IN THE ROYAL COURT OF GUERNSEY

IN THE MATTER OF THOMAS DAVID WATERMAN

-and-

IN THE MATTER OF

THE DRUG TRAFFICKING (BAILIWICK OF GUERNSEY) LAW, 2000, AS AMENDED ("THE LAW")

Decision regarding Confiscation

Application heard on: 10th July, 2018

Judgment handed down: 18th July, 2018

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

Counsel for the Defendant Thomas David Waterman: Advocate S J Maindonald;

Counsel for the Crown: Advocate W A Giles

Materials referred to in Judgment:

The Drug Trafficking (Bailiwick of Guernsey) Law, 2000, as amended
Sections: 5(3), 6(1), 6(4)(b), 9(2) and 11;

The Preferred Debts (Guernsey) Law, 1983, Section 1;

The Drug Trafficking Offences Act, 1986, Section 4(3).

Saloman v Saloman [1897] AC 22;

R v Wallbrook & Glasgow (1996) 1 Cr. App. R(s) 135.

Misuse of Drugs and Drug Trafficking Offences R Fortson (6th edition, 2011)

Introduction

1. These are confiscation proceedings under the Law in relation to Mr Waterman ("D") who, as far back as 29th July, 2016, pleaded guilty, with another, to being concerned in the unlawful supply of the Class B controlled drug cannabis resin. He received a sentence of 9 years' imprisonment. The drug-trafficking aspect has taken some time to come finally before the court, one reason being the involvement of English solicitors, who hold a sum of money and the need to allow D's Advocate to make full enquiry of them. However a good deal has happened over the months, and the issue to be determined has been narrowed down to one item, which is £35,000, part of the sum of £61,200 held by the English solicitors. The benefit to D of his drug-trafficking is agreed to be £287,125.00, which is the street value of the drugs seized, the subject of the Indictment he faced (11.485 kilos of cannabis resin, Guernsey street value at £25 per gram). All other matters have been dealt with or disposed of.

2. D obtained a loan from a local finance company on 23rd October, 2015. It was part of the purchase price of a property in Gosport, totalling £68,000. The loan was taken out by D. It is suggested that it was taken out in his capacity as director of Eddie's Cleaning Services Limited. The £35,000 was transferred by the finance company to the bank account of Eddie's Cleaning Services Limited on 26th October, 2015 (an amount excluded from the original restraint order). The funds were then transferred to the client account of the English solicitors, in Portsmouth. It was intended, it is said (paragraph 16 of D's skeleton) for the repayments to come from Eddie's Cleaning Services Limited's account.

3. The following events have emerged since D's sentencing. Firstly, the finance company has obtained judgment in the Royal Court (by consent) for a sum including the £35,000 (8th April, 2016). A letter from the finance company's Advocate is appended to the Law Officers ("A's") bundle, divider 3). Judgment was against D personally. At page 30a of A's bundle, there is a letter dated 2nd February 2018 from the Portsmouth solicitors stating that the sum of £61,200 (of which the £35,000 in question is a part) was received into their account from Eddie's Cleaning Services Limited. But the contract for sale of the property was "prepared and signed by Mr Waterman in his sole name not the company name and "therefore I can confirm that the funds are being held on behalf of Mr Waterman and not in a company name".

4. In oral submissions on behalf of D, it was emphasized that the company`s interest would have been registered after purchase of the property. It was in D's mind, simply a question of when. The person who dealt with D has left the firm of solicitors and the letter-writer has not dealt with D. The file notes do not help. In her written argument (paragraph 23) D's Advocate submitted that these funds "do not comprise the Defendant's free property. They are beneficially owned by a company, Eddie's Cleaning Services Limited of which the Defendant has only an interest".

Legal Principles

5. A made the point that "clear and cogent evidence" is required on behalf of D. The case relied upon is the English decision of R v Wallbrook and Glasgow (1996) 1 Cr App R (s) 135 (divider 4 of bundle). That was in the context of a loan. Dyson J, giving the judgment of the Court of Appeal added that a defendant must produce "clear and cogent evidence; vague and generalised assertions unsupported by evidence will rarely if ever be sufficient to discharge the burden on the defendant". This relates to what was Section 4(3) of the Drug Trafficking Offences Act, 1986 – the equivalent and subsisting Guernsey provision is Section 5(3) of the Law. The general point as to evidence of financial arrangements is, with respect, one that should apply across the board in cases such as these. The specific suggestion put forward on behalf of A (see paragraph 4 of the second skeleton) is that even if the amount was a "loan" from D to the company, it is still recoverable. Apart from the oral evidence of T/D/S Player,

who confirmed her affidavits, there was no other witness testimony at the hearing. D did not give evidence.

