



Forfeiture of Money in Civil Proceedings.
Royal Court
17th February 2017

JUDGMENT
8/2017

Forfeiture of money in civil proceedings.

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

-and-

IN THE MATTER OF THE SUM OF £2,000 CASH SEIZED AT
GUERNSEY AIRPORT ON 18TH JULY 2016

APPLICATION FOR AN ORDER FOR THE FORFEITURE OF SEIZED CASH
PURSUANT TO SECTION 13 OF THE FORFEITURE OF MONEY, ETC IN CIVIL
PROCEEDINGS (BAILIWICK OF GUERNSEY) LAW, 2007

Application heard on: 31st January, 2017

Decision handed down: 17th February, 2017

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Applicant: Advocate J Hill

Counsel for the Respondent: Advocate A M Merrien

Cases referred to:

In Re Cohn [1945] Ch 5;

Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139;

Saxby v Fulton [1909] 2 KB 208.

Legislation referred to:

The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009, Section 20;

The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011; rule 20;

The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, Sections 13 and 61;

The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Rules, 2012, rule 17.

Texts referred to:

Cross and Tapper on Evidence (12th edition), page 692;
Evidence (Emsley) (3rd edition), page 528.

Introduction

1. This is an application by HM Procureur (“A”) under Section 13 of The Forfeiture of Money etc. in Civil Proceedings, (Bailiwick of Guernsey) Law, 2007 (“the 2007 Law”), for the forfeiture of £2,000 in cash seized from the Respondent (“R”) at Guernsey Airport on 18th July, 2016 and subsequently extended on 19th July, 2016. R appeared at the hearing fixed for 12th January, 2017 and then obtained the services of Advocate Merrien. In order to give proper time for instructions to be given, the application was adjourned until 31st January, 2017 and the order further extended.
2. On the 31st January, 2017, both A and R were legally represented. On behalf of R no evidence was called. Jayne Louise Limond was present and substantiated her affidavits on oath, but was not subject to cross-examination. Both Advocates made submissions on how they saw the legal and procedural situation and the matter was further adjourned for deliberation. A’s evidence is therefore unchallenged (in respect of Jayne Louise Limond’s affidavits and supporting documents) and no evidence was called on behalf of R. A bundle with the affidavits and supporting documentation was prepared on behalf of A, and no objection taken to its contents.
3. The grounds for this application are conveniently set out in former officer Limond’s affidavit of 20th October, 2016 at paragraphs 11 and 12. The relevant provision of the Law of 2007 is section 13(2)(a) to the effect that “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 is intended by any person for use in unlawful conduct”. This is specified as the “intended purchase of unlawful substances”. It is further suggested that R “intended to purchase controlled substances for onward supply to another”.

Facts

4. The unchallenged facts are set out in paragraphs 8 to 13 of the affidavit referred to above. On 18th July, 2016, the cash detector dog indicated R’s rucksack. R and his girlfriend were on their way to London Gatwick, thereafter for a week-long all-inclusive holiday in Tenerife, without their children. R’s explanations for the provenance of the cash are regarded by A as inconsistent. They are summarized in paragraph 9, page 3 of the affidavit. First of all, R said he had saved the £2,000 seized from his work as a plasterer. Shortly after, R said he was unemployed, had last worked as a plasterer 4 months earlier, but had had £1,000 or so from his mother about a month previously for pointing work on her house. R’s girlfriend had €1,535.00 in her possession, but this was not seized in view of her explanation it came from her grandfather, who could not specifically remember this, but was not good at remembering things.
5. The £2,000 comprised two bundles of cash, a mixture of £10 and £20 Guernsey notes. R said it was for “*shopping in Gatwick*”. But when the point was made these were local notes and not able to be tendered in the UK had no answer. R became “*quite animated*” at the prospect of seizure saying it could not be taken as it was his and added “*no, no, this is serious. I need that money*”. Following formal seizure, R was described as being very upset and panicked (paragraph 12 of affidavit) saying “*do you want the shirt off my back too as I’m now fucked*”.

The cash, as stated, comprised Guernsey banknotes in two bundles: each of £1,000; one of £500 in £10 notes and £500 in £20 notes, the other £1,000 in £10 notes. Following the seizure, swabs revealed the first bundle was positive for heroin, the second bundle positive for cocaine.

