

Application by HM Comptroller under Section 13 of the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007, for the forfeiture of cash seized from the Defendant.

[2021]GRC019

**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
THE SUM OF £2,362.00 (PLUS INTEREST) IN
CASH SEIZED ON FRIDAY, 03 JULY 2020
AT 10:00 HRS AT GUERNSEY POLICE STATION**

-AND-

**ON APPLICATION BY
HER MAJESTY’S COMPTROLLER**

**Application for an Order for the Forfeiture of
Seized Cash Pursuant to Section 13 of
The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 20**

Application heard on: 6th April 2021 & 12th April 2021

Decision handed down on: 20th May 2021

Before: Jessica E Roland, Deputy Bailiff

**Counsel for the Applicant: Advocate P M Grainge
Mr L Luscombe appeared in person**

Cases, texts & legislation referred to:

The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007

In the matter of The Forfeiture of money in civil proceedings, funds held in case and on application by HM Procureur 26/2011

Muneka v Comrs of Customs & Excise [2005] EWHC 465

Bassick and Osborne v Commissioners of Customs and Excise [1993] 161 JP 377

Angus v United Kingdom Border Agency [2011] EWHC 461 (Admin)

R (on the application of Bavi) v Snaresbrook Crown Court [2013] EWHC 4015 (Admin)

Fletcher v Chief Constable of Leicestershire Constabulary [2013] EWHC 3357 (Admin),

Sandu v Chief Constable of the East Midlands Police [2019] EWHC 3316 (Admin)

DECISION

Introduction

1. This is an application by HM Comptroller under Section 13 of the Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (“the 2007 Law”) for the forfeiture of the sum of £2,362 (which was amended from £2,556) and any interest accruing thereon, being cash seized from the Respondent at the Guernsey Police station on the 3rd July, 2020 at 10:00, and subsequently extended from the 6th July, 2020. The matter was originally set down for the 22nd February, 2021, however due to Covid-19 the matter was then re-listed to be heard in April 2021.
2. Andrew Simon, who is a Customs Officer, employed by Home Affairs Committee of the States of Guernsey (“the Committee”) in the role of Economic Crime Investigator, filed three affidavits in support of the application and also gave evidence in Court. During the course of the hearing it became evident it would be of assistance to the Court for Natalie Tucker, who is a senior policy officer in the office of the Committee of Employment and Social Security dealing with benefit payments, made to the Respondent.
3. The Respondent filed one affidavit and also gave evidence on his own behalf. The Respondent also called PC De La Mare as a witness who gave very brief evidence.

Facts

4. At about midnight on Friday 22nd May, 2020, two Police officers were on uniformed mobile patrol in Castel when they stopped a Honda motor vehicle. The Respondent was the driver, but also in the car was the Respondent’s 13 year old daughter. One of the Police officers conducted a search under Section 22 of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 on the Respondent and on his vehicle.
5. No controlled drugs were found on the Respondent, but a single yellow tablet was found on the driver’s seat and the Respondent was subsequently arrested and taken to Police Headquarters. His vehicle was also taken to Police Headquarters for a thorough search. A single white tablet was found in the centre console of the car in addition to another “tablet” found by a Police Dog near the driver’s seat which was subsequently established to be a Tic Tac. There was also some packaging for medication in somebody else’s name in the car.
6. The Respondent had a rucksack with him containing £1,910 and a further £152 was found in various places within the vehicle. The Respondent was arrested on suspicion of money-laundering.
7. The Police also attended at the Respondent’s home address, where they searched for controlled drugs. No controlled drugs were found but a further £494 was found. £194 in the Respondent’s daughter’s room and £300 in 6 x £50 notes. Subsequently, £194 of the money that had been seized was returned to the Respondent as it was believed to belong to his teenage daughter.
8. On the 2nd July 2020, all charges were dropped against the Respondent.

The Law

9. The application is made pursuant to Section 13(2) of the Law, namely:

“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 any part –
(a) is any person’s proceeds of unlawful conduct, or
(b) is intended by any person for use in unlawful conduct.”

