Application for a Certificate under Section 16(2) and for a determination under Section 16(4) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law (as amended).

[2021]GRC061

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

BETWEEN:

HM PROCUREUR — **Applicant ("A")**

-And-

PETER EDWARD DAWSON-BALL — **Respondent ("R")**

And

IN THE MATTER OF THE CRIMINAL JUSTICE (PROCEEDS OF CRIME) (BAILIWICK OF GUERNSEY) LAW (as amended) ("The Law")

Application for a Certificate under Section 16(2) and for a determination under Section 16(4) of the Law.

Applications heard on: 1st December, 2021

Decision handed down: 15th December, 2021

Before: John Russell Finch Esq., O.B.E., Lieutenant Bailiff

Counsel for the Applicant ("A"): Crown Advocate W A Giles
The Respondent appeared in Person.

Materials referred to in Judgment:

The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (as amended), Section 16.
The European Convention on Human Rights, First Protocol, Article 1.

R v Waya [2012] UKSC 51;
Paulet v UK (2015) 61 EHRR 39.

***Archbold (2021 edition)* paragraphs 5B-298, 5B-299.**

Decision

Introduction

1. The background is concisely set out in the affidavit of Elizabeth Helen Huggins annexed to the Applications, dated 6th September, 2021, particularly at paragraphs 3-6. On 22nd March, 2019, R was sentenced in the Royal Court in respect of money-laundering offences contrary to section 39(1) of the Law. On 10th October, 2019, his benefit was assessed as £2.2 million. An order for confiscation for £1 was made, that being the known amount then of his realisable assets. The balance of £2,199,999 remains outstanding. In August 2021, intelligence showed that R had opened a savings account in the UK with the Nationwide Building Society. The amount shown on 3rd September, 2021, is £4,275.10. A's Applications relate to that sum as realisable property greater than the amount of £1 originally taken into account when R was sentenced (Sections 16(2) and (4) of the Law).

2. At the hearing R represented himself. There was no dispute on the facts as set-out above. A copy of the transactions on the account in question was put before the court. It was accepted that there was a small correction of + £1 to the figure in the account. R made representations to the court, which he confirmed on oath and was briefly cross-examined on behalf of A. On 25th November, 2021, the Advocate who had represented R in the original case, mailed the Law Officers with 6 points to consider. R essentially relied on these, subject to various amendments, which did not alter their main thrust. It would appear that the most relevant parts are those set out in paragraphs 1-3 of that mailing, especially 3:

> "In particular Mr Dawson-Ball is concerned that:
>
> 1) The sum of money which he has been ordered to pay, amounting to some £1,500,000 and increasing at the rate of over £100,000 a year with interest, is a sum which he has no chance whatsoever of repaying ever.
> 2) Indeed, Mr Dawson-Ball has no chance of even keeping up with the interest running on this sum.
> 3) That the seizure of very minor sums, around £4,000 in this case, is preventing him earning a living. As has been explained he has been attempting to earn a living by delivering boats. I am instructed that the £4,000 was an upfront payment from someone who wanted their boat delivered from one port to the next. That sum was therefore to pay not only a modest element of wages but also to cover fuel, food for the trip, mooring fees etc. The seizure of these sums left Mr Dawson-Ball effectively stranded, I understand in the south of Italy, not only unable to earn a living but also in the precarious position of being effectively a person 1,000 miles from home with no way to pay for his return."

3. In his account, R describes his yacht-delivery business, which normally is available for 6-months of the year. His consultancy work is "petering-out"; that business explained the £3,232.25 sum received on 22nd February, 2021. The sum under consideration at the hearing, i.e., £4,276.10, was allocated to expenses, including crew costs for a delivery. It would be reimbursed by the client in due course. R also referred to being stranded when the sum was discovered and relying upon others to pay harbour fees and fuel expenses when stuck in South Italy. R suggested that the case brought was "disproportionate" and affected his legitimate way of making a living when there was no concealment. R added that his other income comprises £12,000 p.a. in State pensions, and his wife receives £300 per month. The sum of £16,343.02 shown as a credit in the account on 8th April, 2021, was a refund of bank charges, plus interest. R's testimony was not disputed.

The Law

4. Section 16 of the Law is set -out:

"Increase in realisable property

16. (1) This section applies where, by virtue of section 5(3), the amount which a person is ordered to pay by a confiscation order is less than the amount assessed to be the value of his proceeds of criminal conduct.

