Judgment 26/2012

In the matter of the Forfeiture of money in civil proceedings, funds held in cash and on application by Her Majesty's Procureur - Royal Court - 2nd September 2011

Civil Proceedings (Bailiwick of Guernsey) Law, 2007 – application forfeiture of money – granted.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF
THE FORFEITURE OF MONEY, ETC. IN CIVIL PROCEEDINGS
(BAILIWICK OF GUERNSEY) LAW, 2007, AS AMENDED

-And-

IN THE MATTER OF
£4,299.00 FUNDS HELD IN CASH

-And-

ON APPLICATION BY
HER MAJESTY'S PROCUREUR

Case heard on: 24th August, 2011
Judgment handed down: 2nd September, 2011
Before: John Russell FINCH Esquire, Judge of the Royal Court

Advocate J Hill appeared for HM Procureur
Messrs J R Ogier and N J Dorfner appeared in person

Cases and Statute referred to in Judgment:

Angus v United Kingdom Border Agency [2011] EWHC 461 (Admin)
Muneka v Commissioners of Customs and Excise [2005] EWHC 495 (Admin)
R (on the application of the Director of the Assets Recovery Agency and Others) v Green and Others [2005] EWHC 3168 (Admin)

The Forfeiture of Money etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, as amended, Sections 13(2) and 61

JUDGMENT

Introduction

1. This is an application for the forfeiture of £4,299.00 cash that has been seized since the 2nd January 2010. It was originally in the hands of the Island Police, but has since been re-seized by the Guernsey Customs. Forfeiture is now sought under the provisions of Section 13 of the Forfeiture of Money etc. in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, as amended. A hearing took place on 24th August 2011. HM Procureur was represented by Advocate Hill and Messrs Dorfner and Ogier appeared in person to oppose the Application. All the papers had been served well in advance and the affidavits put forward in support of the Application were accepted. The only "live" witness on behalf of the Applicant, HM Procureur, was Customs Officer Randle. Mr Dorfner did not give evidence, but made submissions; Mr Ogier both gave evidence and made submissions. Officer Randle's evidence supported her affidavit and she was not cross-examined. For the sake of convenience I shall refer to the Applicant as "HMP", Dorfner as "D" and Ogier as "O". References to page numbers and documents refer to the composite bundle provided in support of the Application.

Law

2. It is not intended to set out the terms of the legislation extensively. The nub of the case is governed by Section 13(2) of the Law. It states:

> *"(2) The Royal Court may order the forfeiture of the money or any part of the money if satisfied on a balance of probabilities that the money or part –*
>
> *(a) Is any person's proceeds of unlawful conduct, or*
> *(b) Is intended by any person for use in unlawful conduct."*

"Unlawful conduct" is defined in Section 61 of the Law. The Royal Court must decide, on the balance of probabilities, if any matters alleged to constitute unlawful conduct have occurred, that any money is any person's proceeds of unlawful conduct, or that any person intended to use any money in unlawful conduct. HMP alleges (see Para 3.2 of the Skeleton Argument) that the cash was obtained through theft and kindred offences committed in the Bailiwick. HMP referred to various English cases on the almost identical legislation in that jurisdiction which are annexed to the Skeleton Argument.

3. The cases cited on behalf of HMP were:

> R (on the application of the Director of the Assets Recovery Agency and Others) v Green and Others [2005] EWHC 3168 (Admin);
>
> Angus v UK Border Agency [2011] EWHC 461 (Admin); and
>
> Muneka v Commissioners of Customs and Excise [2005] EWHC 495 (Admin)

4. The cases are authority (not binding in Guernsey, but highly persuasive and I propose to follow them) for the following propositions which are relevant to the present matter:

> (i) In a case of cash forfeiture "*a customs officer does have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct"* (Para 29 of Angus);

(ii) This follows from the decision of Sullivan J in the Green case, which is quoted in the judgment in Angus at Para 19. Sullivan J was concerned with a civil recovery order, but the judgment in Angus made it clear that this approach should also govern cash forfeiture applications. You cannot have two separate tests depending on whether it was High Court civil recovery or criminal court cash forfeiture applications. The relevant words used by Sullivan J and approved are:

