



Forfeiture of Money - Heykers v HMC
Royal Court
28th November 2018

JUDGMENT
46/2018

Decision on the release of monies for the purposes of an appeal to the Court of Appeal

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 (“THE LAW”)

-AND-

HUGO FRANZ MARIA HEYKERS

Applicant
(“A”)

-and-

HER MAJESTY’S COMPTROLLER

Respondent
(“R”)

Decision on the release of monies for the purposes of an appeal to the Court of Appeal

Decision handed down on: 28th November, 2018

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

Counsel for the Applicant: Advocate T A Crawford

Counsel for HM Comptroller (Respondent): Advocate R Gist

DECISION

Introduction

1. This matter is being dealt with on the papers, and written submissions on behalf of both parties have been received and considered. The short background is that on 3rd September 2018, the Royal Court (comprising myself) ordered the forfeiture of USD26,638.56 and €58,736.62 (plus interest), having found they were the proceeds of unlawful conduct under the Law. The relevant appeal period expired on 3rd October, 2018, and Notice of Appeal was dated and received on 2nd October, 2018. But on 12th September, 2018 the bank which held the funds released them prematurely. It is now accepted that if the present application succeeds any sums will be met from the General Revenues of the States of Guernsey, who

received them. A now seeks (having successfully received a similar amount in order to contest the original application) a release of £10,000 to fund his appeal.

2. R contends that the Royal Court is *functus* and, in summary, the Forfeiture Order having been made, the monies are no longer A's. They are not detained or frozen, so that the requirements of the Schedule to the Law, particularly paragraph 1(b) monies "which belong to him" and which "he would otherwise be entitled to use for that purpose [i.e. funding legal expenses] (were the monies not detained or frozen)". R also makes the more general suggestion that the terms of the Order are not met in this application, as although paragraph 2 provides for the ability to apply for the provision of legal expenses "for the purposes of proceedings in connection with this Order and any subsequent proceedings for a Forfeiture Order", the appeal is not "subsequent proceedings for a Forfeiture Order". (emphasis supplied) A is no longer a party to these proceedings, but an Appellant to the Court of Appeal. As paragraph 13 of R's written submissions puts it, "Mr Heykers has no entitlement to use these monies. In any event the monies are not detained or frozen".
3. A refers to Section 13(3) of the Law. The monies are to be frozen and may not, subject to (as is relevant here) Section 54 of the Law, which refers to the Schedule, be released under any power inferred by the Law "until any proceedings in pursuance of the application (including any proceedings on appeal) (emphasis supplied) are concluded". It is also pointed out that by virtue of Section 15 of the Law, monies forfeited accrue to the General Revenues of the States, but shall not be so credited "before the end of the period within which an appeal under Section 14 may be made". A accordingly invites this Court to "treat the remaining funds now in the custody of the Respondent as funds that are still frozen pursuant to the Freezing Order and subject to the bar on release, pursuant to Section 13(3) of the Law". The premature release has had the effect "seemingly" to put the matter outside the Royal Court's jurisdiction, but A should not be penalised on account of this.
4. Having considered the written submissions it seems unjust that A should suffer as a result of the premature release of the funds, 20 days prior to the appeal deadline. As A points out, such release is contrary to Section 13(3). In addition, the subsection plainly envisages an appeal. If the monies were still held in accordance with Section 13(3) there would be no question of ruling the application as outside the Royal Court's powers. One would then naturally alight on paragraph 2 of the Schedule. If satisfied A is unable to pay for representation it may be directed (inter alia) that the "prohibition on the release of monies imposed by Section 13(3) ..." be varied to allow payment for reasonable legal expenses.
5. With great deference to R, the arguments put forward are unduly legalistic (in the narrow sense of the word), bearing in mind the premature release of the monies, which was not A's fault. He should not be deprived of the benefits of the legislation because someone else has fallen into error. Accordingly the merits of the application need to be considered. Taking account of A's earlier successful application in the original hearing and his latest affidavit, of 11th October, 2018, the sum of £8,000.00 is released. A's estimate in the affidavit extends to £6,142.00. It is hoped this is broadly correct. If the total sum (which should be dealt with in the same way as the earlier amount) is less then, of course, the balance is repayable. It is hoped it will not be more, and if so, convincing justification will need to be given. Counsel are asked please, to draw up an Order.