10. Unlawful conduct is defined by Section 61(3) of the Law:

(1) Conduct which occurs in any place in the Bailiwick is "unlawful conduct" if it is unlawful under the criminal law of that place.

(2) Conduct which -

(a) occurs in a country outside the Bailiwick and is unlawful under the criminal law of that country, and

(b) if it occurred in any place in the Bailiwick, would be unlawful under the criminal law of that place, is also unlawful conduct.

(3) The Royal Court must decide on a balance of probabilities whether it is proved –

(a) that any matters alleged to constitute unlawful conduct have occurred,

(b) that any money is any person’s proceeds of unlawful conduct, or

(c) that any person intended to use any money in unlawful conduct.”

11. HM Comptroller makes his application under Section 13 (2) (a) and (b)

Summary of the Evidence

12. The affidavits and oral evidence of Mr Simon mostly focussed on the investigation that he has undertaken into the Respondent’s lifestyle, income and outgoings. The Respondent was in receipt of States Benefits prior to his arrest which were to support him and originally four then three children. Mr Simon established that Mr Luscombe had one bank account with Frees and two Capital One credit cards both with low credit limits. The Respondent took part in a social trading and investment platform known as ‘ETORO’ and used an on-line gambling website, SkyBet. Mr Simon endeavoured to complete a financial interview form with the Respondent, but this was incomplete. Mr Simon (along with PC De La Mare) also looked into the explanation put forward by the Respondent that the reason why he was carrying cash was to purchase a motorcycle. He confirmed that the Respondent had bought a motorcycle that day and that it appeared that originally he was going to buy a different one.
13. The Respondent alleged that the £300 at his home was birthday money belonging to the Respondent’s children, but Mr Simon spoke to one of the children’s grandmother’s Ms S who denied that she would have had the money for this level of generosity towards some of her many grandchildren.
14. Mr Simon followed enquiries into the use of the Respondent’s SkyBet account by Ms S. She said had used it but she thought it was no more than between £500 and £1000.00 and for a more limited period than the Respondent had said. An assertion that the Respondent used his credit cards to buy items for others and then being repaid in cash was supported by his enquiries with Ms Le M to just over £500.00 (although no receipts were produced).
15. The Respondent informed Mr Simon during the course of his investigation that he used cash back when he bought groceries and the like because it cost him a fee to use an ATM. Also, that

he was unable to pay money into his account in Guernsey which meant that he retained cash. After initially being informed by the Respondent's bank that there was no evidence of use of cash back, the bank then provided a statement detailing the cashback facility being used in 2019 although not in 2020. Mr Simon confirmed that the Respondent's bank did not have a branch in Guernsey and no other banks in Guernsey allowed money to be deposited into the account holders' accounts with Ffrees Bank through that bank.