6. Going back to the basic statutory provisions, section 6(1) of the Law sets out:

> "(1) For the purposes of this Law, the amount that might be realised at the time a confiscation order is made against the defendant is –
> (a) The total of the values 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 together with the values at that time of all gifts caught by this law."

Then at D's skeleton, paragraph 27 the wording advanced is:

> "The Defendant has never sought to argue that the loan … is a priority obligation within the Law."

This wording, as A submits in the 2nd skeleton, paragraph 8:

> "… rules out any argument surrounding the operation of section 6(4) of the Law."

(Section 6(4)(b) is relevant, and alludes to any sum that will be a "preferred debt" if D's affairs were declared in a state of désastre, under section 1 of the Preferred Debts (Guernsey) Law, 1983).

7. Despite the laudable industry of D's Advocate, the only evidence available from the English solicitors is the letter of 2nd February, 2018. It is short, but perfectly clear in its content. The writer is identified as a "director" at the foot of the letter. It plainly indicates that the funds are held in D's name "and not in a company name". Further support for this comes in the judgment of the Royal Court on 8th April, 2016, against D personally (see the Plaintiffs Advocate's rather wistful letter of 22nd June, 2016, also at A's divider 3 and mentioned earlier). So it was D who could have used the funds, prior to restraint, and D who under a judgment of the Royal Court, owes the money. In those circumstances it would seem that the picture is clear. D wrote a rather heartfelt letter dated 7th March, 2018, which was appended to a small extra bundle produced for the hearing. He wants to move on, clear the debt and put the matter to rest. It has indeed taken court time, but that was due to the need to be fair to both sides. Fortunately the issue in the end was rather a narrow one. But on the facts, applying the provisions of the Law, the £35,000 is, in effect, frozen in time as his and has to be dealt with accordingly. The evidence is all in favour of A's application.

The Corporate Veil

8. This was touched on briefly. In her latest bundle D's Advocate copied the well-worn case of Saloman v Saloman [1897] AC 22, a classic decision if ever there was one, engraved on generations of lawyers from their studying days. If the conclusions set out above are technically incorrect and it is, despite the findings on the evidence, the company that has to be looked to, then the perennially absorbing question of piercing (or as Advocate Giles rendered it "lifting"), the corporate veil arises. It appears that no single principle is applicable to all the cases. It depends on the individual circumstances. In the leading textbook *Misuse of Drugs and Drug Trafficking Offences* (6th edition, 2011) R Fortson, at 13-299 notes the following:

> "The size of the company, whether it is a "family company", and establishing how decisions are taken (and by whom) are relevant considerations."

This is not a case where the Company has been shown to be purely a device to avoid the law, but it is a classic small company. It was incorporated in 2006 with two co-directors: Messrs Winston Waterman and Eddie Hawkey; it was struck-off on 19th May 2016. There has, on the evidence, been no substantial challenge to T/D/S Player's conclusion in her original section 11 (of the Law) statement of 26th July, 2016, page 8 (as submitted in A's second skeleton at paragraph 5) to the effect that the company was "a creature" of D, (including some reference to certain items of expenditure, such as shopping – although it was not possible to state that these were not legitimate purchases). Accordingly, this is a case for peering under the veil on the available facts. Hence the amount of £161.11 held by HSBC in D's name (Monty's Cleaning) is also included in the final total.

Conclusion

9. A's application therefore succeeds. The sum of £35,000 is added to the available amount of realisable property caught by Section 6 of the Law, a total of £78,612.27. In order to avoid bureaucratic difficulties, a period of two months from the date of this decision is granted for the receipt of this amount. If there are any problems, the period can be extended without a further hearing. Under section 9(2) of the Law a period in default is required. For the amounts £50,000 to £100,000, the maximum is 2 years, so this is reduced to 18 months, consecutive to any other period D is subject to at the date of the judgment.

J R Finch, O.B.E.
Judge of the Royal Court