

DECISION

1. This is an application for a Confiscation Order under Section 2 of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended (“the Law”). At the hearing the Applicant Law Officers (“A”) were represented by their specialist Advocate, Advocate Giles. R was not legally represented. The only oral evidence was that of Detective Sergeant Player, who had produced the Prosecutor’s Statement under Section 11 of the Law. Her evidence, producing this statement, was unchallenged. R did not give evidence, but had submitted written materials and made oral submissions. The issue for determination turned out to be a narrow one.
2. It suffices, for the purposes of this decision, to mention that R and another were convicted of a relevant drug-trafficking offence on their own admission on 29th July, 2016 and R received 10 years’ imprisonment. The Royal Court’s sentencing remarks are at Tab 8 of the bundle prepared on behalf of A (“the bundle”). There have been some written exchanges between A and R, but the simplest way of approaching the case is to consider the latest Section 11 Prosecutor’s Statement (Tab 1 of the bundle) and R’s detailed written submissions dated 27th July, 2017. The case has now slimmed down to the following elements:
 - (i) The benefit under Section 4(3)(a) of the Law is the drugs seized at Guernsey street value at the time. This is £1,246,025.00 (paras 8 and 9 of Tab 1). This amount is taken into account on the basis of the leading English case of R v Islam [2009] 1 AC 1076. This was not disputed by R at the hearing;
 - (ii) the realizable amount, within the meaning of Section 6 of the Law was assessed at £17,254.80 by A (see paragraphs 10 and 11, Tab 1). This was the amount in dispute.
3. In relation to the specific items which taken together make up this figure:
 - (i) a 50% share of a Nissan Cabstar tipper truck valued at £1,000. This amount accords with R’s figure in his letter of 30th May, 2017;
 - (ii) restrained amount in NatWest account 74130625, £4,582.92. This is a joint account for R and his partner. The balance does not include monies deposited by his partner since R’s incarceration. R suggests £5,000.00 was lent to his son’s mother at his request and the restrained sum therefore belongs in his son’s bank account.
 - (iii) balance of NatWest account 74308718, £10,845.88. This is in R’s business name. R submits that he is indebted to States Income Tax and States Insurance in the region of £5,300.00. This is in relation to R himself (£4,200.00) and his son (£1,100.00).
 - (iv) cash in R’s wallet, £326.00. D points out that this originated in an account held jointly with his partner, so one half (£163.00) in hers;
 - (v) cash found in bedroom, £500.00. Again it is taken from a joint account with R’s partner, so £250 is also hers, he states.
4. Putting it in simple terms, the task of the Court when an application for a Confiscation Order is made under the Law is, having applied the statutory assumptions in conformity with Section 4 of the Law (“Assessing the Proceeds of drug-trafficking”), it then comes to select the realisable amount within the meaning of Section 6. Section 6(1) states that the amount that may be realised at the time a Confiscation Order is made is:-

- “(a) the total of the values at that time of all the realisable property held by the defendant, less
- (b) where there are obligations having priority at that time, the total amount payable in pursuance of such obligations.”

Sub-section (2) deals with “realisable property” which, for the purposes of the present case, means “any property held by the defendant”. Then sub-section (4) goes on to show for the purposes of sub-section (2) when an obligation has “priority”. Sub-section (4)(a) (fines) is not relevant here; sub-section (4)(b) refers to any sum which if a defendant was “*en désastre*” would be a preferred debt within the meaning of Section 1 of the Preferred Debts (Guernsey) Law, 1983 at the date of the Confiscation Order. Section 1 was amended by the Preferred Debts, Désastre Proceedings and Miscellaneous Provisions (Guernsey and Alderney) Law 2006, Section 1. In summary, the list is: (i) wages or salary due for the previous 6 years to an employee; (ii) holiday remuneration that has accrued for an employee; (iii) any income tax deducted for a 12 month period in the preceding 6 years and not paid by the employer under Section 81A of the Income Tax (Guernsey) Law, 1975, as amended; and (iv) Class 1 States Insurance Contributions, subject to the same conditions. It is therefore only items (iii) and (iv) that need consideration in the present case.

5. The loan of £5,000 from R’s son (see item (ii) in paragraph 2 above) does not constitute an item that should be deducted. The authority for this is another English case R v Pattison [2007] EWCA 1536. To be allowed as a deduction an encumbrance under Section 7 of the Law has to be secured.
6. The only remaining relevant factor in the present case is the sum of £1,100 R has stated is outstanding to the Tax and States Insurance authorities (item (iii) above). His own £4,200 does not fall within any of the Preferred Debt exceptions. Neither does the £1,100 on the wording of Section 1(1)(b)(iii) and (iv) of the Preferred Debts Law. The amount must be deducted under Section 81A of the Income Tax Law, i.e. what is known as “E.T.I.”. The same applies to insurance contributions. Setting aside a sum in a wish to provide for such liabilities does not fall within the statutory wording.
7. The next question is the joint ownership suggested in respect of the other amounts. As A put it in his letter of 13th March, 2017 to R, the leading case of R v May [2008] UK HL 28 (Tab 7) covers this point. Following R v Chraistny (No. 2) [1991] 1 WLR 1385 someone with joint control of the benefit could be made liable for the total. In May at paragraph 46 it is stated:

“The sum which the appellant, jointly with others, was found to have fraudulently obtained ... was, in law, as much his as if he acted alone.”

A referred to the general proposition in the Endnote to the decision, at paragraph (6) which indicates:

“D ordinarily obtains property if in law he owns it whether alone or jointly, which will ordinarily connote a power of disposition or control ...”

So putting it in rather basic terms, if A and B are holders of a joint bank account containing £5,000, either has the legal right to go and draw the full amount, even if they personally had paid in nothing. Hence in the present case any jointly-owned items, as a matter of law, fall to be included in the realisable amount.

8. R has referred to the provisions of the European Convention on Human Rights. Confiscation proceedings do not breach the requirements of Article 6, see e.g. Grayson v UK (2008) 48

EHRR 722. The UK Supreme Court in R v Waya [2013] 1 AC 294 held that Orders should be “proportionate” within the terms of Article 1 of the First Protocol. This decision means that a court should only make an order for a sum which is “proportionate” in relation to the aim of the legislation when it is faced with an application for an order that would be disproportionate. The purpose of the confiscation legislation was “to impose upon convicted defendants a severe regime for removing from them their proceeds of crime”. There is nothing disproportionate in the present application, particularly considering the relatively modest amount of the realisable assets and the very large benefit figure of over £1.2 million.

9. For the sake of completeness, it should be mentioned that the statutory assumptions set out in Section 4 of the Law apply and nothing has been put forward under Section 4(4) to defeat those assumptions. It is accepted by R that within the meaning of Section 4(3)(a) the street value of the drugs represents the benefit; it has only been the amount that might be realised under Section 6 which was in issue. R argued his points courteously and clearly and A’s letters did their best to assist him. However, the Law is against R, for the reasons set out.
10. Accordingly, A’s application succeeds and is granted in the terms set out in paragraph 12.5 of the Prosecutor’s Section 11 statement of 11th July, 2017 (Tab 1). HM Sheriff is appointed as Receiver under Section 29 of the Law. It is necessary to fix a period of imprisonment in default under Section 9 of the Law, which will be 9 months consecutive to any present sentence. This is deferred for a period of 28 days (which can be extended by the parties by agreement, if necessary, without recourse to the Court) from the date of this judgment to enable payment to be made and will cease to have effect on payment of the full amount of £17,254.80.

J R Finch, OBE
Judge of the Royal Court