Appeal from an order of LB Marshall made on 27 February 2024, regarding HMC's application to forfeit proceeds of an account under section 13 of The Forfeiture of Money etc in Civil Proceedings (Guernsey) Law, 2007

[2024]GCA041

IN THE COURT OF APPEAL
(CIVIL DIVISION)

Court of Appeal No.580

Before: **Sir Richard McMahon, Bailiff of Guernsey**
Mr Paul Matthews JA
Mr Michael Furness KC JA

IN THE MATTER OF:

THE FORFEITURE OF MONEY ETC. IN CIVIL PROCEEDINGS (BAILIWICK OF GUERNSEY) LAW, 2007 AS AMENDED

AND

USD 14.1 MILLION PLUS ACCRUED INTEREST HELD IN A BANK ACCOUNT (NO 05301155) IN THE NAME OF FIDEILITY MANAGEMENT LTD

BETWEEN:

FIDEILITY MANAGEMENT LIMITED **Appellant**

and

HIS MAJESTY'S COMPTROLLER **Respondent**

Advocate Michael Adkins for the Appellant
Advocate P M Grainge for the Respondent

Furness JA

1. This is the judgment of the Court.

Introduction

2. This is an appeal from an order of Lieutenant Bailiff Hazel Marshall KC made on 27 February 2024 ("the Order"). The reasons for making the Order are set out in her judgment of the same date ("the Judgment").

3. The Appellant, Fidelity Management Ltd ("FML"), is a company, originally incorporated in the Turks and Caicos Islands, which is the holder of account number 05301155 ("the Account") with the Royal Bank of Canada, Guernsey Branch ("the Bank"). At the outset of these proceedings, the Account was in credit to the sum of some US$ 14.4 million, plus accrued interest. On 3 May 2023 the Respondent, His Majesty's Comptroller ("HMC"), applied for an order freezing the Account under section 10 of The Forfeiture of Money etc in Civil Proceedings (Guernsey) Law, 2007 ("the 2007 Law"), which was granted on 26 June 2023. Directions were given to enable FML to challenge the making of the Order under section 11 of the 2007 Law. On 25 January 2024, before FML's challenge under section 11 had been determined, HMC issued an application under section 13 of the 2007 Law to forfeit the proceeds of the Account. Under the terms of section 13(2), on the hearing of a forfeiture application the onus is on FML to prove that the money in the Account is not the proceeds of any person's unlawful conduct, and is not intended by any person to be used in unlawful conduct.

4. HMC contends that the wording of section 13(3) has the effect that the forfeiture application superseded FML's application to set aside the freezing order, with the effect that the freezing order can no longer be challenged, and the hearing of the forfeiture application must be listed in place of the hearing of FML's application. FML disputes HMC's interpretation of section 13(3), and argues that the Court should continue to direct the hearing of its application under section 11, so that the forfeiture application will only be heard if its application to set aside the freezing order fails. FML relies on the fact that section 13 makes it a prerequisite for the making of a forfeiture application that the account sought to be forfeited has been subjected to a freezing order. Thus, it is argued, the validity of the freezing order must be determined before the forfeiture application can be proceeded with.

5. At a hearing on 27 February 2024, the Lieutenant Bailiff accepted the submissions of HMC. She stayed the hearing of the application to set aside the freezing order, and directed that the forfeiture application be heard in September of this year. FML now appeals that decision. Its first ground is that, as a matter of construction of section 13(3), any application under section 11 which had been issued before the forfeiture application was made must be heard in advance of the hearing of the forfeiture application itself. Its second ground is that a construction which fails to give effect to the result contended for by its first ground would mean that the 2007 Law contravenes its rights under Article 1 of Protocol 1 of the European Convention on Human Rights ("the Convention"), meaning that the Court must read into the 2007 Law wording which renders it compliant with the Convention. Thirdly, it is said that it was an abuse of process for the Court to make the Order it did, having regard to the course of the proceedings up to that date, and the conduct of HMC.

6. The wording of the grounds of appeal is as follows (omitting the sub-paragraphs to each ground which particularise the errors in the Lieutenant Bailiff's judgment which FML says support each ground):

GROUND 1: in making the Relevant Orders, the Lieutenant Bailiff erred in law as to the true construction of the [2007] Law, including as to the true construction of section 13(1) and (3) of the Law. She was wrong, in particular, to conclude that section 13(3), on its true construction, had the effect that the Release Application [ie FML's application to discharge the freezing order under section 11] was superseded by the Forfeiture Application and should no longer be heard.

GROUND 2: further or alternatively, in making the Relevant Orders, the Lieutenant Bailiff erred in law by failing to discharge her statutory duty under section 3(1) of the Human Rights Law, which required her, so far as it is possible to do so, to both read and give effect to the relevant provisions of the Law, and in particular section 13(1) and (3) of the Law, in a way which is compatible with the Convention rights as defined in section 1(1) of the Human Rights Law, including rights under (1) A1PI and (2) Article 6.

GROUND 3: further or alternatively, in making the Relevant Orders, the Lieutenant Bailiff erred by failing to conclude that hearing the Forfeiture Application in advance of the Release Application would constitute an abuse of the Court's process and/or a wrongful exercise of the Court's case management powers.

The legislation

7. Since these proceedings were commenced, the 2007 Law has been repealed and replaced. It is, however, by virtue of its transitional provisions, the Law which applies to the events giving rise to this appeal. As applied to this appeal, the 2007 Law falls to be read as amended by Forfeiture of Money, etc. in Civil Proceedings (Bailiwick of Guernsey) (Amendment) Ordinance, 2022 ("the 2022 Ordinance").

8. The jurisdiction for granting a freezing order under the 2007 Law is found in section 10, which, so far as material, reads as follows:

> "(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 –
>
> (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 or V of this Law or proceedings under legislation in force in a country designated under section 53 relating to the forfeiture of funds or other property by a court in non-conviction based proceedings, or

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

(6) The second condition is that there are reasonable grounds for suspecting that the funds are intended by any person for use in unlawful conduct and that –

(a) the making of the order is justified while their intended use 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 or V of this Law or proceedings under legislation in force in a country designated under section 53 relating to the forfeiture of funds or other property by a court in non-conviction based proceedings, or

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

(6A) …

(7) An order under subsection (1) or (3) –

(a) may be made ex parte and in chambers,

(b) may be made notwithstanding that notice of the application for it has not been given to any other person,

(c) must provide for notice to be given to persons affected by it, and

(d) may be made subject to such terms and conditions as the Bailiff thinks fit.

(8) Any interest accruing to the account in respect of the frozen funds shall also be frozen and is to be added to the funds on their forfeiture or release.

