

Forfeiture of Money etc. in Civil Proceedings (Bailiwick of Guernsey) Law 2007, section 13. Qualifying conditions for forfeiture; meaning of “*the money... is any person’s proceeds of unlawful conduct*”; need to identify such proceeds; exercise of court’s discretion. Application for forfeiture dismissed.

[2023]GRC015

**IN THE ROYAL COURT OF GUERNSEY  
ORDINARY DIVISION  
Civil Matter 2235**

**In the Matter of the St Christopher Trust**

**And in the matter of**

**BETWEEN:**

**HIS MAJESTY’S COMPTROLLER**

**Applicant**

**-v-**

**CARTER & ASSOCIATES (a firm)  
(as trustee of the ST CHRISTOPHER TRUST)**

**Respondent**

**-and-**

**EEP MANAGERS LIMITED**

**Interested Party**

**Before Her Honour Hazel Marshall KC, Lieutenant Bailiff, sitting alone**

**Dates of Hearing: 14<sup>th</sup> and 15<sup>th</sup> February 2023**

**Judgment handed down: 17<sup>th</sup> February 2023**

**Counsel for the Applicant: Advocate P. M. Grainge**

**Counsel for the Respondent: Advocate A. R. Cole**

**Counsel for EEP Managers LLP: Advocate B. B. D. Manchak**

**Legislation and authorities referred to:**

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

*Re H & Others (minors)* [1996] AC 563

*Lakatamia Shipping Company v Nobu Su* [2021] EWHC 1907 (Comm)

## **JUDGMENT (Approved)**

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### **The Application and its history**

1. This is an application by His Majesty's Comptroller ("**HMC**") commenced on the 13<sup>th</sup> May 2022 under section 13 of the *Forfeiture of Money, etc, in Civil Proceedings (Bailiwick of Guernsey) Law 2007*, ("**the Forfeiture Law**") for the forfeiture of certain monies comprising some €678,906 plus accrued interest, which I will call "**the funds**". They are held in bank accounts with Barclays Bank in the name of EEP Managers LLP, ("EEP") a Limited Liability Partnership who operated two closed end investment fund schemes. EEP Managers LLP is administered by Apex Funding Corporate Services (Guernsey) Limited, formally IPS Guernsey Limited, who provide its corporate directors. The effective Respondent, the St Christopher Trust (more accurately, its trustees) were investors in the EEP investment schemes.
2. Monies representing the closing proceeds of the schemes have been distributed to all its investors other than in respect of the St Christopher Trust, for reasons which will appear. Barclays Bank, and by extension EEP or Apex, have been prevented from paying these funds over to the trustee of the St Christopher Trust, who is Carter & Associates, a firm of South African attorneys, because of a freezing order made under section 10 of the Forfeiture Law, on the 16<sup>th</sup> December 2020, and renewed several times thereafter.
3. Carter & Associates have previously requested payment from Apex, or EEP, in at least 2019, but this has not been made owing to a "do not pay" direction issued to Barclays and Apex by the Guernsey Financial Intelligence Unit, under the legislation. Unfortunately, Apex could not tell Carters this, in peril of committing a "tipping-off" offence, such that Carters, after some understandably heated correspondence with Apex, felt obliged to pursue Apex/EEP in court, for breach of mandate. This is a regrettably cumbersome approach to getting at the real issue with regard to the investigation of the legitimate provenance of funds, but it appears to be the inevitable consequence of aspects of the regime of the anti-money laundering legislation. At this point, the Trustee's discovered the involvement of the FIU.
4. After the funds had continued to be frozen for another 17 months, Carters' patience expired yet again, and in December 2021 they instituted on behalf of the St Christopher Trust proceedings seeking the release of the funds under section 11 of the Forfeiture Law. That application was eventually listed for hearing in June 2022, but in May 2022 this application for the actual forfeiture of the funds was issued by HMC. That was listed for a hearing in December 2022 but was adjourned until 14<sup>th</sup> February 2023. It then came on before me for a two-day hearing.

### **The essential issue**

5. As I have said, the funds represent the last share of distributions from two investment funds that are run by EEP, which they have been prevented from paying out because of a freezing order under the Forfeiture Law. The essential issue before the court at this time is whether such funds fall to be forfeited to the authorities in Guernsey, represented by His Majesty's Comptroller, on the grounds that they are or represent the proceeds of "*any person's unlawful conduct*" as further defined and laid down in the Forfeiture Law.

## Background facts

6. I turn to the background and the parties. The St Christopher Trust is a Seychellois trust which was established on the 6<sup>th</sup> June 2008. It was successor to an Isle of Man trust, the Martinique Trust, which was terminated and moved on when Barclays Bank ceased to be engaged in certain aspects of its fiduciary business, which including that which covered the Martinique Trust. The Seychelles was a commonly used trust jurisdiction for South African offshore trusts at that time.
7. At its inception the St Christopher trustee was the Mayfair Trust Group. In 2012 the trusteeship passed to Mr Carter, a South African Attorney, personally, together with International Law and Corporate Services PTY Limited, another South African company. Carter & Associates the firm became sole trustee in November 2017, and so remain.
8. The economic settlor of the St Christopher Trust is Mr Daniel Ian McArthur, a South African citizen. He was a beneficiary of the former Martinique Trust. He is not and never has been a beneficiary of the St Christopher Trust, although he is not excluded from that trust. The beneficiaries are his wife and children.
9. Mr McArthur's background is in the healthcare industry. He obtained a degree in chemical pathology and biomedical sciences from the University of Stellenbosch in 1979, and pursued a career in the commercial field of medical science. From 1982 he worked for Kendall Company SA Pty Limited, a South African subsidiary of Colgate Palmolive. In 1985 he and a friend, a Mr Ashmead, bought out Kendall Limited from Colgate on a 50/50 basis, under a management buyout when it was in difficulties. They did so through a vehicle, the Macmed Health Trading Trust, in which their respective family trusts were equally interested. This was then converted to a company, which eventually became Macmed Healthcare Limited, ("**Macmed**"). Mr McArthur had the healthcare industry experience, and Mr Ashmead was the financier. Mr McArthur held the position of Managing Director with Macmed.
10. Macmed's business was that of the supply of specialist hospital equipment and consumables. It expanded successfully, apparently through a strategy of acquisitions, and ultimately it had a complex group structure with over 70 subsidiaries. Mr McArthur took frontline responsibility for its operations, certainly in its early stages, and subsequently was very thoroughly involved in marketing and sales and suchlike, that being his experience and expertise.
11. In September 1987 Macmed had grown sufficiently to seek a listing on the Johannesburg Stock Exchange. At that time Mr McArthur and Mr Ashmead together bought 2,100,000 shares for the sum of (or equivalent to) £31,000. Those shares were held by Nearco Trustees, who nominally held them on behalf of the trustees of Mr Ashmead's Jersey family settlement, but it was always understood, and Mr Ashmead has confirmed this, that they were intended to be held as to 50/50 between him and Mr McArthur.
12. In 1996 - and this date is important, as will appear, - those shares were sold by Nearco for the sum of approximately £1,772,000 and the proceeds were then either held, or divided equally between the two respective family trusts. It is common ground that the

funds now in question can be traced back to, and represent, part of the proceeds of the 1996 sale of shares. It is convenient to deal with that now.

13. The funds represent, as I have said, parts of the proceeds of the sale of shares in Macmed which was made by Nearco, and it will be observed that was some 25 years ago. The tracing of this provenance is along the following lines. (This account may not be precisely accurate, but it is provided only for context in view of the agreement between the parties as to the effective tracing back of the funds to the proceeds of the share sale in question).
14. In 1999, subsequent to the sale of the Macmed shares, an apparently good investment opportunity in funds managed by EEP came to the attention of Mr McArthur/Mr Ashmead. As the minimum investment required from a single investor was €1 million, and this was a greater amount than either Mr Ashmead's or Mr McArthur's trusts were willing to invest, a Manx company, Reeve Limited, was formed to enable them to invest through that company. They did so in the proportions of one-third to Mr McArthur, and two-thirds to Mr Ashmead. The investments were made in two tranches in September 1999 and September 2004.
15. In September 2008, shortly after the inception of the St Christopher Trust, the one-third share of Reeve's interest in these EEP funds was transferred to the St Christopher Trust itself. Thus, it is agreed the present funds can be traced back to being part of the proceeds of sale of the original shares in Macmed made by Nearco, and that is their only source.
16. Returning to the history, Mr McArthur continued as Managing Director of Macmed after 1987, now with a board of directors of 16, or it may have become that by the time of the later matters with which I am concerned; at any rate, there was more than just him. In 1991 a company secretary was recruited. This was a Mr Hiscock. He was an accountant, and he impressed Mr McArthur and his fellow board members with his apparent financial sophistication and knowledge. Mr Hiscock subsequently revealed that he was an undischarged bankrupt, and that appears to be the reason why he could not therefore be an actual director. Nevertheless, he had so impressed the Board by this time that he kept his job. The board reposed a good deal of trust and a lot of power into the hands of Mr Hiscock.
17. The Macmed Group collapsed in 1999, apparently heavily insolvent, after pressure from its bankers with regard to loans, which led to the banks scrutinising and questioning certain transactions which had taken place. It appears that the results shown in the accounts of Macmed had been manipulated. Macmed went into administration in 1999. Insolvency practitioners were appointed, and there was then a lengthy enquiry into Macmed's affairs. The collapse was notorious. Eventually the liquidators carried out an investigation over several years, concluding that there had been fraudulent manipulation and misrepresentation in the financial statements of Macmed, starting with its accounts for the year ended the 31<sup>st</sup> March 1996 and thereafter until its collapse.
18. There may have been civil proceedings brought by the liquidators. There is a reference to Mr McArthur's paying some ZAR 14 million in this context, but that may not be true or accurate. It is not directly material at present and I will consider this later as far as necessary. However, criminal investigations also ensued, and subsequently ultimately Mr McArthur and others were the subject of criminal charges under South African

Companies Laws. This case appears from its case numbers to have started with charges made in about 2005.

19. Ultimately the central perpetrator of the fraud for criminal purposes was accepted to be Mr Hiscock. He was tried on 24 counts of fraud, with an alternative of a statutory offence of reckless trading, which I will be referring to below. In March 2021 he was convicted on 23 of these counts, and received several sentences of ten years' imprisonment, some suspended for five years, and others absolute, all to run concurrently. A long judgment was given by the presiding Magistrate.
20. In the meantime, on 29<sup>th</sup> May 2008, Mr McArthur had entered into a Plea and Sentence Agreement with the South African Authorities in relation to the charges made against him. By that Agreement, he pleaded guilty to and was thus convicted of 30 counts of contravening section 424 (3), of the South African Companies Act number 61 of 1973 read in conjunction with sections 1, 2, 3, 219, 4241 and 441D as amended. The precise form of the admitted offences was that, during the period 1995 to 1999, he:

*“ unlawfully and knowingly conducted the business of Macmed in a reckless manner as set out in the preamble, supra, [which I will be referring to later, which sets out certain facts] without due regard thereto that the manner in which the business was conducted would result in prejudice, it ultimately contributing to the final liquidation of Macmed, to: Macmed, its board of directors; its subsidiaries; its shareholders; its creditors, including Standard Bank, Absa, FNB and Nedbank; the employees of Macmed; its then auditors Deloitte and Touche; and/or Fisher Hoffman Sithole; and the general investing public.”*

21. Mr McArthur was sentenced under the Sentence Agreement to a fine of ZAR 40,000 or two years on each count of the 30 counts, of which ZAR 20,000 and one year were suspended for five years on condition that he committed no further offence of dishonesty. The total fine was effectively therefore ZAR 600,000 or 30 years in prison. (For perspective, the exchange rate between the SA Rand and the pound sterling (£) at that time was around R15 to the £.)
22. A confiscation order was also imposed on him in terms of section 18 of the Prevention of Organised Crime Act 121 of 1998, read with certain other sections, *“It being ordered that the benefit of ZAR 1,400,000 (“the confiscation amount” hereafter) received by the Accused be paid into the Criminal Asset Recovery account on or before the 31<sup>st</sup> December 2008”*, with interest if there were late payment.

