



**Her Majesty's Procureur & Hugo Heykers and ABM
Amro Channel Islands Ltd**
Royal Court
19th July 2018

**JUDGMENT
44/2018**

Application to permit the payment of legal expenses as an exception to a Freezing Order.

IN THE ROYAL COURT OF GUERNSEY

Between:

HM PROCUREUR

Applicant

-and-

(1) HUGO HEYKERS

(2) ABM AMRO (CHANNEL ISLANDS) LIMITED

Respondents

Decision handed down on: 19th July, 2018

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

Counsel for the Applicant: Advocate R Gist

Counsel for the First Respondent: Advocate C A Tee/Advocate T A Crawford

(The Second Respondent did not appear and was not represented)

Cases and Statutes referred to in Decision:

Director of the Asset Recovery Agency v Fleming and Ors. [2017] NIQB 6;

National Crime Agency v Gedminas Simkas [2016] EWHC 728 (Admin);

Serious Organised Crime Agency v Azam [2013] EWCA Civ 970.

The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007 (as amended), Schedule paragraph 4.

European Convention on Human Rights ("ECHR"), Article 6 and Article 1 of the First Protocol.

DECISION ON LEGAL EXPENSES

Introduction

1. This follows on from my preliminary decision of the 18th June, 2018. In that it was decided that the First Respondent's ("R1's") application to permit the payment of legal expenses as an exception to a Freezing Order dated 26th January, 2018 in respect of USD and Euro accounts should await the lodging of affidavit evidence in accordance with the case of Director of the

Asset Recovery Agency v Fleming and Ors [2017] NIQB 6. The main issue will be the Applicant's ("A's") application seeking forfeiture of these funds, which total USD26,529.73 and €70,757.68 plus accrued interest, held in R1's name in the Second Respondent's ("R2's") bank in Guernsey.

2. A written submission from Advocate T Crawford dated 29th June, 2018 exhibiting supporting documents has been received and considered. There is an affidavit from R1 which essentially bears out his Guernsey legal aid application dated the 16th May, 2018. That form was annexed to an affidavit from Advocate Crawford of 6th June, 2018. R1 is already funded under the Guernsey legal aid system and it is a condition of this that he makes the present application.
3. The Guernsey legal aid rate is £167.00 per hour. As of 6th June, 2018 £2,605.20 had been incurred as costs. Advocate Crawford (paragraph 13 of his affidavit of 6th June, 2018) considers further expenditure in the region of £10,000.00 is likely. The latest estimate is £8,884.40.

Basic Submissions

4. On behalf of A, the Fleming case was put forward; paragraph 13 of A's skeleton of the 13th June, 2018 states:

“The First Defendant is a convicted drug trafficker and a determination has been made that he benefitted substantially from his unlawful conduct. There are reasonable grounds to believe that the funds held by the Second Defendant derive from the unlawful conduct of the First Defendant. The “desirability of the person” must be open to question.”

5. In response R1's submission of 29th June referred to the English case of National Crime Agency v Gedminas Simkas [2016] EWHC 728 (Admin), a decision of Edis J. This refers to an earlier decision Serious Organised Crime Agency v Azam [2013] EWCA Civ 970. Both cases are annexed to the written submission.
6. The “desirability” issue is found in paragraph 4(a) of the Schedule to the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, as amended (“the Law”). This reads:

“The Royal Court in deciding whether to release any amount for the payment of legal expenses under this Schedule –

(a) Must have regard (in particular) to the desirability of the party being legally represented in the proceedings in question ...”

((b) states that the possibility of legal aid being granted if no such money is released must be disregarded.)

7. Putting it very shortly, the Simkas case proceeds on the basis that the Court of Appeal in Azam was right to consider the matter “from the starting point that the respondent is entitled to use his property to obtain representation”. Azam also sets out the general position at paragraph 66 of the judgment. In respect of the present application the following words of Lloyd LJ are apposite:

“I would therefore reject the proposition that there is a specific burden of proof on the applicant which requires him to prove that there are no other available assets which could be used for the relevant purpose, such that if he does not discharge that burden, his application must fail.”

The exclusion was also justified by virtue of Article 1 of the First Protocol and Article 6 of the ECHR, given “the confiscatory nature of the proceedings”.

Conclusion

8. It is not necessary to discuss any differences in wording between the English and Guernsey legislation. They are not material in this matter, as the principles in the cases cited on behalf of A are, it appears, wholly apposite. R1 has referred to the differences in wording between the provisions at paragraphs 27-32 of the written submissions of the 29th June, 2018, but it is therefore not intended (Ockham’s Razor) to consider them.
9. On the materials presently before the Court and noting (especially) paragraph 4(a) of the Schedule to the Law and the relevant parts of the ECHR referred to in Azam, the application succeeds. The amount to be released from R2 is the equivalent of £10,000.00 as of the date of this decision. The sum is to be paid to ABT Advocates and any amount not expended to be held by them until the final decision of this Court in the forfeiture application. A draft order should be drawn up by R1’s Advocate, hopefully approved by A, and submitted for signature.

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