…"

9. "Unlawful conduct" is defined under section 61 to mean (1) "Conduct which occurs in any place in the Bailiwick…if it is unlawful under the criminal law of that place"; and (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".

10. The following points should be noted. First, in order to obtain a freezing order HMC only needs to show "reasonable grounds for suspecting" that the account (or so much of it as is to be frozen) represents the proceeds of unlawful conduct or that it is intended to be used for unlawful conduct by any person (together with the supplementary requirements of subsections (5) or (6)). Second, an order can be obtained *ex parte* without notice to the affected parties. We were told by Advocate Grainge (who appeared for HMC) that that is the usual procedure, although it was not followed

in this case. Third, the Court can impose such terms and conditions as it thinks fit when making the order.

11. The release of frozen accounts is dealt with under section 11 which, so far as material, reads as follows:

> "(1) This section applies while any funds in an account maintained at a bank are frozen under section 10.
>
> (2) The Bailiff may direct the release of the whole or any part of the funds if the following condition is met.
>
> (3) The condition is that the Bailiff is satisfied, on an application by the person whose account was frozen, that the conditions in section 10 for the freezing of the funds are no longer met in relation to the funds to be released.
>
> …"

12. Forfeiture is provided for under section 13:

> "(1) While money is detained under section 7 [which relates to the detention of seized cash] 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.
>
> (2) The Royal Court shall order the forfeiture of the money or any part of the money unless satisfied on the balance of probabilities, by the person against whom such an order is proposed to be made, that the money or the part is not –
>
> (a) any person's proceeds of unlawful conduct, or
> (b) 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."

It should be noted that the power to apply for forfeiture conferred by section 12(1) is conferred on H.M. Procureur, as the senior Law Officer, although in the present case the forfeiture process has been conducted by HMC.

13. Section 16 affords a person who was deprived of the money in the account by unlawful conduct, or any owner of the money in the account other than the account holder who is subject to the freezing order, the right to apply for its release. Section 54, and the Schedule to the 2007 Law, gives the Court power to order the legal costs of a respondent or other party to be met out of the account.

14. Subsection (2) of section 13 was substituted for the original subsection (2) by the 2022 Ordinance. As originally enacted subsection (2) read as follows:

> "The Royal Court may order the forfeiture of the money or any part of the money if satisfied on the 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".

On any view, the amendment which replaced the above wording with the current version of section13(2) made a significant change to the basis on which forfeiture might be ordered. Under the original subsection, the onus was on HMC to prove that the money in question was any

person's proceeds of unlawful conduct, or was intended by any person for use in unlawful conduct. All the account holder needed to do in order to avoid forfeiture was to persuade the Court that HMC's case could not be made out on the basis of the evidence adduced in support of it. If HMC proved its case, the Court had a discretion, indicated by the use of the word "may", to order forfeiture. Under the version of the subsection in force for the purpose of these proceedings, the onus is on the account holder to prove the negative propositions that the account represents no-one's proceeds of crime and that no-one is intending to use them for the purpose of unlawful conduct. Although HMC will have had to establish reasonable grounds for suspicion against one or more persons in order to get the freezing order which is the necessary preliminary for the forfeiture application, the account holder has to do more than prove that the money in the account is unconnected with the unlawful conduct of that person or those persons; it also has to prove that there is no-one else in the world whose unlawful conduct relates to the account. If the account holder fails to discharge that onus, the Court is directed to forfeit the account – the element of discretion has been removed. Section 14 provides for an appeal against a forfeiture order to the Court of Appeal.

15. Both parties drew the attention of the Court to the terms of the Policy Letter of the Committee for Home Affairs dated 25 July 2022 (P.2022/73) which was addressed to the States of Deliberation before they came to make the 2022 Ordinance, which substituted section 13(2). Paragraph 6 sets out the advice of HMC in relation to that substitution. The advice refers to the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 and the UK legislation on unexplained wealth orders ("UWOs"), both of which involve, in defined situations, imposing an onus on the asset owner to disprove a criminal connection to the assets in their ownership. HMC's advice goes on to say:

> "6.6 The measures outlined above are beginning to be used with effect. Similar measures would clearly be beneficial in the Bailiwick, given that it faces the same difficulties as other jurisdictions in obtaining evidence to demonstrate the origin of assets and there is a specific finding in the NRA about the risks to the Bailiwick from proceeds of foreign kleptocracy and other forms of corruption. The advantage of the Jersey process is that it is less cumbersome than the UWO process, and its overall scope is wider.
>
> 6.7 Therefore, I advise that an amendment is made to the Civil Forfeiture Law whereby the burden of proof is shifted to the owner of the assets where the assets are already subject to a freezing order (which means the court has already been satisfied that there are reasonable grounds to suspect the criminal nature of the assets), in the same way as in Jersey. The amendment should also include a regulation making power that would enable the Committee to put in place a process whereby a forfeiture decision could be revisited in the event that new evidence came to light, in the event that this is considered necessary once use has begun to be made of the reversed burden of proof."

We return below to the assistance which can be derived from this document when construing section 13.

16. As it plays some part in the history of this matter, we should briefly advert to the provisions of the Criminal Justice (Bailiwick of Guernsey) Law, 2002. This provides (in sections 38 to 40) for a regime whereby banks and other financial institutions may obtain clearance from the Financial Intelligence Unit ("FIU") for consent to do any act, or to deal with any property, in any way which would comprise an offence under those sections in the absence of such consent. Where a bank seeks consent to permit a withdrawal from an account, and consent is refused, the bank in question will refuse to honour the withdrawal request. The account holder's remedy in those circumstances is to take civil proceedings against the bank to establish their title to the account, and to prove that there are no grounds for the bank to refuse to make the requested payment. The

2022 Ordinance introduced sections 12A and 12B into the 2007 Law, which provide for a summary forfeiture procedure in cases where there has been a refusal of consent by the FIU. It seems that this procedure could have been activated by HMC in this case, but it was decided not to take that course, and instead to proceed by way of freezing order and "standard forfeiture".

The facts

17. The Account was opened in around 6 December 1995 by someone purporting to be Thomas Henry Magill, who claimed to be a director and secretary of FML. He supplied documentation to evidence his identity. FML's case is that in fact Thomas Henry Magill was an alias, that the identity documents were false, and that the instructions were actually given by one Frank Laport, who was the beneficial owner of the monies credited to the account, and of the shares in FML. HMC relies on these circumstances as part of the foundation for its reasonable grounds for suspicion.