### **The legal framework**

23. I will have to return to the above in detail, but first it is appropriate to deal with the legal framework in Guernsey. As relevant context, the Forfeiture Law applies in its first Part to “cash”, which is defined to include not only notes and coins but negotiable instruments, etc (and, rather quaintly, postage stamps), and deals with the authority of the police to search premises and persons, and to seize and detain any cash where the officer has reasonable grounds for suspecting that the cash is,

*“any person’s proceeds of unlawful conduct or is intended by any person for use in unlawful conduct.”*

That is a reference to Section 6. It provides a regime for the detention of such cash and its eventual release if the reasonable suspicion required is found no longer to apply.

24. This case though concerns the subsequent Part of the Law. The basis on which a freezing order is granted in this Part appears in section 10 of the Law. Subsections 10(1) to (5) read:

*“Freezing of bank accounts.*

*10. (1) Where there are reasonable grounds for suspecting that the funds or any part of the funds in an account maintained at a bank -*

*(a) are any person's proceeds of unlawful conduct, or*

*(b) are intended by any person for use in unlawful conduct,*

*and the funds or the part of the funds are not less than the minimum amount, an application may be made to the Bailiff by or with the authority of Her Majesty's Procureur for an order prohibiting the funds or the part of the funds from being transferred or withdrawn from, or otherwise paid out of, the account.*

*Funds and an account which are the subject of such an order are 'frozen' for the purposes of this Law.*

*(2) The maximum period for an order freezing funds under subsection (1) is four months.*

*(3) The period for which funds are frozen under subsection (1) may be extended by a further order made by the Bailiff, but that further order may not authorise the freezing of the funds -*

*(a) beyond the end of a period of four months beginning on the date of that further order,*

*(b) in any case, beyond the end of a period of two years beginning on the date of the original order under subsection (1), unless the Bailiff orders otherwise in any particular case in the interests of justice.*

*(4) On an application by or with the authority of Her Majesty's Procureur for an order under subsection (1) or (3), the Bailiff may make the order if satisfied, in relation to any funds, that either of the following conditions is met.*

*(5) The first condition is that there are reasonable grounds for suspecting that the funds are any person's proceeds of unlawful conduct and that*

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*(a) the making of the order is justified while the origin or derivation of the funds is further investigated or consideration is given to bringing -*

*(i) proceedings in the Bailiwick or elsewhere against any person for an offence with which the funds are connected, or*

*(ii) proceedings in connection with the funds under Part III of this Law or under corresponding legislation in force in a country designated under section 53, or*

*(b) proceedings described in paragraph (a)(i) or (ii) have been started and have not been concluded.”*

25. The section also provides for notice of a freezing order to be given to any interested parties. That is the jurisdiction under which the funds in question here were originally frozen.

26. Section 11 then provides for an order releasing the funds to be made if the court is satisfied that the conditions in section 10 are no longer met. Section 12 provides that,

*“For the purposes of this Law ‘money’ means cash detained under section 7 and funds frozen under section 10,”*

so we are dealing with that latter point.

27. Section 13 then deals with forfeiture, and says:

*“(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.”*

Section 13(2)(b) does not apply here, we are dealing with 13(2)(a).

28. Further relevant provisions are that section 59 defines “proceeds of unlawful conduct” as follows:

*“References in this Law to money or other property which is the proceeds of unlawful conduct include references to money or other property which, in whole or in part, directly or indirectly represents the proceeds of unlawful conduct.”*

29. Lastly, section 61 defines “unlawful conduct” as follows:

*“(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.”*

Section 61(1) is obviously included to cover all the islands as well as merely Guernsey. Section 61(3)(c) is not relevant.

30. It will be seen from the above that the basis on which any Forfeiture Order may be granted to HMC is that there is reason to believe that matters of unlawful conduct, as defined, have occurred, and that money is any person’s proceeds of unlawful conduct. The unlawful conduct has to be criminal conduct. It must first be shown to be such in the foreign jurisdiction where it occurred, and then also be shown to be such under Guernsey Law at the time. It must then also be shown that the monies in question are any person’s proceeds of that unlawful conduct. The precise meaning of the latter qualifying fact has given rise to particular dispute.

## **The evidence**

31. The evidence that is relied on to found the application made by HMC here is the factual evidence of a Mr Brogan and a Ms Limond, who are both officers of the Economic and Financial Crime Bureau. Each of them made affidavits and also attended the hearing

for cross-examination. The trustee of the St Christopher Trust, obviously the party primarily interested in the matter, relies on affidavits of Mr McArthur, incorporating certain corroborative evidence by his wife and by Mr Ashmead, and also of Mr Carter. Mr McArthur attended for cross-examination on a video link from South Africa. Mr Carter attended in person.

32. There was a statement of agreed facts, which I do not need to set out, but which incorporated the facts that I have recited above and may recite below.
33. There were expert reports from South African lawyers on both sides, a Professor Hctor for HMC, and an Advocate Cassim for St Christopher Trust. This evidence went to inferences which could or could not be drawn from the terms of the Plea and Sentence Agreement, but in the end, these witnesses were not called, because two essential points were agreed between counsel which meant that this was not necessary. The two points of agreement were:
  - (1) *That the experts agree that dishonesty is not a necessary element of the section 424(3) offence, and*
  - (2) *that interpretation of the Plea and Sentence Agreement and the Charge Sheet is a matter for the court [ie this court] which should be based on the ordinary sensible meaning of the documents taking into account the circumstances.*
34. The importance of the agreed experts' opinion at (1) is that the offence under section 424 of the South African Companies Act actually carries two alternative offences within it. There is an offence of recklessly carrying on a company's business, and also an offence of carrying on its business with an intent to defraud creditors. They appear in the section as alternative bases for the index offence. Specifically, in this case, the only charge that was made against Mr McArthur, and to which he pleaded guilty, was framed in terms of recklessness, and not in terms of intention to defraud.

### **Burden and standard of proof**

35. The first question that has arisen as a matter of procedure is a question of the burden and standard of proof. It is agreed that the burden of proof lies on HMC, and it is agreed that it is proof on balance of probabilities. I should perhaps mention here that there are amendments to section 13 of the Forfeiture Law, which I understand will reverse this burden of proof, but I equally understand they are not yet in force and, in any event, transitional provisions would mean that this would not apply to this case. I mention this only for completeness because the parties are agreed that the burden lies on HMC.
36. Advocate Grainge emphasises that it is a balance of probabilities test only, and it is not the criminal standard of proof beyond reasonable doubt, despite the odd fact that in effect it is an assessment of the likelihood of such conduct having taken place.
37. Advocate Cole for the St Christopher Trust accepts this, but submits that while the standard of proof is only balance of probabilities, nevertheless where dishonesty or other disgraceful conduct is being alleged, the cogency of the evidence required to discharge that burden on the balance of probabilities is increased, citing the well-known case of *Re H & Others (minors)* [1996] AC 563 for that qualifying factor. The justification is that one starts from the position that a person will normally be behaving honestly and

properly, and as this is therefore the normal situation and expectation, it requires more cogent evidence to justify a finding which departs from that position.

38. I accept Advocate Cole's submission and I do not think that Advocate Grainge really departs from it but, in the end it is not particularly material. One assesses the whole of the evidence to decide whether on the balance of probabilities HMC's case is actually made out, HMC must therefore show:

- (1) That criminal conduct occurred in South Africa. This is obviously admitted as to Mr McArthur, but the extent of it is still a matter of dispute.
- (2) That that conduct would also have been criminal in Guernsey. That is heavily disputed.
- (3) That the funds are the proceeds of such conduct. That too is disputed.

Finally, it is recorded that the grant of a Forfeiture Order is necessarily discretionary.

39. A second case has actually been advanced subsequently by His Majesty's Comptroller, relatively late. As far as the requirement for criminal conduct occurring in South Africa is concerned, up until recently that has been advanced on the basis that it is Mr McArthur's own conduct which is relevant, giving rise to arguments about whether that conduct was or was not conduct which would, at the time, have been criminal in Guernsey. However, Advocate Grainge has now advanced an alternative case, that criminal conduct by Mr Hiscock, if that were criminal conduct that would be criminal conduct in Guernsey as well, would qualify under s 13 and 61, even if the conduct of Mr McArthur would not do so. She submits that that is the result of the interpretation of the phrase in s 13, that the monies have to be shown to be "*any person's proceeds of unlawful conduct*". She relies on the meaning of "*any person*" submitting that it is not, therefore, confined to Mr McArthur, albeit he was the economic settlor of the funds. I will deal with that point at an appropriate point later.

### **The Timing point**

40. The first point, however, is timing. It is admitted that the funds are traceable to being, and only being, part of the proceeds of the Nearco sale of Macmed shares in 1996. The sale, as I have said, has been asserted by Mr McArthur, and confirmed by Mr Ashmead, and in evidence the witnesses for HMC accepted that they had no other evidential basis to contradict this.

41. I understand that enquiries have been made by both parties to try and ascertain when the actual sale took place, but they have not borne any fruit, the sale of course now being more than 25 years ago.

42. However, after that sale, the funds thereby realised of course had nothing to do with Macmed. Plainly therefore no unlawful conduct regarding Macmed happening after the sale of the shares could result in those proceeds being the proceeds of such later unlawful conduct. None of the criminal conduct on the part of either Mr McArthur or Mr Hiscock after 1996 can therefore be relevant on any basis. In practice this means that only Count 1 on the Charge Sheet in relation to either Mr McArthur or Mr Hiscock is in fact relevant, as that is the only Charge which refers to conduct which took place in or earlier

than 1996 itself (although it is right to record that in Mr Hiscock's case a degree of activity in 1995 is also recorded).

43. But there is, as I have said, no clearer evidence as to the actual date of the sale. HMC in effect says that this does not matter and, in the circumstances, I should not be too troubled by that, and certainly it should not prevent a Forfeiture Order being made. I will consider this later.