> *"1. In civil proceedings for recovery in Part 5 of the Act the Director need not allege the commission of any specific criminal offence but set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.*
>
> *2. A claim for civil recovery cannot be sustained solely on the basis that a respondent has no identifiable lawful income to warrant his lifestyle."*;

(iii) Accordingly HMP bears the burden, to the civil standard, to the extent described. It is not necessary to establish the commission of a specific offence, but the matters alleged to constitute "*unlawful conduct"* need to be shown. The Muneka case is relevant to this aspect of the case. In his judgment Moses J (at pares 8 and 9) said:

> *"8. In my judgment, the context of the questions as to whether the property had been obtained through unlawful conduct or was intended for such a purpose, by the Customs Officers at the airport, and again the context of resistance to forfeiture proceedings before the district judge, are of significance. The fact that this appellant lied was evidence upon which the district judge was entitled to conclude that the very suggestions put to him were in fact true on the balance of probabilities. The context in which the questions were asked is, in my judgment, important. The district judge was entitled to ask herself: why should this appellant have lied about the source and destination of that cash? He must have appreciated that such lies could have had no reasonable explanation other than that the suggestions made to him as to their source and as to destination were in fact true?*
>
> *9. In my judgment, in that context the fact that there was no explanation for the source of that money, no reasonable explanation as to why he was taking that cash to Albania, the fact that there were discrepancies in his explanations as to the source of the money or as to its destination, taken together, did establish both source and intention. At least the district judge was entitled to conclude on the balance of probabilities.*"

And at Para 12 of the judgment:

> "*A lie in that context may well entitle the fact-finding body to infer what the source or intention for which the cash was to be used was in reality on the balance of probabilities.*"

Accordingly, where a person does tell lies about the source or intended use of the cash, this is evidence which may be relied upon to discharge the burden which HMP has to meet.

Facts

5. There is no material dispute on the facts, only on their interpretation. The circumstances of the original seizure are set out fully in Officer Randle's affidavit at paras 9-16, and not in issue. On 2nd January, 2010, the Respondents O and D, and D's sister (girlfriend of O) were at Guernsey Airport. They were buying air tickets for cash. The initial intention was to go to Dinard, but D did not have a passport. Next they tried for Exeter, but this was unavailable, so they bought one-way tickets to Stansted at a cost of £405. Upon being searched by the Police, D's sister had £2,000 in her handbag which she said was O's. D held £1,505 and had just paid £405 cash for the tickets, which was refunded and forms part of the total. At the Police Station, O was found to have £119 in cash and D's sister had £290 at her home, £20 of which was returned to her. The money which is the subject of the present Application therefore comprises:

£2,000.00	-	from D's sister, belonging to O (admitted by O)
£1,505.00	-	held by D
£405.00	-	paid by D for tickets and refunded
£270.00	-	at D's sister's house
£119.00	-	on O's person
£**4,299.00**	=	**Total**

In respect of the total, O accepts ownership of the £2,000 found on D's sister, £119 cash found on his person and £270 cash at D's sister's house. He does not admit owning the £1,910 held by D. D claims this amount is his own. The Royal Court did not hear any evidence from D's sister, who did not attend.

6. It is accepted that some four hours before being stopped at the Airport, O burgled a flat in St Sampsons. He received 3 years imprisonment for this offence on 7th September, 2010 and was ordered to pay £900 compensation. Another person or persons unknown were involved in this crime. O was sentenced on the basis £900 was stolen by him, although the victim claimed a much larger sum - £15,000 to £25,000. O accepted in evidence that £900 of the amount seized is due and payable as compensation, but disputes any more money was stolen. O also accepted that he is a convicted thief, robber and burglar. In the course of the financial investigation, O and D's sister volunteered for interview, but D did not attend. He was, however, interviewed by the Guernsey Police as part of a money laundering/handling investigation.