18. Between 2002 and 2004 a number of payments were made into the Account, ostensibly on Mr Magill's instructions. In 2005 Mr Laport died. On 30 October 2007 a request was made by a Mr George Collins to withdraw the funds in the Account. Mr Collins was a Chicago lawyer and family friend. He was acting for Mr Laport's three daughters, who were now claiming to be the beneficial owners of the entire shareholding of FML. Following this request, the Bank sought consent from the FIU to effect the requested withdrawal and consent was refused. The Bank, in consequence, refused to permit any money to be withdrawn from the Account. Between 2005 and HMC's application for a freezing order in 2023 no proceedings were brought against the Bank by FML or Mr Laport's daughters to establish their right to withdraw money from the Account.

19. On 3 May 2023 HMC made an application for a freezing order over the Account, to which FML and the Bank were respondents. This application was made on notice, and was supported by an affidavit sworn by Mr Brian McCreight, a Detective Constable and Financial Investigator of the States of Guernsey Economic and Financial Crime Bureau. The first hearing of the application was on 27 June 2023 before the Lieutenant Bailiff . At that hearing Advocate Grainge set out HMC's case for a freezing order. Advocate Adkins, for FML, stated FML's opposition to the proposed freezing order, but also said that it was not in a position to make its full case without the benefit of an order that FML's costs be met out of the funds in the Account (his position being that FML and Mr Laport's daughters did not have the resources to fund their opposition to the freezing order themselves).

20. It is clear from the transcript of this hearing that FML was aware from the outset that at some point the freezing order would be followed by an application for forfeiture, and that on the hearing of the forfeiture application the onus would be on FML to show that the Account was not connected with any person's unlawful conduct. Advocate Grainge told the Court that HMC was not quite ready to apply for a forfeiture order but that it was hoped that it would be made during the first freezing order (ie within 4 months of the freezing order being made)**.** Advocate Adkins submitted that the question whether reasonable grounds for suspicion existed to justify the freezing order was a distinct issue to the issue which arose on a forfeiture application, and that if FML successfully showed that no such reasonable grounds for suspicion existed it could avoid having to contest forfeiture. He then submitted, as this Court reads the transcript, that FML was concerned that the making of the freezing order put it in jeopardy of a forfeiture application which would move the proceedings on to the next stage, without FML having the opportunity to contest the freezing order. On that basis he asked for a direction that HMC not issue a forfeiture application within the first four months of the currency of the freezing order.

21. By an order of the same date, the Court made the freezing order. It refused to order that no forfeiture application be made within the first four months of the order, but did require HMC to give FML four days' notice of his intention to make an application for forfeiture. The Order provided that the Bank or anyone affected by the Order could apply to the Court to vary or discharge it. The Order also gave directions for the filing of evidence relating to FML's application for funding out of the Account. By an order dated 11 July 2023 the Court granted FML's funding application, with no opposition from HMC.

22. By an order dated 26 July 2023 the Court gave directions relating to FML's proposed application to set aside the freezing order. These made provision for the filing of factual and expert evidence, and made provision for the application to be heard over three days in May 2024. FML issued its application under section 11 on 21 July 2023. On 17 October 2023, on the application of HMC, the Court granted a four month extension of the freezing order. This was not opposed by FML.

23. On 25 January 2024 HMC issued an application to forfeit the money in the Account. On the following day the Court gave directions for the exchange of skeleton arguments on the following issues:

    (a) Whether the Release Application [ie FML's application under section 11] had been superseded by HMC's Forfeiture Application; and
    (b) If the Release Application had not been superseded by HMC's Forfeiture Application, whether [FML's] application should be heard first, and on its own.

Those issues were directed to be heard at a hearing on 27 February 2024.

The Judgment and the Order

24. At the hearing on 27 February 2024 the positions of the parties were essentially the same as they are before this Court. HMC argued that the wording of section 13(2) was mandatory. Once a forfeiture application had been made, the freezing order had to remain in place until the forfeiture application had been determined. The Court had no jurisdiction to vary or discharge a freezing order during the currency of the forfeiture application save in the very limited circumstances of sections 16 and 54. HMC's position was therefore that the Release Application had indeed been superseded by the Forfeiture Application as envisaged in issue (a), and issue (b) therefore did not fall to be addressed. On behalf of FML, Advocate Amy Davies argued that, on a true construction of the 2007 Law, its provisions must be construed so as to enable the Court to rule on a subsisting application under section 11 in advance of determining whether an account should be forfeited. That is because it is a pre-condition for a valid forfeiture application that the account is subject to a freezing order, so the validity of the freezing order must be determined before it can be known whether the statutory precondition for the making of a forfeiture application has been met. It cannot, it was submitted, be the case that HMC can, in effect, remove an account holder's right to challenge the freezing order under section 11 by the expedient of issuing an application to forfeit the Account. FML also relied on its Convention rights, in particular under article 1 of Protocol 1 to the Convention (protection of the right to the enjoyment of property).

25. FML also submitted that in the light of the procedural history of the matter it was an abuse of process for HMC to have issued the forfeiture application when he did.

26. In her judgment the Lieutenant Bailiff preferred the submissions made on behalf of HMC.

27. On the question of the proper construction of the 2007 Law, the Lieutenant Bailiff said this about FML's submissions:

"77. It is the logic of Advocate Davies' proposition that one must determine the Release Application first, because it was launched first and is entitled to be heard first, and then (assuming it succeeds) one will determine that the freezing order has lost the basis for its existence, is unjustified, and therefore falls, and in consequence, the Forfeiture Application somehow falls at that stage. Ingenious though her argument is, however, it just does not seem to me that that is what the legislation is really intending. The legislature is effectively intending, in my judgment, that the ring is held by a freezing order in the meantime whilst the authorities consider whether to seek to forfeit the monies or not, and that after HMC has obtained a freezing order, the question of its maintenance depends either on a successful release application, or the determination of a forfeiture application if one is made, even after a release application has been started.

78. Advocate Davies' submission amounts to the submission that rather than the currency of a freezing order being simply a condition precedent to the commencement of a forfeiture application which simply then takes over as the condition for continuing the freezing order, the qualifying condition for a freezing order must be treated as being a continuing qualification for any forfeiture application being allowed to continue, as well, with this having the potential for enabling the applicant to obtain the release of funds which HMC intends to seek to forfeit (even though perhaps not entirely ready to proceed) and thereby obtain the release of the funds under a less stringent test than the test which the institution of the forfeiture application would then require him to surmount. That just does not seem to me to sit well with the way in which the legislature has effectively laid down that what is to be determinative is the outcome of the Forfeiture Application, because the legislature has plainly, in my judgment, regarded the actual forfeiture application itself as being the pivotal matter in deciding what can or is going to happen to the funds."