### **HMC's case**

44. HMC's primary case is this: Mr McArthur was convicted in 2008 on counts which show criminal conduct in South Africa and in which he effectively admits conduct which would also then have been criminal in Guernsey.
45. The basis for this latter assertion has, though, changed through the various hearings. Initially, allegations were made invoking the alleged involvement of Mr McArthur with a Mr Peter Chapman and some firm called Securrency. These were then abandoned, as was also reliance on an order against Mr McArthur that was once made in the Seychelles in relation to confiscation of proceeds of crime there. This was later overturned on appeal, although HMC says that this was actually due to a change in the law there. Be that as it may, as neither of these matters is now relied on, I have not investigated them, and I simply ignore them.
46. Next, HMC relied on fraudulent trading as being the equivalent of the South African criminal conduct in Guernsey. However, it was then realised that this offence had not been introduced into Guernsey law until 2008, and therefore this argument could not support the forfeiture application.
47. Therefore, HMC now frames his case on the basis that Mr McArthur's conduct, amounted to either conspiracy to defraud or false accounting, both offences being common law offences which were included in Guernsey law in 1996. He relies on the conduct admitted to by Mr McArthur in the Plea and Sentence Agreement and further revealed in certain facts found in the judgment given in relation to Mr Hiscock, which Mr McArthur had in fact exhibited to his own evidence and relied on himself, as showing that he had not been criminally implicated in dishonest conduct. HMC then asserts that the funds were therefore, on balance of probabilities, shown to be the proceeds of such unlawful conduct.
48. Both these assertions, as to the criminality of conduct, and as to the proceeds of it, were disputed by Mr McArthur and the St Christopher Trust. Latterly, as I have mentioned, HMC's case has been expanded to assert that the facts revealed that the conduct of which Mr Hiscock was convicted would have been criminal in Guernsey, and that the section is wide enough to cover the funds as the proceeds of his unlawful conduct. This would of course avoid any problem arising from whether or not HMC could demonstrate that Mr McArthur's conduct could be said on balance of probabilities to have been criminal conduct in Guernsey. It is far easier to prove that in the case of Mr Hiscock. This argument thus throws the true construction of section 13(2) and the phrase "*any person's proceeds of unlawful conduct*" into sharp relief.

### **The issues**

49. Three issues are put forward by Advocate Grainge, and appear to be the issues in the case itself. They are,
- (1) did Mr McArthur's admitted conduct amount to unlawful conduct within the Bailiwick?
  - (2) did Mr Hiscock's conduct bring the funds under the "*any person's proceeds of unlawful conduct*" rubric?
  - (3) Finally, are the funds held by Barclays the proceeds of Mr McArthur's conduct and/or Mr Hiscock's conduct (as appropriate) as described in the South African court documents?

**(1) Did Mr McArthur's admitted conduct amount to unlawful conduct within the Bailiwick?**

50. On the first issue (would Mr McArthur's conduct amount to unlawful criminal conduct if committed in the Bailiwick), Mr McArthur says he was convicted only of "reckless delegation." It will be appreciated that the Guernsey offences of conspiracy to defraud or false accounting are not made out by merely reckless conduct.
51. This appears to be true in relation to the actual statement of the conviction in relation to Count 1, cited above, but HMC says that whilst that was all that was necessary to support his plea to the particular offence and the conviction, the facts which he admitted to in the remainder of the Plea and Sentence Agreement amount to conduct which would be criminal in Guernsey, amounting to either conspiracy to defraud and/or false accounting, when they are examined for their own import and meaning.
52. Before moving on to these submissions, it is necessary though, to explain generally what occurred in relation to Mr McArthur's Plea and Sentencing Agreement, which I have not done already. The course of events is extremely heavy and complicated. In giving the necessary outline, I will do so in deliberately passive terms, because the extent of Mr McArthur's actual, active, involvement in all this is central to the dispute.
53. In about the end of 1995 or 1996 Macmed had a lot of a slow moving stock or inventory, which it had had to write down in its accounts, because public companies have to do so under the general principles of accounting practice by reference to which they must prepare their publicised accounts. Macmed wanted to increase its turnover, and there was a plan to sell this stock to a third party, Bass Medical Pty Ltd (whom I will refer to as "**Bass**"), at a figure higher than its current book value in Macmed's books, on the basis that Bass would be able to sell it.
54. However, the agreement with Bass had a clause in it that Bass could return any unsold stock. When Bass did not sell it, post-dated cheques were taken from Bass for its later payments due to Macmed. Other arrangements were made to enable Bass to meet the post-dated cheques which included, eventually, an agreement the effect of which was that Macmed would buy back its own stock - to enable Bass to pay it for its purchase of the stock in the first place.
55. The auditors queried the first part of the transactions in relation to the 1995-1996 accounts (Macmed's accounting year was to the end of March in any year) in May 1996,

because of their unusual terms, and they wanted to reverse them in the accounts. Their concerns, made known to Mr McArthur among others, were to go before the board of Macmed on the 27<sup>th</sup> May. On the 26<sup>th</sup> May, in the afternoon, it was arranged that Bass itself would be sold on to a third party, effectively a Mr Lampert, together with Macmed also selling on to him one of its own dormant tax-loss subsidiaries as a “sweetener”.

56. The sale agreement was then back-dated to an earlier date. The auditors could not disprove the timeline, incorporating this, which was presented to them on the 27<sup>th</sup> May, and they settled therefore for putting a note in the accounts drawing attention to the “*unusually good terms*” of this transaction, but the effect of this, and another similar warehousing transaction relating to a disposal of stock in a joint venture between Macmed and Iatric, in Zimbabwe, had the effect of inflating the apparent profits of Macmed Group earned up to the 31<sup>st</sup> March 1996 by some ZAR 2.4 million.

### **Contents of the Plea and Sentence Agreement**

57. It is necessary therefore, against that background and to enable one to understand it, to look at the Plea and Sentence Agreement entered into by Mr McArthur, although as mentioned, only Count 1 is relevant.
58. The Charge itself against Mr McArthur is under a case number with a 2008 year. This is apparently because the original charges that were made against Mr McArthur, Mr Hiscock and others together in 2005 were separated out as between him and those others, and Mr Hiscock was eventually tried on his own under the original file no. Mr McArthur’s case therefore became a separate one.
59. The heading of the Agreement is, “*A Plea and Sentence Agreement in terms of section 105A of an Act 51 of 1977, “between the State and the Accused.”* Mr McArthur is described as “*the Accused*”, and the State is represented by the Deputy Director of Public Prosecutions. The agreement continues “*They hereby enter into an agreement in terms of a plea of guilty in terms of section 105A(1)*” et cetera, - this is called the “*Conviction Agreement*” - and a sentence, also in terms of section 105A(1), which is called the “*sentence agreement*”,

*“to secure a conviction of the Accused on section 424 of the Companies Act, as outlined in the charge sheet attached hereto, and marked annexure A, to be sentenced to punishment as provided for in this agreement.”*

60. It then states, “*The Accused was charged under case number 1404184 of 2005 with others, but for the purpose of this plea agreement the parties successfully requested a separation of the trial.*” Authority is then given from the National Director of Public Prosecutions for the Agreement. Consultations made by the designated prosecutor with the investigating officer are set out. There is then a reference to consultations by the designated prosecutor with the complainant, who has consulted the banks that I have already mentioned, as well as the joint liquidators of Macmed Healthcare Limited (in liquidation).
61. It then continues “*The joint liquidators and the complainants were provided with the opportunity to make representations to the National Director of Public Prosecutions as to the contents of the Agreement, and they support the Plea and Sentence Agreement.*”

62. It is then states that, “*Mr McArthur recognises his rights, he has been informed of them, to be presumed innocent until proved guilty beyond reasonable doubt, to remain silent, and not to testify during proceedings, and not to be compelled to give any self-incriminating evidence whatsoever. He tenders therefore a plea of guilty on the basis as set out in subparagraph 8 of the Agreement below,*” and there are then certain admissions made by Mr McArthur, namely that he has been informed that the agreement cannot bind the court not to exercise its discretion to make a specific order or conduct a specific enquiry, that he has not been unduly influenced or threatened, etc. He admits that he is of “*sound and sober senses*” while entering into the Agreement, and he states that he understands the terms ‘unlawfulness’, ‘knowledge of unlawfulness’, ‘intent’, and ‘recklessness’ in section 424 of the Companies Act, and that his legal representative explained it to him.
63. There then follow, importantly. the admissions relating to the charges themselves. The first of these, at Paragraph 8.1 provides a Preamble to the whole Agreement. It states: “*The Accused admits the facts set out in the General Preamble to all the 30 counts, and in addition the following.....*”
64. Now, the “General Preamble to all the 30 counts “is to be found on the Charge Sheet. It is long and elaborate, and whilst this very fact is relevant, I am only going to read the relevant paragraphs. If necessary, though it should be treated as if it is read into this judgment.
65. First, there are many paragraphs about the background to Macmed itself. At paragraph 11 there is then a paragraph that:

*“11. The price of Macmed shares was influenced by factors such as its reported revenue, earnings, debt, cashflow, credit rating, as well as its ability to meet revenue and earnings targets and forecasts.”*

(I should mention that every factor which is listed in the Preamble is prefaced by the phrased “*and/or*” for some reason. This could make for odd results, in places, if treated literally, but it seems just to be a standard formal form.)

*“12. It was critical to Macmed’s ongoing business operations that it maintained its credit lines with major banks. The banks in granting and maintaining this credit line relied on, among other things, the published financial statements and Macmed’s ability to perform within its forecasts.*

*13.It became apparent that from 1996 through to its liquidation a wide-ranging scheme was developed and executed to deceive the investing public and lenders by manipulating Macmed’s published financial statements by maintaining and/or enhancing a reputable financial accounting capacity, and by establishing, maintaining and/or enhancing a positive perception within the healthcare and financial and lending industries.*

*14. The creation of false transactions had the ultimate effect of inflating the annual financial statements of Macmed.*

*15. The non-disclosure of liabilities and contingent liabilities enhanced the apparent financial strength of Macmed.*

*16. The establishment and non-disclosure of a cash reserve kept in the trust account of BVPG was utilised to effect payment for some of the false transactions.”*

Especially importantly, paragraph 17 reads:

*“17. The Accused explained some of the false transactions to Macmed’s external auditors through misleading descriptions and justifications that were designed to dovetail with accounting and financial reporting requirements, but which masked the true intent of the Accused to present a false and misleading portrait of Macmed’s current and likely future financial position.”*

The Preamble continues:

*“18. The Accused was the managing director and chief executive officer of Macmed. He however elected to pursue his marketing interests all over the world, causing him to be absent from his office regularly.*

*19. To do this, accused ‘delegated’ his functions as managing director and chief executive officer to Alan Hiscock, the company secretary, knowing that the last-mentioned is an unrehabilitated insolvent, and in addition allowed Alan Hiscock to act as the de facto financial director of Macmed ‘ratifying’ the reckless trading acts referred to supra and in detail infra when he returned to his office.”*

66. So, those are the “General Preamble” facts referred to, but there were then the additional specific admitted facts recorded in the Preamble to the Plea and Sentence Agreement itself, at Paragraph 8 (1). In addition, Mr McArthur admitted:

*“1. He was the managing director and chief executive officer of Macmed Healthcare (in liquidation).*

*2. He together with his former co-accused Alan Hiscock, Lloyde Hanson and Robin Maguire formed the core management team of Macmed.*

*3. Macmed was a holding company of about 90 subsidiaries, and was divided into four divisions that operated in the medical, hospital and pharmaceutical sectors of the health industry. It was one of the 100 largest companies in South Africa, with an issued share capital of around 400 million rand, and about 3,000 employees. The Macmed Group was liquidated on the 15<sup>th</sup> October 1999.*

*4. Claims of the approximate sum of ZAR 1 billion were proven during the course of the liquidation process, of which about ZAR 400 million were recovered.*

*5. He had to execute his duties as managing director, chief executive officer and member of the board in accordance with his statutory and common law obligations, as well as other duties that arose from his fiduciary relationship with Macmed, its subsidiaries, its shareholders, its creditors and its employees. These imposed on him, inter alia,*

*(a) a duty to take reasonable care to ensure that the business of the company was not carried on recklessly, or with intent to defraud*

*creditors of the company or creditors of any other person, or for any fraudulent purpose;*

- (b) a duty to ensure that in his conduct as managing director and chief executive officer he took reasonable steps to ensure that all transactions were bona fide, and that they were at arm's length and for real value;*
- (c) a fiduciary duty to ensure that he applied due care and skill, and took reasonable steps to ensure that the office of managing director and chief executive officer, and the powers exercised within that office, were used exclusively to the benefit of the company as a whole, and never for personal advantage, i.e. to act honestly in his dealings with his colleagues and shareholders, and without conflict between his corporate duty and his private interest; and*
- (d) a duty to ensure that the financial statements are free from material misstatements.*

*6. Hiscock was appointed company secretary of Macmed. At the time of his appointment he was an unrehabilitated insolvent, and could therefore not be appointed as a director, in accordance with the Companies Act number 61 of 1973.*

*7. Although Hiscock was the company secretary, the Accused in his capacity as managing director, chief executive officer and member of the board of directors, allowed Hiscock to act as the de facto financial director of Macmed, and to execute the duties normally associated with that of the financial director of a company.*

*8. The Accused allowed Hiscock expressly and/or tacitly to execute his statutory and common law obligations while pursuing marketing opportunities, both nationally and internationally, thereby causing him to be absent from Macmed's principal offices for extensive periods of time.*

*9. Macmed thus had no appointed de jure financial director.*

*10. Reports were made to him that Hiscock was involved in fraudulent transactions that had a material influence on Macmed's financial position."*

That last is also an important paragraph.

