

An application on the behalf of HM Comptroller, under s.13 of The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007

**[2020]GRC001**

**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-**

**IN THE MATTER OF €10,025.31  
HELD BY THE ROYAL BANK OF SCOTLAND INTERNATIONAL  
IN THE NAME OF  
APAX EUROPE VI-1LP DISTRIBUTION,  
ACCOUNT NUMBER 56418331, SORT CODE 16-20-29**

**Between:**

**H M COMPTROLLER (“A”)**

**-AND-**

**(1) APAX PARTNERS (GUERNSEY) LIMITED (“R1”)**

**-and-**

**(2) JACOB (“KOBI”) ALEXANDER (“R2”)**

**-and-**

**(3) ROYAL BANK OF SCOTLAND INTERNATIONAL (“R3”)**

**Application heard on: 19<sup>th</sup> December, 2019**

**Decision handed down on: 21<sup>st</sup> January, 2020**

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

**Counsel for HM Comptroller (Applicant): Crown Advocate C M Rabey  
Counsel for R2: Advocate C H Edwards**

**(Neither R1 nor R3 appeared)**

**Legislation referred to in Judgment:**

The Forfeiture of Money etc. in Civil Proceedings (Bailiwick of Guernsey) Law 2007, as amended - Sections 9, 13, 59 and 61;

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

The Theft (Bailiwick of Guernsey) Law 1983, Sections 16 and 19.

**JUDGMENT**

**Background**

1. This is an application on behalf of HM Comptroller under section 13 of the Law for the forfeiture of €10,025.31 (“the money”) held in an account beneficially owned by R2. Neither R1, nor R3 participated in the hearing. R1’s Advocate wrote a letter stating their neutrality and intention to abide by any Order made by the Royal Court. Hence the only active participants were HM Comptroller and R2. A joint bundle was prepared and the skeleton arguments were expanded upon in full oral submissions at the hearing. At the end of the hearing the parties were told that a written decision would be handed down as soon as practicable, which this now is. During the course of argument I expressed mild surprise that there was so much paperwork (and effort) for what is a comparatively small amount, but it appears that there may be other sums which may be the subject of proceedings. However, this application and its assessment relate only to the amount cited and the circumstances surrounding it. No oral evidence was heard, but there were a number of detailed affidavits put in by both parties, with copious supporting documents.

**Applicable Legal Principles**

2. The Law has been included in the bundle at divider 11. The relevant provisions in this matter start with section 13(2), which provides for the forfeiture of money if it is found on a balance of probabilities that it is any person’s proceeds of unlawful conduct (or, which does not apply here, is intended by any person for use in unlawful conduct). Unlawful conduct includes conduct occurring in a country outside the Bailiwick which is unlawful under the criminal law of that country, and, if it occurred in the Bailiwick would be unlawful (Section 61). The proceeds of unlawful conduct includes money that indirectly represents the proceeds of unlawful conduct (section 59). The unlawful conduct put forward is the back-dating of share options. This is not in itself unlawful under U.S. Federal law, but it is where accompanied by deception. R2 was convicted of one count of securities fraud before the US District Court for the Eastern District of New York, by way of a plea bargain, and on 23rd February, 2017 and received 30 months’ imprisonment on that offence. R2 had gone to Israel on a pre-planned holiday on 21<sup>st</sup> June, 2006, but decamped to Namibia (South-West Africa), which does not have an extradition treaty with the U.S.A. He became a Federal fugitive wanted on warrant. Extradition was commenced in Namibia. R2 was arrested, and in August 2016 chose to return to the U.S.A. to face criminal and civil proceedings. He had in 2010 settled civil proceedings with the S.E.C., paying \$47.6 million in “disgorgement” plus a \$6 million penalty. A good way to follow R2’s case is to be found in the lucid “Analysis of Sentencing Factors” prepared by U.S. Senior District Judge N. Garaufis at pages 163-168 in divider 6. This is, with respect, in very clear terms, and makes the important point that whilst (as stated) back-dating is not per se illegal, R2 lied to shareholders and investors “over and over again”. As a result the company of which he was chairman and C.E.O. had to “restate its financials”. R2’s co-adjutors were the company’s (Comverse Technology) Senior Counsel and its Chief Financial Officer, who also admitted their guilt. It is relevant to mention here that R2’s actions, had they occurred in the Bailiwick, would at the time have amounted to obtaining a pecuniary advantage by deception under the Theft (Bailiwick of Guernsey) Law 1983, section 16. In my opinion they would also likely have amounted to the offence of false accounting

under section 19 of the same Law. (The latter offence was underused, but proved to be relevant in a number of serious fraud cases that I dealt with in England). So, in concluding this part of the judgment, it is only necessary to state that the “corresponding law” requirement is met and that the civil burden of proof applies – this latter point is a particularly relevant one in this case. The fact that these are civil proceedings also assists in allowing the reception of evidence that might very well not be usable in a criminal prosecution - a consideration which will be stressed throughout and in the conclusions.