28. On the issue as to whether the 2007 Law as interpreted by HMC infringes FML's Convention rights, the Lieutenant Bailiff summarised the argument at paragraphs 57 to 59 of the Judgment. The Lieutenant Bailiff then concluded, at paragraph 80:

> "I do not see that HMC's construction is inconsistent with "human rights" considerations. The analysis of the loss of a right to have one's release application determined according to the requirements of ss 10 and 11 of the Law as a deprivation of a possession is highly abstract, and the right to respect for one's possessions and property under Article 1 of the First Protocol in any event, subject to restriction by lawful limitations, in the public interest and in accordance with local and international law principles. Equally, the question of Article 6 rights, ie having one's rights determined by a trial by an independent and impartial tribunal, as applied to this situation, rather begs the question of what those rights actually are."

29. On the abuse of process argument, the Lieutenant Bailiff observed (at paragraph 65) that what FML's argument under this head really amounted to was that if HMC was correct in saying that the Release Application was superseded by the Forfeiture Application, HMC was, in the circumstances, estopped from making a forfeiture application before the Release Application had been determined on the merits. Thus formulated, the Lieutenant Bailiff dismissed the argument, saying, at paragraph 68:

> "In a sense Advocate Davies' client took a chance in pursuing the Release Application as it did. That is sounding rather unsympathetic, but all I mean is that they did what they did in what they perceived to be their own interests, and without any reliance on HMC or its attitude or conduct that could possibly be enforceable, that such work would be of value, or that any particular process would take place, or be allowed to proceed, with regard to the Release Application. It may have been that what they hoped was that the Release

Application would be determined first, and they aimed to bring this about, but it does not seem to me that any action by HMC has given rise to any form of estoppel which could possibly apply."

30. The Order provided that the Release Application should be stayed. It was ordered that the hearing fixed to commence on 9 September 2024 should be the final hearing of the Forfeiture Application, but with provision for it to be relisted if FML needed more time to prepare for it. FML was granted liberty to appeal.

Analysis and conclusions

31. There are some points about the 2007 Law which can usefully be made at the outset.

(1) The requirement that there be a freezing order in place before a forfeiture application can be made is not merely a procedural requirement, it is a substantive precondition to HMC's ability to apply for forfeiture. That is because it imports the requirement for HMC to show reasonable grounds for suspecting that the money in an account represents the proceeds of unlawful conduct or is to be used in the commission of unlawful conduct. That requirement must be satisfied before HMC can place the onus on the account holder to show why the account should not be forfeited.

(2) Even on HMC's construction of the 2007 Law, it remains necessary for HMC to prove to the Court that there are reasonable grounds for suspicion. HMC met that requirement in the present case at the hearing on 27 June 2023, just as he would have to meet it in any case where the application for the freezing order is made *ex parte* without notice. The argument in the present case centres around whether it is necessary for the account holder in all circumstances to have the opportunity to contest the Court's ruling on the existence of reasonable grounds for suspicion before the account holder is required to demonstrate why the account should not be forfeited.

(3) The issue as to whether there are reasonable grounds for suspicion, and the issue as to whether the account holder can prove the money in the account should not be forfeited (ie that it is not the proceeds of any person's unlawful conduct and is not intended to be used by any person in unlawful conduct) are two distinct issues. HMC has sought to argue that it is not significantly more onerous to discharge the onus of showing why no forfeiture should be ordered than it is to defeat HMC's case that there are reasonable grounds for suspicion (because grounds of suspicion are easily made out). No doubt in some cases the account holder will be unable to dispel the reasonable grounds for suspicion without, in effect, proving the matters they need to establish in order to avoid forfeiture. But that will not be so in every case, and according to FML, it is not so in this case. One might suppose a case where the reasonable grounds of suspicion are based on evidence that the beneficial owner of the account is a well-known convicted criminal. If the account holder can show that he is a person with the same name as the criminal, but is in fact an entirely different and unconnected individual, then the case for reasonable suspicion may fall away, and the freezing order may be discharged without the account holder having to go on to prove the more onerous facts necessary to avoid forfeiture.

(4) That said, it is almost inevitable that the account holder will have to start their case against forfeiture by dispelling the grounds of suspicion relied on by HMC when obtaining the freezing order. If they can do that, then it will be for the Court to decide how much affirmative evidence it will require in order to establish the matters which need to be proved in order to avoid forfeiture.

(5) FML is correct to point out that the new section 13(2) introduced in 2022 makes a significant change to the position of an account holder who is responding to a forfeiture application. It is not simply that the onus of proof is reversed. The fact that the account holder has to prove the absence of unlawful conduct in relation to the account means that they must do more than disprove a particular case made against them by HMC; they have to prove the absence of any case which might be brought against them in relation to any wrongdoing or intended wrongdoing committed by any person. In effect they will have to satisfy the Court that the provenance of the money in the account is untainted by unlawful conduct, and that the current owners are unlikely to be engaging in unlawful conduct in the future. As FML point out, proving provenance may be difficult for the successors in title to the original beneficial owner of the account, if he is dead.

(6) There is no doubt that the change to section 13(2) has greatly increased the significance of the wording in section 13(3). Under the original wording of section 13(2), the issue of a forfeiture application involved HMC undertaking a higher burden of proof than was involved in obtaining the freezing order. Instead of showing reasonable grounds for suspicion of unlawful conduct, he was, by issuing the forfeiture application, undertaking actually to prove the existence of unlawful conduct in relation to the account. Under the 2022 wording, at least on HMC's construction, the issue of a forfeiture application not only casts the onus on to the account holder, but it also relieves HMC from having to defend the existence of the reasonable grounds for suspicion which he relied on to obtain the initial freezing order.

Ground (1)

32. We now turn to the first ground of appeal. The problem here for FML is that the wording of section 13(3) is clear and mandatory. The thrust of FML's case is that the legislation must be construed so as to avoid the result whereby the hearing of a challenge to the legal basis of the freezing order is superseded simply because a forfeiture application has been issued. Advocate Adkins' written and oral submissions emphasise, from FML's perspective, that such an outcome is, for a whole range of reasons, unfair and unreasonable and cannot have been intended. Summarising his written submissions:

(1) He argues that the legislature must have intended that the statutory right to apply for the release of funds under section 11 of the 2007 Law, upon being given notice of a freezing order under section 10(7)(c) of the Law, should be a real and practically effective right. It may be the only means by which a person is able to challenge a freezing order if the order has originally been obtained as a result of an *ex parte* and without notice application. He cites the importance of legislation not impeding the subject's right of access to the Courts. If, however, an application for release of funds made under section 11(1) and (3) could subsequently be stymied and prevented from being heard simply by HMC deciding to apply for forfeiture under section 13(1), there would be no effective opportunity for a person whose account had been frozen to challenge the making of a freezing order.