67. Therefore, (it is recorded) the Accused pleaded guilty to the 30 counts of contravening section 424(3) of the Companies Act, as set out in the Charge Sheet, and he admitted the preamble to each of the 30 counts.

68. Now, the specific Preamble to Count 1, which is the important count in this present matter, appears in the Charge Sheet, and it relates to the Bass transaction. It reads:

*"(1) Macmed was the holding company and/or a major shareholder and/or shareholder of and/or had interests in Kendall, hereafter Iatric Surgical Supplies Pty Limited; Medical Textiles Pty Limited, (the name was later*

*changed to Macmed Africa Pty Limited); Medical Textiles, thereafter Hospital Products Pty Limited, (Hospital Products hereafter); and Bass Medical Pty Limited, the name later changed to Craway Medical Pty Limited, or “Bass” hereafter, all companies duly incorporated in terms of the Companies Law of the Republic of South Africa.*

- (2) *Sandy Auld, (“Auld” hereafter), became the general manager of Kendall, a company in which Macmed was a shareholder.*
- (3) *Auld was the only shareholder and director of Bass.*
- (4) *Iatric operated from Zimbabwe.*
- (5) *During September 1995 Hospital Products, a subsidiary of Macmed, raised and rendered to Bass invoices for old and/or excess stock in the total amount of ZAR 2,672,000-odd VAT exclusive; ZAR 3 million-odd, VAT inclusive. The terms were that the company secretary and Auld would meet monthly to assess sales to determine funds available for payment, and a notarial bond of ZAR 2.5 million, comprising all the moveable assets of Bass, was registered against Bass in favour of Macmed.*
- (6) *Bass was at all times relevant to these transactions unable to honour its obligations thereof, but:*

*(a) during January 1996 it made a payment to Macmed in the approximate amount of ZAR 360,000 that it recovered from the Receiver of Revenue for input VAT;”*

(That was, as I understand it, on the invoices that were rendered to it by Macmed.)

*“(b) during March 1996 it made a further payment of the amount of 24,000 rand to Macmed.; and/or*

*(c) issued two post-dated cheques, one in the amount of 1,690,000-odd rand payable on the 10th May 1996, and another in the amount of 972,000-odd rand, payable on the 10th June 1996, with a total amount of 2,662,000-odd rand.*

- (7) *During March 1996 Iatric sold slow moving stock to Bass in the amount of ZIM\$4 million-odd .....*
- (8) *During May 1996 the honouring of Bass’s first post-dated cheque was engineered by*
  - (a) having Bass raise and render an invoice to Medical Textiles, a subsidiary of Macmed, in the amount of ZAR 1.7 million, VAT inclusive, and*
  - (b) Macmed entering into a discount agreement with Chesterfin Pty Limited, a trade financier in respect of the said invoice, whereby Macmed discounted the invoice to Chesterfin.*

- (9) *Chesterfin drew 45-day promissory notes in total amounting to ZAR 1,753,000-odd against Medical Textiles, all payable on the 24th June 1996, and which promissory notes were accepted by the company secretary on behalf of Medical Textiles.*
- (10) *Chesterfin paid the amount of ZAR 1.6 million to Bass on the 10th May 1996.*
- (11) *The first post-dated cheque was hereafter deposited and honoured in favour of Macmed.*
- (12) *Deloitte & Touche, .... the then auditors of Macmed, on the 17th May queried the validity of this transaction in that*
- (a) *the gross profit percentages on the stock sales were very high, being 79.4 % for Hospital Products, and 49.7 % for Iatric.*
  - (b) *The stock sold to Bass was previously written down in Macmed's books,*
  - (c) *Bass was incorporated just prior to the first sales by Hospital Products to Bass.*
  - (d) *It appeared to be a warehousing transaction in terms of which the true extent of Macmed's stock in trade was disguised by creating simulated sales of stock to Bass, that had the effect that Macmed's income for the year ending the 31<sup>st</sup> March 1996 was falsely increased thereafter.*
- (13) *The General Manager, i.e. Auld, of Kendall, in which Macmed was a major shareholder, was the only shareholder and director of Bass at that time."*

Then, (14), which is important:

- "(14) The Accused then on the 26th May 1996 caused Macmed to enter into an agreement with Auld and Lampert in terms of which Lampert became the only shareholder and director of both Bass and Medical Textiles, backdated to the 1st April 1996.*
- (15) *Then, in a letter backdated to the 16th May 1996 Macmed instructed Lampert to transfer the amount of 1.7 million to Medical Textiles to meet the promissory note in favour of Chesterfin.*
- (16) *On the 10th June 1996 the second post-dated cheque was deposited and honoured.*
- (17) *On the 24th June 1996 the promissory notes were honoured."*
- (18) *During July 1996 Bass and Medical Textiles invoiced the stock back to Macmed at the original invoice price plus 10 %, which invoice Macmed honoured."*

and (19) is also important:

*“(19) These transactions involving old and/or excessive and/or slow moving stock resulted in a reckless overstatement of the income of Macmed for the year ended 31st March 1996 in the approximate amount of ZAR 2,400,000.”*

The Charge Sheet then continues:

*“Therefore, the Accused is guilty of contravening section 424(3),”*

read with certain other sections of the Act which I do not need to read,

*“in that during the period 1995 to 1996 and at or near Midrand within the jurisdiction of this Honorable Court, the Accused unlawfully and knowingly conducted the business of Macmed in a reckless manner as set out in the preamble above...”*

which I have read,

*“...without due regard thereto that the manner in which the business was conducted would result in prejudice, it ultimately contributing to the financial liquidation of Macmed, to: Macmed; its board of directors...;” etc,*

as I have already indicated.

69. Attention is drawn by HMC to the various paragraphs that I have mentioned, which were the ones that I particularly noted in reading out the Plea and Sentence Agreement, because they are the ones that are relied on as apparently implicating Mr McArthur in more than merely reckless behaviour.

70. But the Plea and Sentence Agreement is not finished yet. It brings in further admissions as follows

*“Therefore, the Accused pleads guilty to the 30 counts of contravening section 424(3), of the Companies Act.”*

and in particular he further admits the facts set out in each of the preambles to each of the 30 counts and yet further admits the further matters set out in Paragraph 8.2 of the Agreement, namely:

*“1 The State has alleged and the Accused does not dispute the allegations made in counts 1-30 of the Charge Sheet, that fraudulent transactions were created which materially influenced the financial statements of Macmed.*

*2 The effect of these false transactions individually and collectively caused Macmed’s income to be fraudulently overstated and unlawfully captured as such in Macmed’s financial statements, which influenced creditors to provide facilities to Macmed in the approximate sum of 1 billion rand.*

*3 The Accused recklessly failed in the circumstances to take reasonable steps to verify and/or to implement proper control mechanisms so as to ensure the accurate recording and/or reporting of Macmed’s income, as a reasonable managing director and chief executive officer in his position would have taken*

*the necessary further findings to ensure that the income of the company is correctly stated.*

*4 The Accused in the circumstances knew or ought to have known that the financial records of Macmed raised strong suspicions of inaccuracy which he recklessly failed to disclose, knowing full well that Macmed's creditors would be financially prejudiced in the process."*

Stress is laid, I should mention, on the word "knew" in paragraph (4).

*"5 The Accused recklessly allowed Hiscock, the unrehabilitated insolvent, expressly and/or tacitly to execute his functions as managing director and chief executive officer, who, in addition to being the de facto financial director as such, also executed the financial and related functions normally associated with a managing director and chief executive officer.*

*6 The Accused as a Managing Director and Chief Executive Officer rather focussed on marketing opportunities, thereby neglecting his afore-described official fiduciary duties and functions.*

*7 The Accused finally in a grossly negligent matter 'ratified' these fraudulent transactions, as reflected in counts 1 to 30 when he returned to his office, and therefore conducted the business of Macmed recklessly."*

71. Then, under section 9, there are "The terms of the Sentence Agreement, Substantial facts and Admissions":

*"9.1 The parties agree that the substantial facts and admissions recorded in relation to the Conviction Agreement ought to be incorporated herein insofar as they are relevant to the Sentence Agreement,"*

and then it goes on to deal with the personal circumstances of the Accused, and mitigating factors:

*"1 The Accused is 50 years of age, married, but separated, with two children."*

Then, it cites his qualifications, and that, "He spent his entire professional career working within a sales and marketing portfolio". It goes on:

*"3 The Accused has no experience or skills in finance, accounting, and related matters.*

*4 The Accused relied on Hiscock and the group internal audit functionary to execute all financial and related aspects of his management functions, more especially as he travelled extensively, resulting in lengthy absences on his part from the principal offices of Macmed.*

*5 The Accused was subject to restraint of trade agreements, which precluded him from applying his expertise in sales and/or marketing in competition with Macmed under penalty of substantial sums of money.*

6 *The Accused demonstrated remorse for his involvement in his illegal activities Macmed in that*

- a. *the Accused accepted civil liability by entering into a settlement agreement, based on the civil action that was instituted by the liquidators of Macmed against him and 15 others, which resulted in his financial ruin. The Accused paid the amount of approximately ZAR 14 million, representing the full amount owing by him in terms of the settlement agreement.”*

That was the reference that I mentioned earlier, which I wondered might be a duplicate of other matters.

*“b. The Accused has assisted the liquidators in various civil matters emanating from the Macmed saga....*

*c. The Accused pleaded guilty in this proceeding, and thereby not wasting the Honourable Court’s time. The parties here are at ad idem that the trial herein will last several months, if not years*

*d. The Accused is prepared to testify for the State in casu, and his testimony in the trial against his former co-accused will expose to a large extent the scope of their criminal conduct, as well as to assist the State to expedite and facilitate the prosecution of a lengthy and complex trial.*

7 *The Accused has suffered financially as a result of the demise of Macmed in that:*

*a. The Accused’s reputation suffered severely, especially with the medical and pharmaceutical sectors, within which he could not find employment.*

*b. Pursuant to the Macmed saga, the Accused has derived an income by freelancing within the private business sector. Permanent employment has been secured once the case has been finalised.*

8 *The Accused consents to the payment of ZAR 1,400,000 , which constitutes the proceeds of crime benefits he received herein, into the Criminal Asset Recovery Asset account, as set out in paragraph 11 infra;*

9 *The Accused has no previous convictions.*

10 *The Accused suffers from a fatal and incurable disease, name ankylosing spondylitis, as is evident from the medical reports attached hereinto .... ”,*

11 *The Accused will therefore in all medical probability not survive any period of incarceration.”*

72. The Agreement then sets out “aggravating factors”, which were that:

*“9.3.1 The nature of the offences:*

1. *The Accused realises that the offences he is convicted of are serious in that the legislature deemed it necessary, through the creation of specific legislation to protect creditors, being the persons mentioned in the charge sheet, against company directors, including the Accused, who fail to execute and fulfil their duties in accordance with the law.*
2. *The offence is serious because of the large amount of money involved, and*
3. *White collar crime is prevalent in the country as a whole.”*

Dealing with the” *interest of the community*” as a consideration, it states:

“9.3.2 *The interests of the community*

1. *The Accused was in a position of breach of trust... ”,*

and it recites details of the ultimate deficiency of Macmed, and that the money received by the liquidators is currently the subject of a pending High Court order, but it is unknown how many cents in the rand the preference shareholders would receive.