7. O's explanation is that after his arrest for an earlier burglary offence he jumped bail and went to Cyprus and then Malta. He received no wages in Cyprus, but was paid commission in Malta for around a two year period. His emoluments varied between €100 to €1000 per week. Apart from rent, food and other expenses, O was a regular drug-user and had to be treated in a local hospital from June to November, 2009, for which he did not pay. On 3rd December, 2009, he returned to Guernsey and was in possession of £2,500. This was not located in a "cursory" Customs search. The notes were concealed in rolled-up socks in his effects. Shortly after, on 11th December 2009, O completed an application form for Supplementary Benefit. In this form it was stated he had indeed been out of the Island during the period referred to, working as a PR representative for night clubs, but was not paid (pp. 11 – 16 of exhibit EMA/1). No savings were declared and O signed the form as correct. The form is annexed to the agreed affidavit of Mr Grice, from the Social Security Department. O has also initialled each page. At part 15 the statement is made:

> *"I have been out of the island since 2007, I was doing PR work for night clubs abroad. I was not paid for this work but they gave me a place to live and food and drinks"*.

Mr Grice's affidavit plainly sets out how such a form is completed.

8. D's account, as indicated, is derived from Police interviews in this criminal investigation. The substance of his explanation is that the money found in his possession came from his wages, as an employee of a small local carpentry business. D told the Police he had received £2,300 from his employer on 28th December, 2009, consisting of two weeks wages and a bonus of £600. The employer stated that D had in fact received a total of £1,611.80, including a bonus. When this was pointed out to D, he indicated he had "*just had it given"* by a friend he did not name, in return for selling a Play-Station and associated items. He was asked why he had changed his account and replied that he didn't want to sound like he was "*fucking skint"*. He also admitted that the day before the cash seizure, he had asked his brother for "*twenty quid"*. He could not get access to his other money, as it was at a friend's house. During the six month period prior to the seizure, D's legitimate earnings came to £7,957.39. D does not have a bank account. O made contact with D by mobile phone about 45 minutes after O committed the burglary of the flat.

9. In evidence, O relied upon his letter (pages 641-2) as the basis of his case. In his oral submission, D similarly relied on his letter (page 643). In evidence, O stated that the information in his Supplementary Benefit application was not inconsistent; he did not lie at all. The cash in his socks was not found at the Customs search, which was "*cursory"*. He does not remember making any 'phone calls to D after the burglary. The money that D's sister had was derived from his work in Malta, and was not the proceeds of the burglary. D submitted that his money had been earned by himself and he would not dream of taking anyone else's money. In relation to O's employment, the agreed affidavit of Officer Hale, dated 26th May, 2011 shows that no wages slips or documentary evidence of remuneration was produced and that there were no contact deals for either Access 2 Malta Ltd or Vista Promotions Ltd. Furthermore, on O's own account, he was in hospital for around six months prior to his return to Guernsey and thus not in receipt of any income.

10. O was subjected to a probing cross-examination after giving his account. He was not especially impressive in his further explanations or denials and at times appeared evasive. He accepted that during the period in December, prior to his arrest on 2nd January, 2010, he received £457.75 in benefits. As he readily accepted, he has numerous convictions for offences of dishonesty. The proposition put forward on behalf of HMP regarding the suspicious circumstances in which the cash was seized is also correct. It is, to say the least, a most unusual arrangement to go on the spur of the moment, ready to pay cash for one-way tickets to Dinard, Exeter, and eventually Stansted. O and D's sister were dependent on benefits. D misled the Police on the income he had received from his employment, explained away some of the money by saying he had sold items to a person he would not name, and borrowed £20 from his mother the day before.

11. On the facts and bearing in mind that the standard of proof is the balance of probabilities, I reject the explanations given by O and D. In my judgment the cash seized was established to be the proceeds of, or represented the proceeds of offences of dishonesty. That being so, it is helpful to return to the judgment in the Muneka case (supra) at Para 12:

> *"It is important, in my view, to bear in mind that Parliament has specifically dictated that the standard of proof is one on the balance of probabilities. That has important consequences as to the way the court should direct itself. The lies in the context of the issue may well establish that the source of the money is criminal activity"*.

12. I have already set out paras 8 and 9 of the judgment above. Having rejected the explanations given by Messrs O and D this seems precisely the sort of situation set out by Moses J. Accordingly the Application succeeds and forfeiture is granted.

13. Application granted.

J R Finch
Judge of the Royal Court