### **Surrounding Circumstances**

3. There is, as mentioned, a lot of paper in this case, particularly when one compares it to the frequently sparse documentation that often is produced when forfeiture proceedings in respect of drugs-connected money are heard. After a good deal of reading and re-reading, I have come to the conclusion that, in essence, the facts can be boiled down to a relatively simple description:
  - (i) the money in question arises from distribution from R2’s investment into Apax VI. All payments therein came from his account at Citibank New York. Two came from there in 2005 (\$198,000). A payment of \$102,000 in 2007 came indirectly from Citibank, because it was taken from distributions payable to R2 from Apax VI, and to a lesser extent, Apax V. This last payment was made in that way because of freezing order in “in rem” proceedings, which prevented payment from the bank (see especially the affidavit of Detective Constable Robilliard, at divider 9, paragraph 36(iv)). It is A’s case (on the balance of probabilities) that the payments can be traced back to the profits arising from R2’s unlawful share option back-dating scheme. Apax VI was R2’s distributions account, where returns were paid, and Apax V was a trading account. The relevant Citibank accounts can be conveniently referred to as the 338 account, which is the main one, and the 694 account. A’s case suggests that the 338 account is more likely than not to be involved. The records from the fund administrator do not specify which account was made use of for payments to Apax VI (or Apax V);
  - (ii) A submits that it is “significant” that in 2010 R2 agreed to the forfeiture of all the funds frozen in the 338 and 694 accounts. No admission of liability was made and the agreement is not evidence of where the money came from in itself, but it is a relevant consideration in this application and the Royal Court is entitled to give this fact the weight it considers appropriate when considering the background to this matter. The facts are summarized in D.C. Robilliard’s affidavit at paragraph 19. (The plea bargain details and documentation are attached at pages 17-74). The Agreement is signed by U.S. District Court Senior Judge Garaufis and dated 24<sup>th</sup> November, 2010;
  - (iii) the basis of A’s application comes from two documents also attached to D.C. Robilliard’s affidavit. They need to be considered carefully in view of R2’s criticism of them, made on his behalf by Advocate Edwards. The first document is the report of a Special Committee appointed by his former company, Converse, for the S.E.C. and annexed to D.C. Robilliard’s affidavit at pages 75-95, dated January 29<sup>th</sup> 2009. The second is an amended “Verified Complaint” from F.B.I. Special Agent Kevin Riordon, dated July 7<sup>th</sup>, 2008, in relation to the action “in rem”; this follows on from the previous document and is at pages 97-137. The details of this evidence are considered below at paragraph 7.

### **R2’s response**

4. At divider 7 there is an affidavit from Mr Jeremy Hugh Temkin, a principal of a law practice on 5<sup>th</sup> Avenue in the city of New York, who acted for R2 in the criminal and civil proceedings

described above and remains his attorney. He supports the Notice of Objection in these proceedings put in on R2's behalf (divider 5). He makes the point that his client "immediately and fully co-operated" with the Special Committee. R2's position is set-out, and it is useful to compare this with the observations made by the trial judge, already referred to, in divider 6 at pages 163-168. It is suggested that R2 "did not reap a single penny or profit from the option grants underlying his guilty plea". R2 did not exercise any of the option grants identified in the analysis of sentencing factors by Judge Garaufis. At divider 10 Mr Temkin deals with the documents relied upon by A, namely the Special Committee's report and Special Agent Riordon's "verified complaint". Mr Temkin asserts that R2 has "consistently and adamantly denied that there was any unlawful backdating prior to 1998". The conclusions of the Special Committee and Special Agent Riordon are attacked in view of their evidential limitations and hearsay elements. This is developed further in Advocate Edwards' skeleton argument and was forcefully set-out in his oral submissions. It is also worthy of note that at the sentencing hearing (transcript attached at divider 7, page 128) the Assistant U.S. Attorney, Mr Loonam, referred to the Independent Committee's report and concluded that "The documentation for the early options grant was thin". He did not ask for a Fatico hearing (equivalent to a Newton hearing in this jurisdiction and England).