73. The Agreement then records that the agreed sentence follows consideration of all relevant factors and considerations, which I need not recite and records it is agreed that the sentence which I recited near the beginning of this judgment would be a just sentence.

**The further materials relied on by HMC**

74. Ms Limond in her evidence told Advocate Cole that in making her decision to continue prosecuting the Application, she also took into account findings in the Hiscock judgment, which was delivered finally in March 2021, although it appears as a draft apparently dated 2020. She referred to various paragraphs there, insofar as they related to Mr McArthur, although they appeared, to a great degree, to be evidence from Mr Maguire, who has already been mentioned in the Charge Sheet, and was another director, and a former co-accused.
75. Mr McArthur gave evidence in the Hiscock trial, as he was obliged to do. He did so apparently after a warning in terms of section 204 of the South African law relating to self-incrimination. As I understand his evidence, Mr McArthur was under the impression that he had been told that if he said anything in his evidence which showed he had been involved criminally, the indemnity that he, I think, thought he had received under the Plea and Sentence Agreement, as an indemnity from (further) criminal prosecution, would be withdrawn.
76. In practice, when one looks at that section, which is section 204 of the Criminal Procedure Act 1977, Act number 51, what it seems to provide, as I can read it, is that where a prosecutor informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness in respect of an offence specified by the prosecutor, then what happens is that the court, if satisfied that the witness is otherwise a competent witness for the prosecution, tells the witness (in effect) that he is going to be obliged to answer

all the questions in the proceedings, and that provided he does so frankly and honestly he will be immune from prosecution in respect of the specified charge that has been identified.

77. So, I am not sure what was exactly the purport of the warning that Mr McArthur thought he had been given in his evidence before the court. But nevertheless, it shows and it is recorded that he did give evidence on that basis.
78. It is right to say that he was regarded as an “unreliable” witness, but apparently only about the day of the sale agreement in relation to Bass, and the reason for that I will indicate. In fact when Mr McArthur gave evidence, it appears that he did so on one day in such a manner that it was regarded as necessary to consider whether he was in fact competent to give evidence, and a mini trial was held, which produced the result that the judge concluded that, owing to the fact that he was taking drugs for his disease, his ankylosing spondylitis, and had also taken a sleeping tablet the night before, it had had an effect on his memory, and he was to be regarded as not having given reliable evidence the previous day. This trial within a trial was held on the basis of medical evidence. However, on the basis of that finding, Mr McArthur was subsequently admitted to give evidence again, I think with careful medical supervision as to what drugs he did or did not take.
79. The judge however formed the conclusion that, through no fault of his - it was not being said that he was deliberately dishonest - he was unable to remember quite a number of things, which led to him denying that those things had happened when in fact they had. However, as I read the judgment, Mr McArthur was exonerated from any actual dishonesty or perjury, or anything like that. It was simply that his evidence could not be regarded as particularly reliable and, in particular, where he gave evidence about the day of the agreement regarding the sale of Bass, that was regarded as unreliable. But the judge made other findings as well.
80. I do not find looking at any witness’s evidence in the Hiscock case helpful, but I do, it seems to me, have to look at what was found by the judge himself, and in particular in relation to Count 1. This involves another longish reading, but I have in fact read the entire judgment, in order to place context on the extracts to which Ms Limond referred as being those she said she particularly relied on, in answer to questions from Advocate Cole. I think that this is important.
81. What the judge relevantly found is in [30] to [32] of the judgment although by that stage, he has got up to about page 104 of the actual judgment itself, having reviewed all the evidence, and so forth. The Pretoria Magistrate - Mr Jacobs - then says in relation to Count 1:

*”In view of the findings above on credibility, the evidence of the State witnesses is accepted and, to the contrary, that of the Accused [here, of course, Mr Hiscock] is rejected.”*

He goes on to say:

*“The dispute between the State and the Accused is whether the transaction between Macmed through Hospital Products and Bass*

*Medical, and Iatric and Bass Medical, and Medical Textiles, using the Chesterfin facility, constituted fraud. ....*

*“The first finding that needs to be made is the actual date of sale of Bass Medical and Medical Textiles to Aubrey Lampert. Lampert testified it was on Sunday afternoon, 26<sup>th</sup> May, that he acquired Bass Medical, that a sweetener for helping out Macmed was added, namely Medical Textiles, a subsidiary of Macmed with an assessed tax loss of about R 3 million. To substantiate the date, he handed in the original fax pages of the timeline document Accused and Tyfield were preparing in Cape Town at the time; on it his fax machine had printed the date 26<sup>th</sup> May, and 17.40 hours, the time of receipt of the fax. No one could have manipulated that date on the original fax. It serves as incontestable corroboration of Lampert’s evidence. Maguire initially had the dates wrong, saying it was on McArthur’s birthday, the 2<sup>nd</sup> June, that Bass was sold to Lampert, and that Macmed’s sale conference ended on the 23<sup>rd</sup> May. During cross-examination he corrected the error. The conference, he said, ended a week before 23<sup>rd</sup> May, which made it the 17<sup>th</sup> May.*

*The sale of Bass Medical to Lampert was then a week earlier, either the 26<sup>th</sup> or 27<sup>th</sup> May. By making this correction he unwittingly then corroborated Lampert’s evidence. Auld’s memory, in the event was vague and unreliable. At first he reconstructed the date of sale from the date of another document, the deed of sale, which was the 25<sup>th</sup> March 1996. He was confronted with the evidence of Maguire and Lampert, and conceded during cross-examination that he cannot recall the date, eventually conceding it could have been May 1996, and that [SA18] was backdated to the 25<sup>th</sup> March 1996. It is improbable that Bass Medical and Medical Textiles were sold to Lampert during the last week of March, and more specifically on the 25<sup>th</sup> March as alleged by Mr Hiscock, the Accused, and stated in that document, SA18, and also another document, and the deed of sale for the following reasons:*

*“If Medical Textiles were no longer owned by Macmed, would Accused allow Dennill to proceed with adding it to the Chesterfin facility of Macmed Healthcare and Hospital Products? Why would accused cause Dennill to incur the costs and time wasted ....”*

I need not read the remainder of that, but he then finally says:

*“If it was sold on the 26<sup>th</sup> May 1996 it would make sense. Further, why, when Collie, [who was the auditor], confronted Mr Hiscock on the 24<sup>th</sup> May, regarding the Bass Medical transaction, was no mention made that the company had been sold to Lampert on the 25<sup>th</sup> March 1996?”*

82. Then, he raises certain other questions which he has asked himself which I do not think I really need read. But he then goes on to say:

*“The facts mentioned above are more than sufficient for the court to conclude that it is so improbable that the sale of the Medical Textiles and Bass occurred on the 25<sup>th</sup> March 1996 that it cannot be true. This*

*together with the evidence of the State witnesses justifies a finding that accused is not to be believed, and the court finds that Bass Medical and Medical Textiles were in fact sold to Lampert on the 26<sup>th</sup> May.*

*The finding on 30.2 above inevitably leads to the finding that the so-called timeline document, which is ASH17.1 to 4, was fabricated by Tyfield and Hiscock on 26<sup>th</sup> May 1996 while they were in Cape Town at Macmed's office, and McArthur, Maguire and Auld were with Lampert at his home in Johannesburg, that it was fabricated to cover up the late sale of Bass Medical to Lampert by falsely and intentionally misrepresenting that it occurred before 31<sup>st</sup> March 1996, the end of the Macmed financial year. It was purely a recording of a factual timeline. McArthur, Maguire and especially Lampert's participation was not required."*

(Mr Hiscock in this case is the Accused of course.)

*"The Accused well knew all the alleged so-called facts stated therein, as he demonstrated in his evidence. The contents of the document set out and the circumstances prevailing at the time of its fabrication justify only one reasonable inference, namely that it was an intentional misrepresentation, knowing it to be so, by Accused and the Board of Macmed, designed to prevent Macmed's auditors from reversing the sale of goods from Hospital Products and Iatric to Bass Medical in the financials of Macmed. The deed of sale of Bass Medical to Lampert, as a result of the finding in paragraph 30.2 supra, then intentionally misrepresent the date of the agreement as the 25<sup>th</sup> March while it was in fact 26<sup>th</sup> May 1996. This representation was done to give credibility to the misrepresentation contained in the so-called timeline document, and it perpetuates the lie.*

*Both document, ASH21 and ASH 14, were given to the auditors at the meeting of the 27<sup>th</sup> May in Cape Town, and ASH14 by Auld to Collie on the 30<sup>th</sup> May in Johannesburg while Mr Collie was investigating. The actions to misrepresent the date of the sale of Bass Medical to Auld were planned, carefully fabricated, and cloaked in half-truths and outright lies. The only reasonable inference to be drawn from this is that it was done with the direct intention to misrepresent the true facts, it was done as found in paragraph 3.4 to stop Collie from reversing the Bass transactions or withholding the certification of the financial statements for the financial year 1995-6.*

*The court is aware that Maguire, Auld and Lampert were accomplices to the commission of fraud. They acted in concert with the Accused and the Board of Macmed to mislead Collie and the audit team from Deloitte and Touche in accepting that Bass Medical was sold to Lampert on the 25<sup>th</sup> March. As accomplices, their evidence must be considered and accepted with caution. There are differences in their respective versions of events."*

83. He then goes on to deal with that. I do not think I need read all that. But he then goes on to say at [31]:

*“From the evidence of the State’s witnesses and to a lesser extent that of the Accused, the court finds the true facts and sequence of events pertaining to Count 1 are as follows: Macmed had a high level of excess written-down consumable stock and inventory during 1995. Attempts to have the salespersons in the consumables division of Macmed sell it into the market failed, as it was not lucrative for them to do so. Maguire was requested by Accused and McArthur to increase his efforts to reduce the inventory.*

*After attending a meeting in Cape Town with Accused and Cayetta of Deloitte and Touche, Accused sent Maguire a computer printout of all the written-down stock. Maguire decided to involve Auld, and identified stock on the list Auld could sell, adding slow moving stock, and priced the items at market less 20%, to allow Auld a profit margin. Maguire discussed it with Auld, offered the stock on consignment with Auld to pay Macmed as he sold. Macmed would make a substantial profit on the written-down value. The price Maguire had put in the stock he listed a total of about R2.8 million. Maguire informed the Accused of this. Accused said Macmed had a policy of no consignment sales, as it had to be a sale on invoice or no deal. Maguire spoke to Auld, told Auld what Accused said, added that the unsold goods could be returned, and Auld was to liaise further with the Accused, and Auld accepted. Maguire informed Accused, and sent a handwritten list of stock to be invoiced to Accused as the stock was in Cape Town. Maguire was not involved further. Accused knew Auld did not have the money to pay the stock unless he sold it.”*