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

(Copies of the relevant parts of the legislation, taken from the consolidated version, are appended.)

Forfeiture

Forfeiture

13. (1) While money is detained under section 7 or frozen under section 10, an application for the forfeiture of the whole or any part of it may be made by Her Majesty's Procureur to the Royal Court sitting as an Ordinary Court ("**the Royal Court**").
- (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 the part –
- (a) is any person's proceeds of unlawful conduct, or
 - (b) is intended by any person for use in unlawful conduct.
- (3) Where an application for the forfeiture of any money is made under this section, the money is to be detained or, as the case may be, frozen (and may not, subject to sections 16 and 54, be released under any power conferred by this Law) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded.

Appeal against forfeiture

14. (1) Any party to proceedings for an order for the forfeiture of money under section 13 who is aggrieved by the making of the order or by a decision not to make the order may appeal to the Court of Appeal.
- (2) For the avoidance of doubt an appeal under this section is an appeal in a civil matter for the purposes of Part II of the Court of Appeal (Guernsey) Law, 1961.
- The provisions of that Law and any rules under it apply accordingly.

Application of forfeited money

15. (1) Money forfeited under this Law and any accrued interest thereon shall, subject to subsection (2), be credited to the General Revenues of the States of Guernsey.
- (2) Money and accrued interest thereon shall not be so credited –
- (a) before the end of the period within which an appeal under section 14 may be made,
 - (b) if a person appeals under that section, before the appeal is finally disposed of, or
 - (c) if the money and interest is to be paid elsewhere (for example, into any seized asset fund) pursuant to a direction of the [Policy & Resources Committee].

SCHEDULE

Section 54

LEGAL EXPENSES OF RESPONDENTS, ETC

1. A party to proceedings under section 9 or 11 (release of detained cash or frozen bank accounts) or Part III (forfeiture and release of money) [or Part V (enforcement of orders made outside the Bailiwick)] may apply to the Royal Court for the expenses of his legal representation to be met out of monies –
- [(a) which are detained or frozen under section 7 or 10, or which may not be released by virtue of section 13(3) or 49(2A), and]
 - (b) which belong to him or which he would otherwise be entitled to use for that purpose (were the monies not detained or frozen).
2. The Royal Court, if satisfied that the party is unable to pay for legal representation, may, subject to the provisions of and under this Schedule, and subject to such terms and conditions as it thinks fit, direct that an order made under section 7 or 10 [or (as the case may be) the prohibition on the release of the monies imposed by section 13(3) or 49(2A)] be varied to allow for the payment of reasonable legal expenses which have been or may be reasonably incurred by him for the purposes of the proceedings.

3. The Royal Court may (without prejudice to the generality of its power to impose terms and conditions under paragraph 2) –
 - (a) specify the total amount that may be released for the payment of legal expenses for the purposes of the proceedings or any particular stage in the proceedings,
 - (b) restrict who may receive sums so released (for example, by requiring released sums to be paid to Advocates),
 - (c) restrict the amount of any sum released in respect of any particular item of expenditure or any particular stage in the proceedings,
 - (d) provide for a sum to be released in respect of any particular item of expenditure or any particular state in the proceedings only if the Court (or a person nominated by it) has assessed the item or the stage and approved the amount,
 - (e) limit the amounts that may be released by reference to the amounts that would be payable in respect of the services of an Advocate under the provisions of the Legal Aid (Bailiwick of Guernsey) Law, 2003 or any Ordinance or Scheme thereunder.

4. 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, and
 - (b) must, where the party is the respondent, disregard the possibility that his legal representation might, were the amount not so released, be funded under the provisions of the Legal Aid (Bailiwick of Guernsey) Law, 2003 or any Ordinance or Scheme thereunder.

5. The Royal Court may by Order –
 - (a) make provision for the purpose of carrying this Schedule into effect, and
 - (b) amend this Schedule.