### **A's rejoinder to the objections**

5. Crown Advocate Rabey in her written and oral submissions referred to the points made above on R2's behalf by his attorney. A's case, it was submitted, is not confined to pre-1998 options. Back-dating continued after that time, according to the Verified Complaint (see especially paragraphs 16-18, pages 164-165). Put simply, it is A's submission that payments into Apex V and Apex VI came directly or indirectly from amounts paid into the 338 account between 1999 and 2004. The monies derived from the exercise of back-dated share options issued before that time. It was also accepted that R2's conviction did not derive from activity that generated any funds for him – that is not a central issue. No direct evidence has been generated by R2 about what occurred prior to 1998; the only item emanating in support of his case comes from his American attorney.
6. A good deal was made of the evidential shortcomings in the two main statements adduced on behalf of A. Indeed Advocate Edwards amplified the criticisms Mr Temkin had made. Officials do not, he said, enjoy any privileged status, why should the assertions be accepted? Special Agent Riordon relied on hearsay, as is shown by the declaration at the end of his Verified Complaint. There was also an attempted impeachment of the findings of the Special Committee and its motives (see especially paragraphs 22-24 of R2's skeleton argument). They are "untested conclusions" based on material obtained without evidential safeguards. There was every incentive to present R2 "in a negative light" according to Mr Temkin. These points were in turn robustly countered by Crown Advocate Rabey. The complaints relating to the Special Committee are unsubstantiated and the evidential weight of their conclusions (remembering throughout that these are civil proceedings) is for the Royal Court to decide. Attention was drawn to the constitution of the Special Committee and its "credible" sources. At divider 9, pages 80-81 this can be seen. Independent directors were appointed and the services of a forensic accounting and litigation support firm were obtained. The F.B.I. statement was very detailed, and R2's submissions, it was suggested, "smack of desperation". In relation to this it was submitted that although Special Agent Riordon may not have had personal knowledge of all the details, his sources of information, viz the S.E.C., other law enforcement agencies and official files are prima facie credible. R2 has not produced an affidavit. Whilst he is under no obligation to do so, nor is he obliged to demonstrate the provenance of the funds in question, he was the best person to put forward his side of the case. What his case consists of is an attack on the evidence put forward by A, without anything substantial or detailed in response. This has to be taken into account suggested Crown Advocate Rabey.

7. Crown Advocate Rabey also referred to specifics in the documents, which in her submission make the case of the Law Officers of the Crown more likely than not. They are, in summary form, as follows (and it should be remembered that A's case is that the payments from Citibank can be traced back to the profits made by R2 from his illegal back-dating activities. Accordingly, the money indirectly represents the proceeds of this scheme, which involved unlawful conduct within the meaning of the Guernsey legislation):

- (i) the Special Committee concluded (divider 9, page 77) that in reviewing the company's practices from 1991 to 2005 around 54 million stock options were backdated to obtain "advantageous exercise prices", with the knowledge and participation of R2 (Chairman and C.E.O.) and his two confederates. The total difference in value was over \$71 million, including \$6,435,750 for R2. It is interesting to note that R2 and his co-conspirator Mr Kienberg (Chief Financial Officer) set up and ran a "secret options reserve fund". The operation included option grants to fictitious employees and transfer of these grants to one of two accounts, one of them (which could be viewed as classic chutzpah) designated "I.M. Fanton", inspired by the musical "Phantom of the Opera" (see page 106, paragraph 20);
- (ii) Special Agent Riordon's Verified Complaint is also a very detailed document. At the beginning paragraph 8 sets out the case with helpful simplicity:

"As set forth more fully herein, [R2] together with others, engaged in a scheme to backdate millions of stock options granted to himself and CT1 employees to days when the stock of CT1 was trading at periodic low points. He reaped substantial personal gain from his fraudulent conduct."

And, a little more fully, at paragraph 14:

"Beginning in 1991, [R2], together with others, engaged in a scheme to backdate millions of stock options to themselves to days when the stock was trading at periodic low prices. For example, he backdated the option grants listed in paragraph 61 herein as well as *every* company-wide grant and certain grants to new employees since 1998. As the top recipient of stock options in these company-wide grants. [R2] reaped substantial personal gain from his fraudulent conduct."