16. After it was decided to call Miss Tucker, Mr Simon rightly deferred to her evidence in terms of what States Benefits the Respondent had received but nevertheless maintained his view that given the Respondent's obligations including the care of his children and the outgoings as well as the sums of cash in the car and in the Respondent's home, that this could not be explained by the States Benefits the Respondent received plus the other amounts of cash such as the SkyBet account etc without the Respondent being involved in unlawful conduct.
17. When asked how credible he considered the Respondent's story on his income and outgoings, Mr Simon considered it was not very credible. In his view 'it didn't add up'. He thought it very unlikely that the source of funds were merely the legitimate explanations that the Respondent gave. He accepted that no tests were undertaken on the two pills that were found in the vehicle during evidence.
18. The evidence given by Miss Tucker focussed on the issue of the Respondent's States Benefits, but in particular, the statement made by the Respondent that for a period of time he received States Benefits in excess to the amount that he should have had. Miss Tucker gave evidence that during the period of 2019 to date, the Respondent had received a number of over-payments due to changes in the family circumstances and this came to a total of £908.33. Those sums had been recovered by reductions in subsequent Income Support payments. Miss Tucker confirmed that for a period from the 6th July 2018 to 27th September 2018, the Income Support that the Respondent received included a rent allowance of £274.62 per week. This should have been paid to Housing as rent for the States property in which he was living but was not. After the 27th September, the Income Support attributable to the rent for the Respondent's home was paid directly to Housing. This meant his Income Support was reduced accordingly. It was accepted that during the period that he received the rent directly, he did not actually pay the rent to Housing (although the Respondent had requested that it be paid directly to Housing, rather than being paid by the Respondent or the tenant). This was the equivalent of the "over-payment" that Mr Luscombe had said there had been of £3,720.
19. The Respondent gave evidence on his own behalf and was subject to cross-examination by Advocate Grainge. He said he didn't know what the pills were. In relation to the medication packages, they belonged to a friend of his whom he often gives lifts to, but that did not mean that he had anything to do with those drugs. In relation to his lifestyle, he was adamant he did not live a life of extravagance. He was in receipt of States Benefits and these States Benefits included, for a period of time, substantial additional amounts. He may have got exactly what they were for and when he received them wrong but he did receive them. He was in receipt of considerable States Benefits because he had the care of four then three children and he was not required to repay the additional sums that had been paid to him. He used his SkyBet account and he was quite successful at betting, but also Ms S used the account and then repaid him in cash. He thought the figure was bigger than the amount she said but he couldn't say how much as he was unable to access his SkyBet account due to the investigation in relation to this matter triggering his account being frozen and he being denied access. He used cashback on his debit card and that this had been shown, but he also used his credit cards to buy items for other people who then repaid him in cash. Again he thought it more than the figures that Ms Le M had said. He also made other cash bets which he did well out of giving him additional cash. As he could not pay cash into the bank in Guernsey it was necessary for him to retain this money as cash. When challenged in cross-examination why he went 'no comment' in his Police interview about

the pills, the Respondent replied that “he didn’t know anything about them so he went ‘no comment’ but it didn’t mean that they were drugs or he was drug dealing”.

20. He said that he was returning home from a friend’s house when he was stopped. The cash in the rucksack was the difference between the motorcycle he was going to buy and the one he ended up buying. Originally he had been saving up to go on holiday but with lockdown he decided to buy a motorbike. With regard to the money found in various places, he said he was carrying the money in his rucksack because of the motorcycle sale and that he keeps the cash in that compartment because he pays in cash for his petrol. The roll of 6 x £50 notes was birthday money (£100 each) for the children given to them by their grandmother (not the one that Mr Simon had spoken to).
21. Brief evidence was also given by PC De La Mare who confirmed that when he was making enquiries about the motorcycle, he had not taken a note of the amount that the motorcycle was due to be bought for in the original purchase. PC De La Mare referred to a note he had taken at the time. He had telephoned an individual who was the brother of the person who was originally supposed to be selling the Respondent the bike. This individual confirmed that the Respondent was supposed to be buying the bike but had not bought it. PC De La Mare noted that he had not written down the figure that the Respondent was supposed to have been paying the seller of the bike. He said that the Respondent had said what the figure was in the police interview and that PC De La Mare thought he must have mentioned this to the person on the telephone call, even though he hadn’t written it down.
22. HM Comptroller has asked the Court to put together the various pieces of evidence that the Court has heard to conclude that Sections 13(2) (a) and/or (b) had been satisfied. This included the fact that the Respondent’s story has changed in relation to the source of the cash; the fact that he went ‘no comment’ in relation to the questions on the pills and the packaging in the original Police interview and only provided evidence of that during the hearing; that considering the money was found stuffed in compartments; a substantial sum of the money was found in a rucksack late at night; 6 x £50 notes in a sock in a bedroom cabinet.
23. I was also urged to take into account that there has been very little explanation of any detail prior to the hearing on the figures in relation to the person using the SkyBet account for bingo and that the evidence the Respondent gave was inconsistent and at odds with the information obtained during the investigation from Ms H. Likewise, there are discrepancies in relation to the amount the friend used the Respondent’s credit cards and the amount of States Benefits that the Respondent received and didn’t pay back. The amounts that the Respondent said he had withdrawn in cash from the bank account do not appear to have added up to anything in 2020. It was noted by Advocate Grainge that evidence had now come forward from the bank that this facility had been used by the Respondent in 2019, but nevertheless it didn’t add up to the sort of figures that the Respondent was carrying around in cash and in his house. Taken all together, there was sufficient for this Court to draw the conclusion that the necessary standard of proof had been met in this particular case to make an order under Section 13(2) (a) or (b).
24. The Respondent focused on the non-testing of the two pills, but also that whilst the figures were not accurate, nevertheless, he had shown that he was paid by Income Support, overpayments and rent, that he did get cash back and that he thought the figures from the person using his Sky Bet account were wrong and in excess of the amount that she said, but he couldn’t do anything about this because this account was no longer accessible due to the investigation. But it was evident that he was, and did buy a motorbike, and therefore that is why he had the cash with him in the first place; that he had been visiting a friend and that is why he was driving at that time of night with his daughter.