(2) It is then said that the above legislative intention must be all the more obvious in light of the amendments enacted to section 13(2) of the Law which, it is said, subject an account holder to a range of disadvantages in the context of a forfeiture application. The legislature could not reasonably have contemplated enacting such a forfeiture regime unless the account holder had at least a real and practically effective opportunity to set aside a freezing order and to contest the grounds for making the freezing order, prior to the forfeiture regime coming into operation in a given case.

(3) Furthermore, if an application properly made under section 11(1) and (3) which sought to set aside a freezing order could subsequently be stymied and prevented from being heard simply by HMC deciding to apply for forfeiture under section 13(1), a person may be subjected to the reverse burden of proof, and the Court may be denied any discretion to refuse to order forfeiture, even if the Court could no longer be satisfied by HMC, as a threshold condition, that there are reasonable grounds for suspecting that the funds are any person's proceeds of unlawful conduct or that there are reasonable grounds for suspecting that the funds are intended by any person for use in unlawful conduct. This would be inconsistent with the legislative intention expressed in section 13(1), which requires that funds must be lawfully frozen prior to an application for forfeiture being made.

(4) HMC's position on the effect of section 13(3) also has other highly problematic consequences, which cannot have been intended by the legislature in the absence of the clear language dealing expressly with the situation in which an application for release of funds under section 11 has been made but not determined prior to an application being made under section 13 for forfeiture:

(i) The jurisdiction of the Royal Court to afford relief under section 11 in respect of an application already properly made under section 11(1) and (3) would otherwise become subject to the discretion of HMC, who could oust the Court's jurisdiction simply by deciding to make an application under section 13(1) for forfeiture of funds after the Court was already seised of an application for release.

(i) On HMC's construction of section 13(1) and (3), it would be within the power of HMC to prevent the hearing of a challenge brought by way of application under section 11 to a freezing order which he had previously sought and obtained from the Court on an erroneous basis (and to require a person instead to meet a reverse burden of proof under section 13(2) or otherwise forfeit his property). There is no clear legal authority in section 13(3) of the Law to indicate that this was the legislature's intention.

(iii) A person may be put to the time and expense of preparing an application under section 11(1) and (3) seeking the release of funds only for that application to be stymied and prevented from being heard by HMC by making an application under section 13(1) for the forfeiture of funds, after a period of considerable delay, and potentially with no possibility of recovering the wasted costs from Her Majesty's Procureur (in the light of section 17(2) of the Law, which purports to impose a bar on the recovery of costs).

33. It is submitted, therefore, that once an application under section 11 has been made, the court "must" determine that application before dealing with the forfeiture application, but what the Court must, or indeed can, do is dependent on the requirements of the wording of the legislation. It is stated that section 13(3) is not contemplating or addressing the situation in which an application under section 11 has been made before the making of the forfeiture application. But that assertion has to made good by reference to the wording of the subsection. That is in essence the case advanced by HMC. Advocate Grainge referred to some English case law in this context, but as it was decided on differently worded legislation we find it, with respect, of limited assistance.

34. Both parties referred to the Policy Letter. We do not find this of much assistance in the present case, first because it does not specifically address the issue which the Court now has to decide, and secondly because it is at most an aid to construction; it cannot override the clear wording of the legislation.

35. Notwithstanding the persuasive way which Advocate Adkins advanced his submissions, the definitive statement of the intention of the legislature is to be found in the words of the Law itself. Arguments of the "this cannot have been intended" variety are of no avail unless they lead to a construction of the words used in the Law which is fairly open to the Court. After some discussion in the course of oral submissions, Advocate Adkins accepted that what he was seeking to do was to imply into subsection (2) some qualifying words, which do not actually appear there. In effect, he was saying that section 13(2) should be prefaced by words such as "Subject to any subsisting application under section 11 …".

36. We accept that this would have been a possible way for the legislature to have proceeded. But having regard to the actual words used we, like the Lieutenant Bailiff, find it impossible to suppose that this is in fact the legal structure which the legislature intended, but omitted fully to express. We note that section 13(3) not only provides that the account subject to the forfeiture application is to remain frozen, but specifically provides that the requirement that the account remain frozen prohibits a release by the use "of any power conferred by this Law". Section 11 is "a power conferred by this Law" which is specifically directed to the "release" of monies in the frozen account (see section 11(2)). The wording used in section 13(2) shows that the legislature was alert to the possibility of the argument that the direction in section 13(2) that the account remain frozen did not override other powers of release elsewhere in the Law, and negated it. Having done so, the Law excluded two specific powers from the prohibition on the release of funds in the account, namely those in sections 16 and 54. Section 11 could have been added to the powers which remained exercisable, but it was not.

37. Nor do we think that this is a case where the alternative construction, advanced by HMC, is so unreasonable that it could not possibly have been intended, a situation which on occasion leads the Court to do some violence to the words used in order to give at least some sensible effect to the legislation. It is true that the combination of section 13(2), as introduced in 2022, and]section 13(3) tilts the balance of advantage under the 2007 Law in favour of HMC, and away from the account holder. But the legislature was entitled to proceed on the basis that HMC would not exercise the power to make a forfeiture application in an arbitrary or manifestly unreasonable manner. On that basis, we do not think it at all improbable that the legislature intended that the account holder's application to release monies under section 11 should be superseded once the forfeiture application was made. Of course, one reason which would rule HMC's construction of the Law out of court is if it contravened FML's convention rights. We address that question when we turn to Ground of Appeal (2). But on its face Ground (1) does not seek to invoke Convention rights, and without that invocation we think the construction contended for in Ground (1) is clearly incorrect, and therefore this Ground fails.

Ground (2)

38. Section 3(1) of the Human Rights (Bailiwick of Guernsey) Law, 2000 provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

39. The impact on the construction of legislation of the similarly worded article 4(1) of the Human Rights (Jersey) Law 2000 was considered by the Jersey Court of Appeal in *Imperium Trustees (Jersey) Ltd v Jersey Competent Authority* [2024] JCA 014. Paragraph 64 of the judgment of Matthews JA (which formed part of his judgment with which the rest of the Court agreed) reads as follows:

> "Article 4(1) is modelled on section 3(1) of the UK Human Rights Act 1998. Jersey courts, considering the application of Article 4(1), will find assistance in the approach which the UK courts have taken to section 3(1) of the 1998 Act. As Lord Nicholls of Birkenhead

explained in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at [30], the language used (which is also used in Article 4) imposes on the Court an interpretive obligation of "an unusual and far-reaching character". It authorises, and obliges, the Court to read and give effect to principal legislation in a way which is compatible with Convention rights whenever "it is possible to do so". This does not depend on finding an ambiguity in the language of the statute. Lord Nicholls went on to observe at [30] that "to an extent bounded only by what is 'possible' a court can modify the meaning, and hence the effect" of legislation, provided only at [31] that the court may not "adopt a meaning inconsistent with a fundamental feature of the legislation"".