6. R and his girlfriend duly returned on 22nd July, 2016. They indicated they had, whilst outside the Island, used a white powder R believed to be cocaine and a “*little bit*” of cannabis. Both persons had checked their luggage to ensure there were no controlled substances carried. Ion scans were carried out on a pair of trousers from the dirty laundry bag. The tests were positive for cocaine, heroin and opium. The couple confirmed that whilst in Tenerife, they had used “*some brown*” which they confirmed further was heroin. R’s girlfriend added that they had taken the opportunity whilst the children were not with them. R and his girlfriend came back with around €10.00 and £60.00 in their possession. €1,535.00 had been taken by R’s partner. R declined to sign authorities for financial investigation and contacted an Advocate (not Advocate Merrien). To cut rather a long story short, R failed to engage with the process until appearing on 12th January and running into Advocate Merrien who was present on another matter and seeking his advice. Enquiries in that period show that R had been registered as “non-employed” since July 2012 and in receipt of benefits since then. R resides in Guernsey Housing Association accommodation.
7. A’s summary of the case is found in the affidavit already referred to at paragraph 13. These points have not been challenged in evidence. R of course had the opportunity to do so. The following facts appear to be particularly relevant in this application:
 - (i) the taking of around £3,500 in spending money on an “all-inclusive” (paragraph 10) holiday in Tenerife;
 - (ii) the inconsistent answers given by R when the cash was discovered;
 - (iii) R’s panicked response at the time of seizure;
 - (iv) the lack of any persuasive explanation for the origin of the cash;
 - (v) the use of Class A and B drugs by R and his girlfriend whilst on holiday;
 - (vi) R’s own financial circumstances, being on benefit and in Guernsey Housing Association accommodation.

These, and the other points advanced on the facts by A show that on a balance of probabilities and very plainly, R was at least involved in the possession of drugs whilst in Tenerife. The large amount of cash allows the justified inferential leap that purchase for onward supply was intended (paragraph 12). In the absence of any rational explanation the facts lead to the firm conclusion that the requirements of section 13(2)(b) of the Law of 2007 are met. But it is now necessary to consider Advocate Merrien’s legal submissions before any finding can be made.

Legal Submissions

8. Advocate Merrien drew attention to the wording of the Law of 2007. Section 61 defines “unlawful conduct” and also sets out what the Royal Court must decide on a balance of probabilities:

““Unlawful conduct”

61. (1) Conduct which occurs in any place in the Bailiwick is “unlawful conduct” if it is unlawful under the criminal law of that place.
- (2) Conduct which –
 - (a) occurs in a country outside the Bailiwick and is unlawful under the criminal law of that country, and

- (b) if it occurred in any place in the Bailiwick, would be unlawful under the criminal law of that place, also unlawful conduct.
- (3) The Royal Court must decide on a balance of probabilities whether it is proved –
 - (a) that any matters alleged to constitute unlawful conduct have occurred,
 - (b) that any money is any person’s proceeds of unlawful conduct, or
 - (c) that any person intended to use any money in unlawful conduct.”

It was submitted that there was no evidence to establish unlawful conduct in Spain. The response (Advocate Merrien having mentioned this point courteously to A in advance of the hearing) was the production of two documents harvested from the Internet. These were respectively ‘Spain Travel Advice’ from the Foreign Office and a report on Spain from the ‘European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)’, an agency of the European Union. Both describe in detail the “drugs scene” in Spain and the criminal processes and penalties connected thereto. Advocate Merrien submitted that these were hearsay and should not be taken into account: the correct way of proceeding was to call a person versed in Spanish law. Reference was made to section 20 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009. This sets out the procedure for providing evidence of foreign law. A person “who is suitably qualified” is competent to give such evidence and notice must be given. This was not so in the present matter. Rule 20 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 sets out what must be put in the notice.

- 9. Crown Advocate Hill, on behalf of A, also referred to legislation. The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Rules, 2012, rule 17 reads as follows:

“Evidence: general.

- 17. (1) No evidence may be relied on at the hearing of the forfeiture application unless –
 - (a) it has been served in accordance with these Rules, or
 - (b) the Royal Court gives permission.
- (2) Without prejudice to its powers arising otherwise than under these Rules, the Royal Court may –
 - (a) require or permit a party to the application to give oral evidence at the hearing, and
 - (b) give directions requiring the attendance for cross-examination of a witness who has given an affidavit.”

A concentrated on 1(b), to the effect that no evidence may be relied upon in this type of case unless the Royal Court gives permission. The power to make rules is contained in section 62 of the Law of 2007. In particular for the purpose of the present matter, section 62(1)(c) states rules may be made “in respect of evidence including, without limitation, rules as to the admission of evidence and evidential presumptions,”

A submitted that the provisions of rule 17(1)(b) are sufficient to allow the documents to be put in evidence, as this wording is clear enough.