Discussion

25. Although the English cases are based on law which is similar, but not identical, they are still persuasive for the relevant sections of the Law which are the same.

26. The 2019 case of *Sandu v Chief Constable of the East Midlands Police* [2019] EWHC 3316 (Admin), is helpful in dealing with the differences between the two applications made under 13(2)(a) and 13(2)(b). As set out in that case at paragraph 18:

“Thus the decision in Angus is authority for the proposition that when considering the first limb of section 298(2), an applicant authority must establish on the balance of probabilities that the cash was obtained through one of a number of kinds of conduct, each of which would have been unlawful conduct. Under the first limb, accordingly, it is not enough for an applicant authority to establish only that the cash was obtained through criminal conduct of a kind which could not be identified.”

27. In this regard, the Applicants have relied on alleged drug supply. However, this is not a case where an Applicant is relying on (for example) previous convictions of a Respondent to demonstrate a lifestyle of unlawful conduct. Further, although Mr Simon referred to the two pills found in the Respondent’s car as “controlled drugs”, these drugs were never tested and therefore there is no evidence before this Court about what those pills are other than Mr Simon’s assertions and the Respondent’s denials that he knows anything about them. Likewise, the Respondent says the empty packaging is the discarded rubbish of a friend and there is no evidence to rebut this. Thus, the difficulty for the Applicant is that there is not the evidence before this Court which demonstrates that on the basis of the balance of probabilities for the purposes of Section 13(2)(a) that the money was the proceeds of unlawful conduct.

28. However, as Advocate Grainge submitted the test for Section 13(2)(b) is different, in the words of Coulsen J in *R (on the application of Bavi) v Snaresbrook Crown Court* [2013] EWHC 4015 (Admin) at paragraph 25 of:

“[25] Thirdly, and perhaps most important of all, it seems to me that there may be a difference between what has to be shown in relation to unlawful conduct that has already occurred, and has therefore given rise to the money which is now being forfeited, and intended unlawful conduct which, by its nature, cannot yet have happened. It seems to me that, in the latter case, it may be (I do not put it higher than that) that the requirement on the part of the authorities to show particular intended conduct is less stringent. It can often be difficult for the authorities to demonstrate unlawful conduct which has not yet happened but which is only “intended”. It might make a nonsense of sub-s (b) if the authorities had to show with precision what the unlawful conduct was that the Defendant intended to carry out in the future.”

*“[26] I derive some support for that approach from the recent judgment of Lewis J in *Fletcher v Chief Constable of Leicester Constabulary* [2013] EWHC 3357, where distinctions were made between the requirements of sub-ss (2)(a) and (2)(b) and where Angus was distinguished as a case under sub-s (2)(a), not (2)(b).”*

29. As Holroyde LJ acknowledged in *Sandu* (*supra*) at paragraph 22 this was the case despite the argument that it:

“led to an apparent oddity in having two tests for forfeiture, one requiring a more difficult test, namely the type of criminal conduct to be identifiable, than the other, which requires only that the cash be shown to have come from some criminal activity, even if it be unidentifiable.” (paragraph 22)

and further at paragraph 29 in relation to s298 (2)(b):

“... it is not necessary to show the precise type of crime from which the property was acquired if the circumstances are such as to give rise to an irresistible inference that it could only be derived from crime. In those circumstances the Crown Court was in our judgment correct to order forfeiture. It was entitled to infer on the balance of probabilities that the cash came from criminal activity and that the appellant's intended use of it would constitute a money laundering offence. The cash was therefore "criminal property" as defined in section 340(11) of the 2002 Act, and the appellant's intended use of it would be a criminal offence and would thus be "unlawful conduct" as defined in section 241(1). Thus all the necessary elements for an order pursuant to section 298(2)(b) were established.”