The guidance set out in *Ghaidan* is equally applicable to the Guernsey human rights legislation.

40. FML bases its case primarily on an infringement of its rights under Article 1 of Protocol 1 of the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions and penalties".

41. FML develops its case along the lines summarised below:

(1) The making of a freezing order over the Account constitutes an interference with FML's enjoyment of its possessions, because it is deprived of free access to the money in the account (*Apostolovi v Bulgaria* (Application No 32644/09) 7 November 2019 and *Shorazova v Malta* (Application No 51853/19) 3 March 2022).

(2) The making of a forfeiture order over the Account will constitute a further interference, because FML will be deprived of those monies (*Todorov and others v Bulgaria* (Application No 50705/11) 13 July 2021 and *Yordanov and others v Bulgaria* (Application Nos 265/17 and 26473/18) 26 September 2023).

(3) It is for HMC to justify the interferences referred to in the previous paragraphs. In order for an interference to be justified and compatible with FML's rights under A1P1 (1) the interference has to be in accordance with the law, which must be sufficiently accessible and foreseeable; (2) the interference must be in pursuit of a legitimate aim in the general interest; and (3) the interference must be proportionate: see, for example, *Apostolovi* at [92]-[95] and *Yordanov* at [99]-[130].

(4) The interference caused by the imposition and continuation of a freezing order does not pursue a legitimate aim because of the fact that the monies in an account which are subject to a freezing order granted pursuant to section 10 potentially continue to be frozen even though a meritorious application for release, has properly been made in accordance with section 11, simply because the application for release can no longer be determined by the Court (because HMC has made a forfeiture application). So, the monies remain frozen even if the reasonable grounds for suspicion upon which the freezing order was obtained can no longer be demonstrated to exist.

(5) The interference caused by the risk of forfeiture under section 13(2) does not pursue any legitimate aim, because forfeiture, pursuant to a reverse burden of proof, was only considered to be warranted by the legislature in the interests of addressing the proceeds of crime if (1) the threshold conditions for the freezing of funds under section 10 continued to be met, as objectively established in the view of the Court; and (2) if the

person subject to forfeiture had the benefit of the procedural safeguard of being able to explain to the Court why those conditions were not met, prior to being subjected to the forfeiture regime. However, if section 13(3) has the effect contended for by HMC, the Court may be required to order forfeiture of funds even if HMC is not in fact in a position to demonstrate, at the time it seeks forfeiture, that there are at reasonable grounds to justify the making of the freezing order, and simply because the reverse burden of proof has not been discharged. Forfeiture in these circumstances would not pursue any legitimate aim but rather would risk being arbitrary.

(6) If, contrary to (4) and (5) above, the interference has a legitimate aim, the interference is disproportionate to that aim.

42. The Court was also referred, by way of general guidance, to the observations of Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700 on the correct approach to considering issues around the justification for, and the proportionality of, any interference with convention rights. At paragraph 74 of his judgment Lord Reed observed that the clearest approach to these issues:

> "can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. … I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

Lord Reed was delivering a dissenting judgment, but Lord Sumption JSC, giving judgment for the majority, stated that he did not disagree with anything Lord Reed had said about proportionality (see paragraph 20 of Lord Sumption's judgment).

43. In expanding its case on proportionality, FML relies in particular on the ECHR decisions in *Apostolovi* and *Shorazova* (in relation to freezing orders) and *Todorov* and *Yordanov* (in relation to forfeiture) which we discuss below. However, before considering the merits of these submissions, and the arguments advanced against them by HMC, it is helpful to analyse what exactly it is that FML is complaining about in this case.

44. FML does not, and realistically cannot, assert that legislation which provides for the freezing of assets which are suspected to be related to criminal activity, and the forfeiture of those assets if it is established that they are so related, does not pursue a legitimate aim. Nor does legislation which provides for forfeiture in such circumstances cease to pursue a legitimate aim merely because it places the onus of proof of showing that the requirements for forfeiture are not satisfied on the asset owner (see for example *Yordanov* at paragraphs 118 to 120).

45. The essence of FML's complaint is that it can no longer contest the basis on which the freezing order was made, and therefore can no longer contest the threshold conditions (ie the reasonable grounds for suspicion) which have to be met before it can be required to meet the onus to avoid forfeiture. The legislation provides for such a contest to be entertained, under section 11. FML's complaint is that its right to pursue that contest has been taken away from it. Certainly, section 13(3) of the Law provides, in effect, for HMC to curtail an account holder's right to challenge the freezing order. But the starting point of any inquiry into the merits of FML's complaint has to be to ask whether the issue lies with the terms of the Law (because it gives HMC the power to

curtail an account holder's right to challenge the freezing order) or with the actions of HMC in exercising that power in the circumstances of this case.

46. FML's answer to this question is that the Law must be construed so as to ensure that its application under section 11 is allowed to continue, notwithstanding HMC's decision to apply for forfeiture. But there is an alternative analysis, which proceeds on the basis that it is not the Law which is non-compliant with the Convention, but, potentially, HMC's decision to exercise his power to make a forfeiture application in a way which cut across FMC's application under section 11.

47. In her submissions Advocate Grainge makes the important point that construing the Law to reach the result which FML is seeking requires more modification to the Law than simply taking section 11 applications outside the scope of section 13(3). For example, how long does the account holder have to pursue its pre-existing section 11 application? And what about an account holder who wishes to make a challenge to a freezing order after the forfeiture application has been made? One might suppose a situation, in theory, in which HMC obtained a freezing order *ex parte* without notice, and then immediately issued a forfeiture application. By the time that the account holder came to be notified of the freezing order and the forfeiture application, it would already have lost any chance it might have had to challenge the freezing order. If FML has grounds for complaint here (where the freezing order had been in force for some seven months by the time HMC issued the forfeiture application) then the account holder in this example would have far stronger grounds.