Evidential Considerations

- 10. Researches reveal that in *Cross and Tapper on Evidence* (12th edition) at page 692, the proposition is stated that:

“Judicial notice may be taken of notorious facts, and, in exceptional cases the English courts have treated aspects of foreign law as matters of notoriety.”

The “famous example of Saxby v Fulton [1909] 2 KB 208 is cited, “in which judicial notice was taken of the fact that roulette is legal in Monte Carlo” (incidentally by a strong Court of Appeal):

Later on it is said:

“... it is not clear how far the English Courts will construe foreign legislation without the guidance of an expert witness. There are cases in which the English courts appear to have done this, and their decisions are then, presumably, binding on other courts within the limits of the doctrine of precedent.”

The case referred to is In re Cohn [1945] Ch5, a decision of Uthwatt J. There the Judge applied Article 20 of the German Civil Code to resolve a question of survivorship, giving an answer different to that under English law. Both these cases have stood the test of time in England, and are of high persuasive authority in Guernsey. Another case which has emerged on this topic is F&K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139, a decision of Pearson J. In that case the trial judge construed the Israeli emergency regulations on the properties of absentees and the Absentee Property Law of 1950 without any expert evidence. However, the impact of that case is limited as the parties agreed to the procedure.

11. A wider consideration is whether the doctrine of judicial notice applies. It cannot be said that the penal practices of Spain are “notorious facts”, when considering the examples of such facts in the textbooks. However, indisputable facts may be found “after enquiry”. In the textbook “*Evidence*” (Emson) (3rd Edition) at page 528 the following appears:

“Unlike judicial notice without inquiry, the judge or magistrates will first refer to appropriate sources of information in order to decide the issue. Although such facts are not sufficiently ‘notorious’ to allow the court to take judicial notice without inquiry, this procedure is permitted on the ground that certain works of reference are so reliable and authoritative that it would be absurd to expect evidence to be adduced to prove the indisputable facts contained within them.”

It would seem logical to regard the sources relied upon by A, namely Her Majesty’s Foreign Office, and the EU, as “reliable and authoritative”.

Merits

12. It would be close to Victorian practice to require a suitably qualified person to testify that offences such as possession or supply of controlled drugs are illegal in Spain. The information provided by A is clear and convincing. For example, the section headed “National Drug Laws” in the EMCDDA by an EU agency is to the point. Spain is also one of the EU countries “most targeted by international drug traffickers, especially for cannabis and cocaine transit to other European countries”. Moreover, in the FCO “Spain Travel Advice” it states: “Possession of even a small quantity of drugs can lead to arrest and detention. Possession of large quantities will probably result in prosecution and a prison sentence if convicted.” A quick Internet search will also produce results showing the nature of drug offences in Spain, their prevalence and how offenders are dealt with.
13. In any event, there are at least two cases (referred to in paragraph 10 above), of respectable antiquity, as well as apparently not disapproved by higher courts, which demonstrate that the English courts have treated “aspects of foreign law” as matters of notoriety. But it is not

necessary to proceed along that route in view of the terms of the relevant legislation. Recourse to Section 62(1)(c) of the Law of 2007 shows that rules may be made “in respect of evidence, including, without limitation, rules as to the admission of evidence and evidential presumptions” (emphasis supplied). The Rules of 2012 followed and, as previously mentioned, under rule 17(1)(b) the Royal Court may give permission to rely upon evidence, which, in all the circumstances, it does.

14. The facts of the case, as mentioned in paragraph 7 above, are a reality all one-way in favour of A. In the circumstances R has failed to come up with any explanation, beyond the unsatisfactory things said at the time, has not engaged with the procedure until the last moment, and, on his own admission has possessed drugs, including those of Class A, in Spain. It is also, in view of both the total amount of cash carried by the couple, and, in particular R’s comment to the Border Agency that “*no, no, this is serious, I need that money*” and “... *I’m now fucked*”, a valid inference that a more serious offence than possession was intended and took place. There is nothing emanating from R to rebut this. There is also the very unsatisfactory explanation for how a person in R’s, and his partner’s, seemingly modest circumstances, could have had the money anyway. Again, there is nothing countervailing to weigh in the scales. The merits in this case are undoubtedly in favour of A and to a marked degree.

Conclusion

15. Accordingly on the facts presented and the law applicable to the present case, the application succeeds. The £2,000 is declared to be intended by any person for use in unlawful conduct under section 13(2) of the Law of 2007 and forfeited.

16. APPLICATION GRANTED.

J R Finch
Judge of the Royal Court

17th February 2017