30. As Advocate Grainge submitted that direct evidence is not necessary and circumstantial evidence can be sufficient for the Court to draw the necessary conclusions. The case of Butt v HM Customs and Excise [2001] EWHC 1066 (Admin) although in relation to a different law (being the Drug Trafficking Act 1994(3)) in nevertheless was helpful:

“35. The fact that the court had before it no direct evidence of drugs connection and relied on inference does not, in my view, help this Appellant. The provisions of section 43 are perfectly proper and proportionate to attempt by Parliament to suppress the international evil of the trade in drugs.....

36. ... In any event, I can see no justification for the proposition that only direct, or as Mr Owen put it, positive evidence will suffice. As any Advocate and trial Judge knows, circumstantial evidence can be equally compelling. I find support for that approach in the judgment of Watkins LJ in Bassick and Osborne v Commissioners of Customs and Excise [1993] 161 JP 377 to which I have referred and where the court held that direct evidence was not required.”

31. The words of Moses J from Muneka v Comrs of Customs & Excise [2005] EWHC 465 remain apposite for the section 13(2)(b) test:

“12 It is important in my view to bear in mind that Parliament has specifically dictated that the standard of proof is one on the balance of probabilities. That has important consequences as the way the court should direct itself. This lies in the context of the issue which may well establish that the source of the money is criminal activity and no-where was this better put, if I may say so, than in the short judgment of Sedley J in Nevin where he said:

“While the prescribed civil standard of proof would not, of course, allow the justices to act without satisfactory evidence on the intended use of money, they are not required to direct themselves, for example, in relation to lies told by the defendant, as a judge would direct the jury in a criminal trial. That is not to say that they should overlook the possibility that lies may have the purpose of concealing something other than the misconduct presently alleged. But a suspect who gives an account of his reasons for carrying the money which the justices reject as untruthful cannot complain if the justices go on to infer that from other relevant evidence, that by itself may not have been enough to satisfy them that the true reason was for the use of drug trafficking.””

32. The facts of this case however are different. Whilst the Respondent may have been inaccurate or inconsistent about the sums of money, both in terms of the amount of States Benefits

received, how much he saved, the amounts third parties who may have paid him in cash for using his accounts or credit cards, and he could have done a lot more to help himself in terms of showing where the money came from, overall I was not persuaded that the Applicant has demonstrated to a civil standard, that this money or part was intended by any person for use in unlawful conduct.

33. Whilst there were discrepancies, nevertheless, in my view in the particular circumstances of this case, it would not be appropriate to conduct a detailed forensic mathematical or accounting exercise to work out if the Respondent had accounted for all of the cash that had been found on him or at this home by his explanations. There is no evidence that Respondent is living an extravagant lifestyle. The sum (including taking into account the money that was spent on the motorbike) was one in my view which could be accumulated over a period of time in the way described by the Respondent. There was evidence that he was paid States Benefits during a 12 week period in the summer of 2018 for rent that was not paid over to Housing. His rent for his States property has since then is paid directly by Income Support (which includes a water charge and other standard charges). Over a period of time he has used his cards and access to accounts for the benefit of his friends who have paid him cash; he has used cash-back facility to take money out of his bank account as well as occasional use of an ATM, he had bought a motorbike that day for less than he originally planned which is why he had the rucksack of cash on him. Whilst the Respondents' method of storing his money is not one to be commended it is not enough to infer that it derived from criminal activity or the intention for which the cash was to be used was unlawful conduct.

Conclusion

34. I am not satisfied on the balance of probabilities that the money or any part is any person's proceeds of unlawful conduct or is intended by any person for use in unlawful conduct. The Application is dismissed.