48. Addressing the account holder's complaint in the example by construing the Law so as to make its terms compliant, would involve either having to provide that a forfeiture application could not be issued until after the account holder had had a reasonable time to make an application under section 11, or making provision for section 11 applications to be made after the forfeiture application had been made (in which case there would probably have to be a time limit within which such an application could be made to prevent forfeiture proceedings being de-railed by a last minute section 11 application). By the time all these matters have been addressed, the risk is that the Court would have redrafted a significant part of the freezing order and forfeiture regime under the Law, in a way which would go beyond the latitude which the Court has to interpret legislation so as to make it Convention compliant. Advocate Grainge submits that the process of rendering the legislation Convention compliant in the way FML says is necessary would go beyond what is possible by way of reading down the 2007 Law (citing the observations of Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264 at paragraph 28).
49. The alternative approach would be to proceed on the basis that the Law itself is compliant with the Convention, because it is to be supposed that the Law Officers, as the holders of public offices, will not exercise their powers in contravention of an account holder's Convention rights. The account holder would then have the ability to challenge by judicial review the making of a forfeiture application in circumstances which contravened his rights. But if that approach is appropriate in the case of the example, then the question arises as to why it is not equally applicable to FML's situation as well.

50. We now turn to consider the relevant case law. As regards the freezing order, FML points out that the ECHR in *Apostolovi* at paragraph 96 held for there to be a reasonable relationship of proportionality, the imposition and continuation of a freezing order

> "must be attended by enough procedural safeguards to ensure that the measure is not arbitrary or disproportionate"
>
> and

"[t]he available procedures as a whole must afford those affected by the freezing a reasonable opportunity of putting their case to the competent authorities with a view to enabling them to strike a fair balance between the competing interests at stake"

51. These principles are of course well known. The 2007 Law makes specific provision for an account holder to challenge the making of a freezing order by an application under section 11. The effect of section 13(3) is that once a forfeiture application is made, the freezing order remains in place pending the outcome of the forfeiture application. Provided that the decision to issue the forfeiture application is properly taken, that result seems unobjectionable. If the account holder has not succeeded in challenging the freezing order prior to the making of the forfeiture application, it can still obtain the release of the funds in the account, but it will now have to win the forfeiture proceedings in order to do so.

52. It does not seem to the Court that FML's complaint is really directed at the continuation of the freezing order itself. Its complaint is that it has lost the opportunity to challenge the basis for the forfeiture order, namely the existence of reasonable grounds for suspicion. On FML's own case, if section 13 had provided for the freezing order to continue unchallenged over the hearing of the forfeiture application, but had also provided that the account holder could defend the forfeiture application by showing that reasonable grounds of suspicion did not exist, then we apprehend that FML could not complain that its Convention rights had been breached. FML's case amounts to saying that placing the onus of proving that an asset is not related to unlawful conduct on the asset owner is only justifiable if:

(a) the state first proves at least a *prima facie* case for linking the asset to unlawful conduct and
(b) the asset owner has the opportunity to challenge the existence of the linkage between the asset and the unlawful conduct before having to prove that forfeiture is not justified.

53. In support of these propositions, FML relies on the general statement of principle enunciated by the ECHR in *Shorazova* at paragraph 105:

"…although Article 1 of Protocol No 1 contains no explicit procedural requirements, judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision…An interference with the rights provided for by Article 1 of Protocol No 1 cannot therefore have any legitimacy in the absence of adversarial proceedings that comply with the principle of equality of arms, allowing discussion of aspects that are important to the outcome of the case".

54. FML then relies on EHCR decisions in *Tordorov* and *Yordanov.* These cases are of importance because they consider the application of Article 1 of Protocol 1 to a statutory forfeiture regime, where the burden of proof for showing why forfeiture should not occur was placed on the asset holder. Both of these cases related to forfeiture legislation in force in Bulgaria. *Tordorov* was concerned with cases brought under the Forfeiture of Proceeds of Crime Act 2005, and *Yordanov* dealt with cases brought under the Forfeiture of Unlawfully Acquired Assets Act 2012, which replaced the 2005 Act.

55. Both Acts operated a form of unexplained wealth order. In essence the state had to show the commission of a crime (or unlawful act in the case of the 2012 Act) by an individual, then it had to carry out an assessment as to whether the criminal had acquired more wealth than his available income would justify. If the state assessed that the criminal had unexplained wealth, that individual, or a successor in title, had to prove the lawful provenance of assets which the state identified as liable to forfeiture. In both cases a key issue was the need for the state to show a causal link between a crime or unlawful conduct and the assets to be forfeited.

56. It should be noted that the 2007 Law operates in a different way. There is no assessment of unexplained wealth. Instead HMC has to identify specific monies in relation to which there are reasonable grounds for suspicion. The 2007 Law is in that respect more targeted than the Bulgarian legislation

57. In *Tordorov* the Court began by considering whether the legislation in issue, which was aimed at confiscating the proceeds of crime, pursued a legitimate aim in the general interest and concluded at paragraph 186 that it did. Turning to proportionality, the Court observed at paragraph 188 that:

> "… judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision."

After considering the applicable case law the Court drew attention to a number of factors in the legislation which might show that the law in question was not proportionate. These included the wide range of offences to which the legislation applied, not all of which were likely to generate significant financial returns (paragraph 200); the wide temporal application of the legislation, in that forfeiture could be based on offences committed years before the forfeiture proceedings, and could operate to forfeit an asset acquired up to 25 years before the forfeiture proceedings commenced (paragraph 204); the fact that even small discrepancies between the individual's assets and state's assessment of the amount their lawful activities should have generated could be the subject of forfeiture (paragraph 204) and the fact that the onus was placed on the individual to prove the legal provenance of assets identified for forfeiture (paragraph 205). As to the last point, the Court observed, in paragraph 205:

> "… the Court cannot agree with the applicants that the reversal of the burden of proof resulted in itself in a disproportionate interference with their property rights. It will take into consideration, however, the difficulties the applicants might have faced in meeting their burden of proof due to the lengthy periods of time covered by the confiscation proceedings and the other factors described above."

58. The Court then considered a range of procedural issues which also placed difficulties in the way of individuals seeking to resist forfeiture applications. It then stated in paragraph 211:

> "While none of the deficiencies of the procedure under the 2005 Act described above could in principle, in themselves, have affected decisively the proportionality of the forfeiture measures against the applicants, the Court has to take into account their cumulative effect. It is of the view that, taken together, the above factors could result in the uncertainty and imprecision criticised by the Court in *Dimitrovi* …, in other words they could render forfeiture under the 2005 Act disproportionate to the legitimate aim pursued by it."