And at paragraph 25:

"[R2], together with others, knowingly and intentionally made false statements, misrepresentations, and material omissions in CT1's proxy statement, annual and quarterly filings and stock option plans."

(Which is why I consider the offence of false accounting is also likely made out.)

- (iii) The statement then goes over R2's nefarious activities in some detail, including (paragraph 58) an alleged blatant attempt at perverting the course of justice. The statement is replete with facts, dates, details and amounts. It was made, it should be noted, for the purpose of the civil action, which forced R2 to pay back a considerable sum of money plus a large penalty. When it comes to paragraph 61, it is stated that R2 "deposited over 1.6 million shares acquired through the exercise of options acquired through the back-dating scheme". The shares were sold as listed in paragraph 62. The gross proceeds are given from February 1999 to

January 2004 (the last January 2006 entry being disregarded). At paragraph 62 the following explanation is given:

“Each of these sales involved amounts over \$10,000 and the proceeds of each of these sales (all of which included profits) were deposited into the 338 account.” This amounted to fraudulent activity under Federal Law. The 694 account is referred to in paragraph 64, and R2 transferred substantial funds to it from the 338 account early in 2004.

At the end of this document is a “Verification” showing the sources of information relied upon. This is made up of “my personal knowledge, information provided by the Securities and Exchange Commission and other law enforcement officers, and the official files and records of the Federal Bureau of Investigation”.

## **The Merits**

8. I do not attach the same importance as Advocate Edwards (and Mr Temkin) do to the sentencing procedure and the reference to the documentation relating to the earlier activities as “thin”. Not only, of course, are we concerned now with a different and lower burden of proof, but the context of this remark needs to be appreciated. The Prosecutor had what he wanted and there was no point in ventilating matters at a evidential hearing when he considered (divider 7, pages 127-128) “I don’t think its material to the sentencing guideline calculation, because we’re not using it for loss”. So the equivalent of a Newton hearing was not needed. This is the sort of decision a sensible Prosecutor could properly make, and I am likely to have done the same myself were I in Mr Loonam’s shoes. This is hardly some sort of estoppel. The essence of R2’s submissions, delivered in Advocate Edwards’ customary robust and confident style, was an attack on the two main items of documentary evidence, as dealt with above. The question of the weight to be attached to the evidence is for the Royal Court to decide. In relation to this point it seems to me that the evidence comes from reliable sources and it is open to me to accept it, having given appropriate consideration to the submissions made on behalf of R2.
9. R2’s problem is his absence from the stage. Although his capable and well-experienced Attorney has done his best, the person to explain his dealing, motivations and reasoning is R2 himself. Of course he is under no obligation to produce an affidavit, but when dissecting a person’s actions the best vehicle for understanding them is that person himself. Instead we have (stripping the padding away) an attack on two well-produced and detailed documents, prepared for official purposes and convincing in their contents. Under rule 17 of the Forfeiture of Money, etc., in Civil Proceedings (Bailiwick of Guernsey) Rules, 2012 I have relied upon the written evidence, and then found the criticisms lacking in substance. I have repeatedly observed that these are civil proceedings and therefore the strict evidential rules applicable in a criminal case do not apply. The response from R2 is unconvincing and would be more apposite if this were a criminal matter. Advocate Edwards is right, of course, when he suggests that law enforcement officers are not in a privileged position, but someone who has detailed knowledge of a case is generally a very helpful witness. The attempted attack on the Special Committee also, with respect, rather falls flat on its face. It was constituted by responsible and weighty individuals and R2, it appears, co-operated with it. There is nothing in R2’s evidence to counter-balance its conclusions. Hence, in all the circumstances, I attach considerable weight to both documents and their conclusions - in the absence of countervailing, convincing detail from R2. The fact that documents in these proceedings contain hearsay is not, of itself, a good ground to reject them. As stated, it is always a question of weight. There is also another and highly relevant consideration. R2 is, on his own admission, a convicted fraudster - who was involved in a pattern of deceit which violated the trust other persons had in him and as well as his fiduciary duty to the company. He

became a Federal fugitive and, for a while, sought to evade justice by entering a country with no U.S. extradition treaty. Whatever he said regarding what took place would have to be treated with appropriate and commensurate caution. Putting it bluntly, he deceived others before and cannot come to this case with clean hands - but it would still have been nice to hear from him and evaluate his response. Having considered these points it is evident that A's case is a strong one and the application succeeds. The money is therefore forfeited in accordance with section 13 of the Law, with the customary deduction of costs.

10. Application Granted.

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