(2) If, on an application made in accordance with subsection (3), the Court is satisfied that the amount that might be realised in the case of the person in question is greater than the amount to be recovered under the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased), the Court shall issue a certificate to that effect, giving the Court's reasons.

(3) An application under subsection (2) may be made either by Her Majesty's Procureur or Her Majesty's Sheriff appointed as receiver in relation to the realisable property of the person in question under section 26 or 29 or in pursuance of a charging order.

(4) Where a certificate has been issued under subsection (2), Her Majesty's Procureur may apply to the Court for an increase in the amount to be recovered under the confiscation order; and on that application the Court may –

(a) Substitute for that amount such amount (not exceeding the amount assessed as the value referred to in subsection (1)) as appears to the Court to be appropriate having regard to the amount now shown to be realisable, and
(b) Increase the term of imprisonment imposed in respect of the confiscation order, or vary any terms on which such imprisonment was deferred, under section 9 or, where it had not previously made such an order of imprisonment, subject to section 9, order the defendant to be imprisoned until the substituted amount is paid.

It is to be noted that Section 16(4) uses the word "may", not "shall".

5. Although dealing with the English legislation, there is a case of considerable relevance emanating from a 9-Judge Supreme Court: Waya [2012] UKSC 51. This is deemed a "landmark decision" by the editors of *Archbold* (2021 edition, paragraph 5B-298). The ratio of this important case is applicable to Guernsey, not least because the judges would make up the Judicial Committee of the Privy Council, the ultimate appeal tribunal for the Bailiwick. Furthermore, the decision rests, not so much on statutory interpretation, but on the general principles which underly confiscation proceedings in criminal matters. The position is, with respect, well set-out in paragraph 5B-298:

> "In Waya [2012] UKSC 51; [2013] 1 A.C. 294, the Supreme Court took a fresh approach, and all prior decisions relating to abuse and, to a certain extent, to the valuation of benefit, have to be considered in light of this landmark decision. It was said that although the confiscation scheme in the 2002 Act focuses on the value of the defendant's obtained proceeds of crime, whether retained or not, and that while it is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation, the scheme must be given effect in a manner that is compliant with *art.1 of the First Protocol to the ECHR* (right to peaceful enjoyment of possessions). Accordingly, it was held that if confronted by an application for a confiscation order that would be disproportionate, a judge should refuse to make it."

And at paragraph 5B-299, it is stated that "*failure by a court to consider the proportionality of a confiscation order may itself give rise to a breach of art. 1 of the First Protocol: see Paulet v UK (2015) 61 EHRR 39 …"*

6. The present matter is an application under Section 16 of the Law, not the actual making of a Confiscation Order. But it is considered that the ECHR principle remains the same; there is no reason to confine it. Also, as mentioned in paragraph 4 above, Section 16(4) uses the word "may", which imports an element of discretion (provided it is exercised judicially and on relevant considerations). As also mentioned, there is no dispute on the evidence. R has explained the origin of the sum in question and its use, he has also dealt with other sums in that account. On the facts, his explanations are accepted.

Conclusion

7. The confiscation procedure is a valuable and necessary one. Because of the ingenuity many sophisticated offenders use to evade payment, hide assets, and raise unmeritorious technical points, it has to be effective, and, indeed, in many circumstances, draconian. Until the decision in Waya, the arguments tend to be based on abuse of process, which experience shows is often the last cartridge in the defence's ammunition pouch. In the present case, R has demonstrated that the sum in question (and the other sums mentioned) were obtained legitimately and augment the relatively modest amounts of fixed income he and his wife receive. There is a very large order, and, in practical terms, impossible to repay, although imposed in accordance with law. Nevertheless, it would be quite disproportionate to realise the sum on the facts. This is a set of circumstances where R is making a living, not enjoying a luxurious lifestyle. Even as robust a statute as the Law of 1999, does not entail reducing the person concerned to penury. Obviously, where there is concealment of assets, or deliberate camouflage behind phoney arrangements, the court would be quick to act. R also made the point that repeated applications each time money comes into his account would be akin to an abuse of process. Whilst not seeking to anticipate the result of any future proceedings, it may be that a much larger sum for consultancy, or even maritime activities, might legitimately be the subject of proceedings. The present sum is not.

Decision

8. A certificate under Section 16(2) is granted. However, no extra sum is added to the realisable amount. For the avoidance of doubt, this is a decision on the facts of this particular case and an application of the principle in Waya, which applies to these facts.

J R Finch Esq., O.B.E.
Lieutenant Bailiff

15th December, 2021