84. He then goes on to recite the various things that the Accused did, and all the following paragraphs, which I will treat as read into this judgment. They were in relation to Mr Hiscock and the way he dealt with the documentation. There was nothing referring to McArthur directly or by inference at all.
85. Turning to the end of it, he refers to *“This transaction,...”* (which is the Chesterfin transaction in relation to post-dated cheques, whereby Macmed paid Macmed, through Bass Medical, from the Chesterfin facility, for a portion of the Hospital Products and Iatric stock) which was the final conclusion:

*“This transaction was an intentional fraudulent misrepresentation to the prejudice of Chesterfin. The Iatric stock was used to try and evade the inference that Macmed was trading with itself. The payment of the first post-dated cheque was a misrepresentation to the auditors that the debt was recoverable. Accused and Muller signed the promissory notes that Chesterfin drew on Medical Textiles which showed Medical Textiles was not on the 15<sup>th</sup> May the property of Lampert. [Exhibits] constitute the misrepresentation by accused and the others to Chesterfin. These documents convey the impression that a legal arm’s length sale of goods had taken place between Bass and Medical Textiles, while in truth and in fact it was a simulated sale.*

*Molyneux of Deloitte and Touche, Macmed's auditors, uncovered these transactions during the audit, and reported it to the audit partner, Collie, who confronted Accused on the 24<sup>th</sup> May and McArthur on the 26<sup>th</sup> May with what they had found. Collie insisted on a meeting with the Macmed Board on the 27<sup>th</sup> May with a view to reversing these transactions in the Macmed annual financials for 1995 to 1996. On Sunday afternoon, 26<sup>th</sup> May, Bass Medical and Medical Textiles, together with the stock, were sold to Lampert, and Accused and Tyfield fabricated the so-called timeline document in order to stop the auditors reversing the transaction. The document was handed to Collie and colleagues at the meeting on the afternoon of the 27<sup>th</sup> May.*

*Collie, Molyneux and Duffy [sc the auditors] went to Johannesburg, investigated the document, concluded it was a misrepresentation. They reported their findings to the Macmed Board, who refused that they should inform shareholders. Deloitte and Touche then took legal advice, and accepted they could not disprove the date of sale of Bass Medical to Lampert, and settled for a note in the 1996 Annual Report of Macmed on condition that Lampert pay all the outstanding debts of Bass Medical to Macmed. He did, and they signed off on the financials with a note in the Directors' Report stating operating income had increased by 66 percent to 10.2 million, largely attributable to the expansion of the relationship with Mediclinic and the sale of favourable terms of surplus and slow moving stock, which had been largely written down.*

*Accused and Macmed's Board of Directors thus succeeded by intentional misrepresentations in having the overstatement of net income, profits and headline earnings per share remain in the 1996 financials. The sale to Lampert of Bass Medical was a desperate plan to cover up and undo the fraud by backdating the sale.*

*For these reasons the court finds that the State has proven beyond reasonable doubt that Accused is guilty of fraud on Count 1, as he, together with accomplices, unlawfully falsely and with the intent to defraud misrepresented to Macmed's shareholders Chesterfin and Deloitte that Macmed's published audited consolidated annual financial statements for the year ended 31<sup>st</sup> March 1996 presented purely the financial position of Macmed when in truth and in fact it was overstated with R 2.123 million which was 31.4 % of the net income of R7,044 million to their prejudice. Accused knew that the debt of Bass Medical to Macmed was unrecoverable on the 31<sup>st</sup> March 1996, and the transaction stood to be reversed in the financial statements. The misrepresentation was made to prevent the reversal, and cover up the truth. Accused stands to be convicted on the main charge of Count 1."*

86. Now, I have read all that because I regard it as important to consider the whole of the evidence that actually relates to Mr McArthur's conduct when dealing with this matter. As I have said, it seems to me that the question is:

**Is any conduct by Mr McArthur admitted to by him, or inevitably found, on the basis of the evidence before the court, conduct which (on balance of probabilities) discloses the commission of a criminal offence if it had occurred within the Bailiwick?**

**Discussion and conclusion on first Issue**

87. I have come to the conclusion, having looked at all the evidence, in the round, that I am not satisfied that it does. Looking at the paragraphs in the admissions acknowledged by Mr McArthur in the Plea and Sentence Agreement, I have referred to the paragraphs that are particularly important.
88. There is first paragraph 10 of subparagraph 8.1 of the General Preamble to the entire Plea and Sentence Agreement, which records that “*reports were made to Mr McArthur that Hiscock was involved in fraudulent transactions that had a material influence on Macmed’s financial position*”. The problem with that is that there is no actual definition as to when these reports were made. Mr McArthur admits, plainly, that reports were made to him in 1999, at the end of the relevant period, that Mr Hiscock had been involved in some fraudulent transactions, and that they obviously had a material influence, because action was taken at the time. However, I am not satisfied that that effectively amounts to a clear admission that in 1996, which is the time we are dealing with, such reports were made, nor that any such direct admission was intended by Mr McArthur. The actual statement seems to me to be just too general to be construed as evidence sufficient to tie this admission down to the period in question.
89. Paragraph 4 is the admission that Mr McArthur, in the circumstances, “*knew or ought to have known*” that the financial records of Macmed raised strong suspicions of inaccuracy, which he recklessly failed to disclose.
90. The word “knew” is stressed but it does not, in my judgment, go far enough, first because it is directly coupled with the alternative “or ought to have known” and second, because of the further overarching qualification, later, that what was being admitted was a “reckless” failure to disclose (whatever) but not a deliberate one. It cannot be said that an omission (to disclose) which relates to either one or the other (knew or ought to have known) necessarily relates to knowledge that would actually be dishonesty, and still less when the admission is only as to being reckless about it.
91. The next important paragraph is the admission that is made at paragraph 14 in relation to the Count 1 itself. This is that Mr McArthur then on the 26<sup>th</sup> May “*caused Macmed to enter into an agreement with Auld and Lampert in terms of which Lampert became the only shareholder and director of both Bass and Medical Textiles, backdated to the 1<sup>st</sup> April 1996*”.
92. The finding in the judgment is that, ultimately, the document was backdated to the 25<sup>th</sup> March, so this “admission” is factually wrong in any event, and in fact if the document had been backdated to 1<sup>st</sup> April, it would not have actually affected Macmed’s financials up to the 31<sup>st</sup> March 1996, which was the crucial point. In any event, though, it seems to me that the admission can really only go to the fact that Mr McArthur agrees that the agreement as such, that was actually entered into on 26<sup>th</sup> May, and was entered into with his involvement, in the sense that he was there and helped procure that the agreement, was in fact signed up then. But the wider circumstances of the background in which that might have happened are rather important. I do not think the admission can be

construed as being an admission also of procuring the backdating (quite apart from the fact that any such admission is obviously wrong as the date is wrong) and I am satisfied that it cannot have been what was being admitted, and it would be quite wrong to construe it as such. In fact, all the findings of the judge in the Hiscock case show that the backdating was being carried on elsewhere, namely in Cape Town, with Mr McArthur, although he could not remember it himself, at that stage by the clear evidence of others, being in Johannesburg at Mr Lampert's house. Moreover, the judge expressly found that Mr McArthur, Mr Maguire and Mr Lampert's participation in the false timeline was not required, and this was constructed between Hiscock and Tyfield. Therefore, whilst this is plainly and reasonably an admission that Mr McArthur had a hand in procuring the execution of the relevant document, I do not see it as evidence of an admission that he also procured or was involved in, its actual backdating.

93. I should say that the evidence is that while Mr McArthur imagined that he could not have been in Johannesburg, because he also could not see how, he said, he could have been in two places at once, it was accepted that the meeting with the auditors in Cape Town took place in the morning of the Sunday, and it is perfectly possible to take a plane and get to Johannesburg, and therefore get to Mr Lampert's house, by the time of about 4 pm in the afternoon, which is the time of the meeting that took place between Mr McArthur, Mr Maguire, Mr Lampert and Mr Auld. So, I do not think that suffices to change the general impression.

94. Next, there is Paragraph 17 of the General Preamble to the Charge Sheet itself, which of course relates to the whole of the 30 charges which Mr McArthur admitted to. As the most apparently stark admission, it is the most difficult to explain on its own terms. It is that:

*“The Accused explained some of the false transactions to Macmed external auditors through misleading descriptions and justifications that were designed to dovetail with accounting and financial reporting requirements, but which masked the true intent of the Accused to present a false and misleading portrait of Macmed's current and likely future financial position.”*

95. I first have to say that it is not entirely clear to me what is actually meant here. There is, first, the point made previously that this is not specific to the transactions of 1996, but it is of course fair to say that Mr McArthur would have been involved in the Board Meeting of 27<sup>th</sup> May 1996 at which the relevant sale agreement, now falsely dated, was put forward. Even so, I am not satisfied that this can really amount to a greater admission than of the fact that such transactions were so “explained”, not necessarily actively by him. The most cogent and important fact here, it seems to me, is that another part of the matters which are accepted and admitted all along, not just by Mr McArthur himself, but also by those on the side of law enforcement who were engaged in getting him to sign up to the Plea and Sentence Agreement, was that Mr McArthur himself has absolutely no experience, or skills in finance, accounting, and related matters, and that he consequently relied entirely on Hiscock for those things, in relation to finance. That fact was also accepted specifically by the judge in the Hiscock case to have been the case; it was there agreed by him that everybody recognised that Mr McArthur never took any financial decisions himself; he always referred to other persons.

96. Essentially, matters that relate to the actual accounting points of figures and their treatment, and whether they are legitimately put into formal company accounts, and how they are dealt with, is something that does require some degree of financial knowledge. I deliberately read out, and read into this judgment, the lengthy documents, describing the complicated web of transactions which are the subject of Count 1, because I wanted to illustrate the kind of matters which it would be necessary for Mr McArthur to have had some understanding of, for him to be involved as a participant in deliberate fraud.
97. I asked Mr McArthur ,in the course of his evidence, what in fact he thought he had signed when he signed that document, and in particular this Paragraph 17 which I am discussing. I asked him what he thought it meant when he signed up to it.
98. He answered first by citing the argument that had been put forward on his behalf, that this paragraph cannot have really meant that he was actually admitting to fraudulent conduct itself, because the South African authorities simply would not have let him off so lightly, in terms of allowing him to plead guilty only to the “reckless” conduct of the company’s business, if they had considered that he had been party to an outright fraud. I must say that the level of sentence accepted under the Plea and Sentence Agreement seems to me to support this. It had always been accepted, by everyone, that Mr McArthur in fact had no accountancy or financial knowledge of any real depth. Therefore, while he accepted that he had been grossly negligent and even reckless with regard to letting Mr Hiscock loose to deal with all these things, he had never had sufficient understanding of what Mr Hiscock was doing, to appreciate what was happening and had never himself gone so far as being actively involved with anything with sufficient knowledge, or therefore intention, to make him fraudulent.
99. When I received Mr McArthur’s answer by reference to what the SA authorities might have been expected to be thinking, I objected that that was not really my point. I was asking him how, if he was denying that he had been involved in the fraud, and the active presentation of fraudulent materials to the auditors - how could he have signed up to paragraph 17 in those terms? What did he think it meant? This was all against the background that earlier in his cross-examination he had confirmed to Advocate Grainge that he did not resile from the terms of the Plea and Sentence Agreement which he had signed up to, with all the acceptances and admissions and recognitions of its truth, and so on.
100. His then answer was that, in fact, he would have signed anything at that time, to get the matter finished and over with, given the situation he was in, with his illness, with his responsibilities still to his family, but having lost everything because he had lost the value of his own private shareholdings at the time He would have actually signed, as it were, whatever was put before him, and he would have signed up that he agreed to the terms put to him, in order to conclude the matter on the basis of the offered plea bargain, which would at least have the merit of bringing the matter to an end as far as he was concerned, except for cooperation with the authorities.
101. I recognise that Mr McArthur said that he was not seeking to resile from the terms of the agreement, and that this was expressly put to him in cross-examination by Advocate Grainge. However, at the same time, my impression was that, when he said that, he was really simply accepting that he had signed that document itself, and he could not go back from the fact that he had actually signed it, as opposed to necessarily accepting every word it said.

