developments and that all that happened was the continuation of the lack of consent, the funds would remain in the hands of the bank. Were the factors which had led the court to find in

favour of the bank to change, FIS might decide to consent, or the bank might decide to agree to release the funds; and in any event upon a change of circumstances Garnet could raise further proceedings against the bank.

100. The temporary seizure of property in criminal proceedings constitutes a control of use for the purposes of the second paragraph of Article 1 of the first protocol: see *Raimondo v Italy*. It is on this matter that the question of proportionality arises and the issue as to the actions of the FIS have to be judged. However, whilst there must be a reasonable relationship of proportionality between the means employed and the aim pursued, the Strasbourg Court recognises that states enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and in ascertaining whether the consequences of enforcement are justified in the general interest: see *Chassagnou and Others v France* (2000) 29 EHRR 615. However, where delays imposed an excessive burden amounting to freeholders being kept out of their property for some eleven years, with no possibility of compensation for losses arising, an Italian system of postponing the enforcement of eviction orders – in order to preclude a flood of tenants having to find alternative housing – was found not to meet this balancing: see *Spadea and Scalabrino*: (1996) 21 EHRR 481; see also *Matos e Silvia*, cited above. In addition, in *Sporrong*, it was found that where lengthy restrictions were imposed on the use of property there should be provision for periodic re-assessment.

101. In our judgment the circumstances of the present case do not disclose a lack of proportionality between the overall aim of the States of Guernsey to tackle money laundering and the inability of Garnet to have access to its funds for the time being.

102. The importance of the aim of tackling money laundering needs little by way of adumbration. The particular importance to the States of Guernsey in tackling money laundering is also well known, given Guernsey's reliance on the attraction of international financial business and given well publicised concerns, over the past ten or fifteen years, expressed by outside sources as to the efficacy of its policies in this regard.

103. Turning to Garnet, it is to be remembered that Mr. Hutomo is, as he has declared, the beneficial owner of Garnet. For reasons which we shall state shortly, it seems to us jejune of Garnet to submit, as we understood their case, that merely because the Government of Indonesia had not made out any proprietary claims to the funds, that the Government of Indonesia had currently no proceedings outstanding against Mr. Hutomo or Garnet anywhere in the world and that no allegation of corruption has ever been established before a Court against either Garnet or Mr. Hutomo anywhere in the world, the maintenance of the lack of consent was disproportionate.

104. In his Affidavit of 29 September 2009, Mr. Hutomo depones that the funds in question arose "from the sale by me of other assets which I already held". Among those assets were shares in Lamborghini, sold in about 1999 and held at that time by a company, V Power Limited, which had been incorporated in order that it could acquire that shareholding. Mr. Hutomo also depones that he was at all material times the beneficial owner of V Power Limited. However, notwithstanding the concerns being expressed that there might be other claims to those funds, all that Mr. Hutomo depones as to the provenance of the funds to purchase the Lamborghini shares is as follows "Because of the period of time which has passed, V Power no longer has records which would permit me to provide any further information in relation to the purchase by V Power of the Lamborghini shares.".

105. It is not surprising that this statement failed to allay the suspicions held by the bank. The transaction for the purchase of the Lamborghini shares by Mr. Hutomo must have been a singular event, and it would be surprising if Mr. Hutomo, still in the prime of life, would not remember such an acquisition at the very may-morn of youth. But he does not say that he has no recollection. Nor does he give any reason why V Power – which, it is assumed from the terms of the affidavit, is still in existence – no longer has relevant records. Nor is there any indication that the directors or other officers of V Power, at the time of the Lamborghini

acquisition, are no longer available. Had the funds used for the purchase of the shares come from Mr. Hutomo's own assets it is surprising in the extreme that, assuming him to be sound in mind and body, he has no recollection of the provenance. Equally, if the funds had been a gift from family or friend, it is only reasonable to assume, at first sight, that some information would be available to Mr. Hutomo from other sources.

106. These circumstances are far removed from those where the owner of a residential property has a control imposed upon the enforcement of eviction orders. It is of the essence of anti-money laundering methods to seek to maintain a system whereby funds are properly traceable in order to seek to defeat the mischief which is facilitated where all the links cannot be traced or all the underlying transactions verified.

107. For all these reasons we consider that the Lieutenant Bailiff erred in finding, in paragraph 59, that the Decision was an excessive interference with Garnet's prima facie property rights, unlawful and a breach of Article 1 of the first Protocol.

Conclusion on the substantive appeal

108. For the reasons we have given we allow the Appellants appeals and dismiss the Respondents application for judicial review.