102. I have to decide what I make of all this, in terms of evidence that Mr McArthur was guilty of conduct in South Africa which did not lead to his being charged with any offence which would translate directly into any conduct which was concurrently criminal conduct in Guernsey, but in the course of which he put his name to conduct which could possibly, in principle, amount to just such conduct.
103. In all the circumstances, given the background, and the consistent evidence that the authorities and everyone else involved accepted that Mr McArthur really had no financial knowledge which would have been sufficient, in my judgment, to enable him to understand the effects of the complicated set of transactions which were going on, and were necessary in order to render Macmed's financial statements fraudulent, I find it extremely difficult to accept the apparent admission in Paragraph 17 at its face value. I just do not believe that Mr McArthur really appreciated exactly what it appears to say, viewed on its own and in the cold light of day. It was just one paragraph in a very lengthy and complex agreement itself. There are many things that are difficult to follow, and to understand, in the Plea and Sentence Agreement, and with all the facts which Mr McArthur is supposed to have admitted which are not entirely clear or, in some cases, are actually inaccurate, I do not think that it would be right for me to hold him (as it were) to the fact that he signed that document, and therefore that he was accepting that he knew all about – and explained away – some fraudulent intent behind even the backdating of the document, and still less the import of what was going on as a sequence of fraudulent warehousing transactions. I just do not believe, taking all the evidence I have found and on the balance of probabilities, that he did know all about the fraudulent intent and the fraud that was being committed.
104. As regards his reliability in making such a denial, much is made of the fact that he initially denied to the Guernsey authorities that he had any criminal conviction, when he in fact did. It is right that he did say this despite it being obvious on the face of the Plea and Sentence Agreement that it was a criminal conviction. However, Mr McArthur's statement was apparently based on his having been given a "clear" Police Clearance certificate, confirming that he had no criminal record. It would seem, on examination, that details of his criminal conviction had plainly just not got through to the Police Clearance department, which gave the relevant certificate that he relied on. It also seems to me that Mr McArthur could well have been under the impression that he had been "convicted", if I can call it that, only of civil law offences, rather than actual criminal convictions because of the reference in the Agreement to the Confiscation Agreement, and the other civil proceedings that I have seen referred to in it. I do not find, therefore, that this denial is actually any more than a mistake.
105. As to the further materials in the Hiscock judgment, looking at this I find nothing further which suggests to me that the judge was there making any actual finding of fraud against Mr McArthur himself. He certainly refers to fraudulent misconduct by the Board of Macmed in general, but there were several other persons involved in that as well. In my judgment in order to find that Mr McArthur, specifically, had been guilty of fraud, one would have to look at findings in that judgment which were made against Mr McArthur himself, explicitly, and were related to him alone. The findings made by the judge in relation to Macmed's Board and its intention are simply far too general, to my mind, to be construed as such.
106. I do note that it is quite apparent from the judgment that it was accepted that Mr McArthur had far less involvement in the whole matter than did Mr Maguire, whose

evidence seems to suggest that he was concerned at the beginning as far as the actual planned actions were concerned. Thereafter the judge iterated what had happened as being on the basis that Mr Hiscock was the central mover in the whole matter. The judge in fact did not find expressly that Mr McArthur was actually an accomplice to the fraud, so the only thing that goes further in the Hiscock judgment towards implicating Mr McArthur is the general references to Board actions in, for example, not allowing the matters to go into the financial statements which the auditors wanted to do, and so forth. Once again, in view of the background facts mentioned above, I do not find that this can be construed as any finding against Mr McArthur of personal and deliberate involvement in any such matters.

### **Need to find an identifiable offence**

107. At times, it seemed to me that Advocate Grainge, for HMC, was effectively submitting that a finding of general unparticularised dishonesty on Mr McArthur's part would be a sufficient basis on which to found HMC's case. It was submitted in the skeleton arguments that the admissions recorded amounted to serious criminal conduct, and that the elements of Count 1 amounted to a classic case of inventory fraud. However, in my judgment that is just not good enough. HMC must show Mr McArthur's actual involvement in the elements of a recognised Guernsey criminal offence. It is necessary to make out the facts showing the elements of one of the offences of either conspiracy to defraud or false accounting, which are those relied on, eventually, by HMC.

108. Advocate Cole says that HMC simply does not get there on either basis. I agree. I am not satisfied that the evidence, taken on any basis, actually reveals the elements of the specific offences, one of which, at least, would need to be shown in Guernsey Law.

### **Conspiracy to defraud**

109. The elements of this offence were set out both in the arguments of HMC and also of Advocate Cole on behalf of St Christopher Trust, and I do not think there is any actual difference between them. In my judgment, it is correct that the elements required for this offence do actually mean that there must be (i) a combination, arrangement or understanding between two or more people (ii) with the intention to injure a third party, albeit there is no need for that to be the predominant intention, (iii) with the intention to use unlawful means to do so, and (iv) that the use of such unlawful means must have caused loss to such third party.

110. Advocate Cole cited the case of *Lakatamia Shipping Company v Nobu Su* [2021] EWHC 1907 (Comm) at [78]-[79] for the above summary elements, and I accept that that is correct.

111. He says at the end of the day that when one looks at the facts in relation to the matter, there is no evidence of Mr McArthur having entered into any combination, agreement or conspiracy with any person, and there is no evidence that Mr McArthur was aware that any other person was intending to use unlawful means to cause any loss or damage, that being the result of Mr McArthur's not being financially sophisticated. There is no cogent evidence to establish the purpose of any alleged conspiracy or any means by which it could be established that Mr McArthur was aware of or was a party to such a conspiracy or to achieve such an aim. The charge sheet and the Plea and Sentence

Agreement are consistent with Mr McArthur's having demonstrated only a grossly negligent lack of oversight, and admitted the same.

112. At the end of the day, therefore, he says it is inconceivable that Mr McArthur would have been charged with recklessness offences had any such dishonest intention apparently existed and there is force in this.

113. At the end of the day, cutting matters short, I prefer Advocate Cole's argument, that the facts as put forward simply on the evidence do not demonstrate the elements of a conspiracy to defraud, and they do not do so even if certain of the elements that Mr McArthur has actually supposedly admitted to, were actually found to be correct. I am not, therefore, satisfied that, on balance of probabilities, Mr McArthur committed the offence which, in Guernsey, could have been charged as conspiracy to defraud.

### **False accounting**

114. Similarly, "false accounting" is where a person (i) dishonestly, (ii) with a view to gain for himself or another, or with intent to cause loss to another, (iii) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose or, (iv) in furnishing information for any purpose, produces or makes use of any account or any such record or document as aforesaid, which (v) to his knowledge is or may be misleading, false or deceptive in a material particular.

115. That is the phraseology. I have stressed the evidence that the actual backdating of the document, which seems to be the only "falsification" that was actually put forward, was not something to which Mr McArthur was party at the time it happened. That was carried on in Cape Town, and there is insufficient evidence in my judgment to connect him sufficiently with that to find that he knew of it, as it was happening.

116. But, in any event, even if he did, it seems to me that given Mr McArthur was dealing with what was appropriate to go into financial statements in accordance with the ways of accountants, and the evidence is consistent with the fact that he left all this to Mr Hiscock and the others who were involved. I consider it perfectly fair and reasonable to conclude that in that circumstance there just is insufficient evidence that he would have known that whatever was happening was illegitimate, not least because, as already found, I am perfectly satisfied that he would not have been appreciating its implications. In my judgment, the evidence suggests that any discussions on this matter were quite plainly amongst others, with Mr McArthur not really being party to understanding exactly what was being planned and put forward by Mr Hiscock, together with others such as, apparently, Mr Tyfield, who were involved with him as his accomplices in this particular aspect of fraud.

117. In those circumstances I am again, simply not satisfied that there is sufficient evidence to say, even on balance of probabilities, in the circumstances, as they have been found in South Africa, that that would have amounted to an offence of false accounting in Guernsey Law.

118. I have therefore concluded that neither index offence in Guernsey law has been sufficiently made out against Mr McArthur, on balance of probabilities. Therefore, the funds cannot be the proceeds of his "unlawful conduct" within the meaning of the relevant sections of the Forfeiture Law.

**(2) Are the funds held by Barclays identifiable as the proceeds of any unlawful conduct disclosed in the South African criminal proceedings?**

119. There are two other reasons why, in my judgment, HMC does not make out his case, but these are actually part of the third issue, set out above.

**Timing not made out**

120. The second ground for the finding already made above, whilst dealing, as I am at the moment only, with Mr McArthur, is a timing point.

121. The only effect of Mr McArthur's conduct regarding Count 1 was materially to overstate Macmed's financial position in the 1995-6 accounts by ZAR 2.4 million, there being merely the reservation as to the solidity of the basis for this included in the note of the auditors inserted into the accounts.

122. In my judgment, a further problem that faces HMC on this claim, in any event, is, therefore, that of showing that some part of the proceeds of the sale of the shares in 1996 was attributable to this.

123. This is a timing point. There is simply no evidence as to when the sale of the shares by Nearco took place. In fact, I have not even received any submission as to the balance of probabilities as to this, on the facts. All Advocate Grainge was able to say was effectively that one just "did not know".

124. Now, in practice the accounts could not have any effect on the share price before they were actually published. It is not even clear when that was, but it is perfectly plain it was at least after the 27<sup>th</sup> May when the auditors were raising their concerns, and it was probably even after the dates in June of the various post-dated cheques, because it would seem that they were known to have been involved, and must, previously to the finalisation of the accounts have been honoured, or else there would have had to be some further reference by the auditors to that. That did not happen.

125. The position is that therefore if the burden of proof is on HMC, in my judgment he simply does not satisfy me that it can be said that on balance of probability the relevant sale, which produced the proceeds back to which the funds can now be traced, took place after the accounts themselves would have been published. It is necessary for this to have occurred in order to show that the misleading statements contained in them could have had any effect on the sale price of the shares that was actually obtained by Nearco.

126. I have asked myself some questions about this, although I did not receive any actual submissions. I note that Mr McArthur said that he was approached by the purchaser, who I think was Standard and General, to buy the shares. I suppose it might be said possibly that an approach for a share purchase was more likely to be made after results had been published than before, but in my judgment that would really be pure speculation. I note also that actually, in his third affidavit, Mr McArthur says that he knew that the share proceeds were coming, or were imminent, in about April 1996. On that basis it would suggest that the matter was actually contemplated and perhaps even effected before the publication of the accounts.

127. But on an basis, it seems to me and I find, that it is simply speculation as to the date in 1996 on which the sale was effected, and therefore, I cannot find that HMC satisfies me, on balance of probabilities, that these funds were the proceeds of the conduct that went into Count 1, certainly in relation to any conduct of Mr McArthur.

### **Quantum not made out**

128. Even if this is wrong, I also find that there is also no way of calculating what part, or how much, of the proceeds of such sale was actually attributable to the effects of the (here presumed) unlawful conduct, ie causing an inflated share value. The shares had been held for a very long time, as can also be seen by the amount of the increase in their value that obviously took place. There were certain graphs produced by Mr McArthur showing how shares rose in value generally over the years, but looking at those, I cannot infer anything about the quantum of share value that would or could actually be attributable to any difference caused by any overstatement of the value of the assets of Macmed in the 1996 accounts. This would be necessary, though, so as to enable me to work out exactly which part of the proceeds of sale might be traced back to any effect of any misrepresentation in the accounts, or how that could be traced back, percentage wise, perhaps.

129. It is perfectly plain that one cannot attribute the whole of the increase in value of the shares between 1987 and 1996 to the misstatement of the value of Macmed's assets in the 1996 accounts, even in theory.

130. Advocate Grainge argues that if part of the proceeds of sale were the proceeds of unlawful conduct, then the whole is tainted. She makes that submission in one of her skeleton arguments (22<sup>nd</sup> June 2022) but she provides no authority for this proposition, and simply submits that if funds are mixed then, on that basis, the whole of the funds is tainted.

131. I reject that argument. In my judgment it is contrary to the very terms of s 13 (2) of the Forfeiture Law. This states that,

*“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...”* (emphasis added).

132. Plainly, there are two separate requirements. The court can forfeit the whole if it finds that the whole is the proceeds of unlawful conduct, or the court can forfeit the part if it finds that the part is the proceeds of unlawful conduct. The law, plainly, therefore, treats the case relating to “the whole” and a case relating to “any part” as different cases, and the whole tenor, therefore, is that the law is looking to a causation link and identity between the origin of the funds and the extent of any appropriate forfeiture. This is entirely inconsistent with any conclusion that a finding that any part of the funds is affected by being the proceeds of unlawful conduct, means that the whole of the funds is treated as such and is forfeitable.

133. In my judgment, therefore the burden is on HMC to show which part of the relevant funds, here, should be forfeited. If I am not satisfied that the money in total is the

proceeds of unlawful conduct, then I could make a forfeiture order only if I were satisfied that some identifiable part was, and as to that part only. HMC has not even attempted to make out a case on the “part” ground, and on that basis alone, in my judgment, I cannot make a forfeiture order in his favour.

**(3) Can HMC rely on Mr Hiscock’s conduct to bring the funds under the description of “*any person’s proceeds of unlawful conduct*”?**

134. I turn therefore briefly now to HMC’s alternative case, which is that it can be Mr Hiscock’s conduct that is the unlawful conduct that gives rise to the justification to forfeit.

135. Plainly, it must be accepted that Mr Hiscock’s conduct was unlawful, and I do not think there could be any serious argument but that Mr Hiscock’s conduct would be unlawful under the law of Guernsey at the time. It was plainly fraudulent.

136. Nonetheless, in my judgment, and I record, the timing point (above) applies, because one can only begin to argue that the proceeds of the sale were the proceeds (even) of Mr Hiscock’s unlawful conduct in principle, if one can trace their origins somehow back to that conduct as a matter of causation.

137. It does not actually help, in this regard, that Mr Hiscock’s plans, as indicated by the judge at his trial, may have started in late 1995, because nothing at that point happened that was actually in itself unlawful. It was only later when the actual misrepresentations were made, the backdating of the document, and the misleading statements (implicitly misrepresentations) consequently incorporated into the accounts themselves, that there was the unlawful conduct that could actually then have had the effect that there could even be “proceeds” of that unlawful conduct. In consequence that point still applies in relation to Mr Hiscock, and even if I were to find in HMC’s favour on this issue, his claim would still fail.

138. Equally the quantum point applies, namely the point that HMC cannot identify, and does not even contend, that an identifiable part of the relevant funds can be taken to be traced back to the proceeds of such unlawful conduct.

139. However, as the point has been raised, I need to deal with the issue of “any person’s ... unlawful conduct” as that phrase is used in 13 (2) of the Forfeiture Law.

140. Advocate Grainge’s argument rests on the fact that a Forfeiture Order may be made if the court is satisfied on balance of probabilities that,

*“...the money .....is any person’s proceeds of unlawful conduct...”* .

She submits that “*any person*” means exactly that. Therefore, even if Mr McArthur was innocent, or rather not guilty as I think she would probably prefer to put it, the funds are still liable to forfeiture because the “*any person*” can be Mr Hiscock. In fact, she submits of course that Mr McArthur was implicated, so there is even nothing wrong with that.

141. Advocate Cole submits that “*any person*” cannot mean, literally, “*any person*” because of the unfairness in which this could result. It could have, he submits, a chilling effect also on innocent people depositing their money in Guernsey if it were perceived that a

court could confiscate those monies for something that they know nothing of, which happened a long time ago.

142. My immediate instinct is that Advocate Cole ought to be right because of the inherent unfairness. If Advocate Grainge's interpretation were correct, it would be better achieved by saying simply that the court should be satisfied that "*the money... is the proceeds of unlawful conduct,*" full stop. One does not have to say who it is whose unlawful conduct is being referred to at all, if it is not relevant who it is. Or it could be phrased as "*the money ...is the proceeds of any person's unlawful conduct*", and it would then be obvious that the generality of "*any person*" applied to the unlawful conduct in that general sense. In either case, the meaning contended for by Advocate Grainge could and would be achieved without ambiguity, but that has not been done.
143. The phrase "*...is any person's proceeds of unlawful conduct*" imports two connotations. The first is that of ownership of the proceeds; the second is that those proceeds are correctly characterised as stemming from unlawful conduct. There has to be an element of *ownership* of the proceeds, it seems to me, because this phrase has the connotation of ill-gotten gains.
144. However, I take Advocate Grainge's point that the "person" cannot be entirely confined to the person whose actual proceeds of unlawful conduct they are. First, this is completely inconsistent with the emphasis implied by the word "any". Second, as a practical consideration, it could well be that somebody who is guilty of unlawful conduct deposits, or diverts, the proceeds into the name of somebody else, who might, or might not, be aware of their origin, and a forfeiture order might appear to be quite properly imposed, even in those circumstances.
145. I have to say that if I could construe this phrase as requiring that the unlawful conduct should have some connection with the person whose "proceeds" they actually are, ie the person who owns them, then I would certainly do so. I have tried to see how this might be possible, in terms of construing the phrase purposively or with some kind of necessarily implied limitation. One possibility, referable to this case, is that the answer might be that it simply cannot be said that the funds are or ever were "Mr Hiscock's *proceeds*..." at all, but it is difficult to see how that reasoning can be formulated as a general interpretation of the phrase in question, and in the time available in order to produce this *ex tempore* judgment promptly, (and since it is not a point on which my ultimate decision depends) I have not been able to make any satisfactory (to my mind) such formulation. With reluctance, therefore, I conclude that it is not possible, and a literal interpretation of the words is required.
146. I do so, in fact, largely on the basis that having looked at the initial Part (Part I) of the Forfeiture Law, which I outlined at the outset of this judgment - and some may have wondered why I did so - the similar wording used there is clear, and its universal intention is also comprehensible, because the emphasis there is on dealing with physical cash, negotiable instruments etc, etc.. On that basis, it makes sense that it may well be "any person's" physical cash, negotiable instruments and so forth - even postage stamps perhaps - which is appropriately subject to being seized. At the end of the day, though, that wording that has been carried through into the second part and the third part of the Law, dealing with the somewhat different and ultimately more draconian power of forfeiture. I would therefore accept Advocate Grainge's submission, although, as I have said, I do so with reluctance, because I think it is unfortunate.

147. I think it is unfortunate because, if that were the intended breadth of the qualification for imposition of this penalty, I would normally expect that there would be some exception for the person who is conventionally known as the “*bona fide purchaser for value without notice*”, to be excepted from the operation of such a draconian section, or even possibly the mere “bona fide purchaser” even without value, but there is no such actual exception here.

### **Forfeiture discretionary**

148. This therefore leaves, as far as I can see, the protection for any such person to lie in the exercise of the court’s discretion only. I turn to this now, because it will be noted that the ultimate power to make a Forfeiture Order is, in any event, only that the Court “may” forfeit the property, and it is therefore accepted that this power is discretionary.

149. Even if I were wrong on all the above points of law, I would nonetheless exercise my discretion not to order forfeiture in this case.

150. As far as Mr McArthur is concerned, I have actually found that I am not satisfied that he is guilty of any actually dishonest conduct as regards an offence of either conspiracy or false accounting, as contrasted merely with the criminal recklessness as to the running of the company such as is proscribed as a criminal offence in South African law, and of which he was found, and pleaded, guilty. That is so, as I have said, whatever he may have apparently admitted in his response to the Plea and Sentence Agreement at the time.

151. I note also though that he has also paid up at least the proceeds of the criminal conduct admitted by him, (R1.4million) quite apart from any question whether there was some other action in which he paid monies over to the liquidators, (R14million) which I am unsure about as this was not confirmed, but which, because it is such a major and important point, I would be inclined to think he must have done, as it is so expressly recorded in the Plea and Sentence Agreement, and I doubt if it therefore would have been a duplication of the first penalty.

152. It would in my view be punishing him twice, even if he were guilty, to forfeit the further sums now held in the Barclays account, or even a part of them - and it would have to be only a part of them because quite plainly the whole of the sums cannot be attributed to the whole of any value that might be attributed to the accounts. (It is not a relevant consideration, in this regard, that the beneficiaries of the St Christopher Trust are Mr McArthur’s family rather than him, not just because of their connection but because he is not himself excluded as a potential beneficiary.)

153. If, on the other hand, the funds were liable for forfeiture as a result only of Mr Hiscock’s criminal conduct then, in view of my comments above, I would regard it as equally unfair and unreasonable that they should be forfeited in the hands of Mr McArthur or his family, in effect, in all the circumstances.

154. So, consequently, my primary finding is that for any of the reasons given above, HMC does not make out the claim made to forfeit these funds, a claim which has only been made in relation to the whole of the funds. But insofar as it might be the case that I were wrong, either on points of law or on the timing point above, I would nonetheless exercise my discretion to decline to make such an order in all the circumstances.

155. I would comment that Advocate Grainge submits that the Forfeiture Law is (and she emphasised to me), a law which operates *in rem* and not *in personam*, and it is draconian because its purpose is to send a message to anyone and everyone that Guernsey is not a place where one can deposit the proceeds of crime and get away with it. One must deter undesirables from attempting to use our jurisdiction for that purpose. That is clearly right.

156. However, that cannot simply be an invitation to exercise the draconian power as draconianly as possible in all the circumstances just because it is draconian. It must also be operated so as not to deter innocent and upright parties from placing their business here lest they become embroiled in, or have their assets at risk of confiscation, because of some connection to some unlawful conduct in the past which they knew nothing about. This case is not quite either extreme, I accept, but it certainly seems to me to be more akin to the latter.

157. So, I exercise my discretion not to forfeit the sums in all these circumstances, even if section 13 might be construed as technically wide enough to encompass Mr Hiscock's conduct and, even if I were wrong to hold that I am not satisfied on the balance of probabilities that the share sale took place before any relevant unlawful conduct had actual effect, or that no forfeiture is possible because the relevant "proceeds" cannot be identified.

158. In the event, therefore, I will dismiss this application.

**Her Honour Hazel Marshall KC**  
**Lieutenant Bailiff**

**17<sup>th</sup> February 2023**