The Court then, in paragraph 212 stated that in assessing proportionality the Court would:

> "… follow the position of the Bulgarian Supreme Court which, in its interpretative decision of 2014, prompted by the divergent case-law under the 2005 Act until then, held that a causal link, direct or indirect, had to be established, or had to be presumable, between the assets to be forfeited and the criminal activity. The Supreme Court stated furthermore that the finding of such a link had to be "logically justified" and based on the individual circumstances of each case, and that failure to establish a causal link would mean that any interference with the defendant's property rights is disproportionate …"

59. The Court summarised its conclusions as follows:

"215 To sum up its approach concerning proportionality, the Court observes that, while the potential deficiencies of the forfeiture procedure under the 2005 Act described above did not automatically mean that any interference with the applicants' rights was disproportionate to the legitimate aims pursued, their cumulative effect could be such as to tilt the balance in the proceedings in the State's favour. The Court will thus find in the individual cases it will examine below that the fair balance required under Article 1 of Protocol No. 1 has been achieved where, as a counterbalance and a guarantee for the applicants' rights, the domestic courts provided some particulars as to the criminal conduct in which the assets to be forfeited were alleged to have originated, and showed in a reasoned manner that those assets could have been the proceeds of the criminal conduct shown to exist.

216. As long as such analysis has been carried out, the Court will generally defer to the domestic courts' assessment, unless the applicants have shown such assessment to be arbitrary or manifestly unreasonable."

60. It is significant to note that, notwithstanding its findings that the legislation had the clear potential to result in disproportionate acts of forfeiture, the Court did not think it necessary to find the legislation itself was in breach of Convention rights. Instead, it proceeded, in the remainder of the judgment, to carry out a case by case analysis of the several individual complaints which had been brought before it.

61. The *Yordanov* case concerned the Bulgarian Forfeiture of Unlawfully Acquired Assets Act 2012. Although this Act replaced the 2005 Act, which had been considered in *Tordanov*, it shared many of the same features which had caused the Court concern under the predecessor legislation (see paragraphs 114 to 118 of the judgment in *Yordanov*). The 2012 legislation, however, had a further feature giving rise to the risk of disproportionate application. In paragraph 121 the Court observed that:

> "… an important safeguard contained in the 2005 Act was removed with the 2012 Act, namely the requirement to establish some link between the assets to be forfeited and the predicate offence."

62. The removal of this safeguard led the Court to make the following ruling:

> "… the Court holds that, for a forfeiture under the 2012 Act to be in compliance with the requirements of Article 1 of Protocol No. 1, it is essential, as a counterbalance to the potential deficiencies discussed above, that the domestic courts provided some particulars as to the offences, criminal or administrative, in which the assets subject to forfeiture were alleged to have originated, and showed in a reasoned manner that there could be a link between such offences and the assets in question.

63. The Court then, as in *Tordorov* looked at the individual complaints. Mr Yordanov's complaint was upheld, and the forfeiture of his assets was held to be disproportionate because the Bulgarian courts had not identified any causal link between the assets forfeited and unlawful activity. This was notwithstanding the fact that he had not discharged the onus of showing a lawful provenance for the forfeited assets.

64. Against the ECHR authorities relied on by FML, HMC deploys three English decisions on the application of forfeiture legislation in the United Kingdom. The first of these is *National Crime Agency v Azam* [2016] 1 WLR 2560. In that case the National Crime Agency obtained a civil recovery order under Part 5 of the Proceeds of Crime Act 2002 against a number of properties which represented the proceeds of the crimes of a convicted criminal. Two of those properties had been gifted by the criminal to his then wife. The wife resisted the application of the forfeiture order to the properties in which she had a beneficial interest, relying on the defence provided by section 266(3) of the Act. Subsection (3) permitted a defence where the forfeiture would be

incompatible with any Convention rights. The Court of Appeal held that Article 1 of Protocol 1 was potentially engaged, but that the forfeiture was not contrary to the wife's Convention rights. The forfeiture was not disproportionate to the legislative aim and would not produce an unfair balance between the general interest of the community and the protection of the wife's fundamental rights or cast on her an excessive burden. This case is certainly authority for the proposition that a regime for the forfeiture of the proceeds of crime is not necessarily inconsistent with Convention rights, but it does not address the central issue in this appeal, because (as recorded by the Court of Appeal in paragraph 18 of its judgment) there was no dispute in that case that the properties represented the proceeds of crime. It was not, therefore, a case where the wife had been denied the opportunity to contest that issue.

65. The second case relied on by HMC is *R (on the application of Fresh View Swift Properties Ltd) v Westminster Magistrates' Court* [2023] 1 WLR 3321. At paragraph 27 the Court said this:

> "Both counsel cited *Boljevic v Croatia* (Application No 43492/11) (unreported) 31 January 2017 and *Jahn v Germany* (2005) 42 EHRR 49. These establish the principle that a measure; "must bear a reasonable relationship of proportionality between the means employed by the authorities to achieve that aim and the protection of the claimant's right to the peaceful enjoyment of his possessions." In the context of forfeiture this means simply that the order must not be a disproportionate response to the unlawful conduct in question. This reflects the core principle at the heart of the social contract between the state and the people that when the state interferes in the life of an individual the means of the interference must in type, scale and duration be no more than is necessary to justify its end. A ubiquitous popular expression of the principle is the maxim that "the punishment must fit the crime", itself the subject of satirical treatment by Gilbert & Sullivan. Therefore, whenever forfeiture is to be ordered, the court should conduct a short disproportionality check before finalising its decision. It would only be justified in interfering with the primary decision where it is clearly satisfied that the proposed forfeiture would be a manifestly disproportionate response to the conduct in question."

The Court decided that the forfeiture was not disproportionate.

66. This is a passage which might well be deployed by FML on any hearing of the forfeiture application in the present case. But it does not take matters any further when analysing the issue now under consideration. For present purposes it is another illustration of the fact that forfeiture of the proceeds of crime can be reconciled with Convention rights, but that is not in dispute here, as a general proposition.

67. Finally, on the general approach to be taken to the application of the Convention to a statutory forfeiture regime, HMC relies on *R (on the application of Police of the Metropolis) v City of London Magistrates' Court* [2015] EWHC 1656 (Admin). In that case an application for forfeiture of cash was made by the police under section 298 of POCA. Section 298(4) provided:

> "Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded."

Notwithstanding this wording, the magistrates made an order releasing the cash to meet the criminal defence costs of the party who claimed ownership of the cash. The Divisional Court held that the wording in subsection (4) was mandatory, and that no release was permissible until the forfeiture application had been determined. In paragraph 18 the Court observed that there was no violation of Article 1 of Protocol 1, although the contrary does not appear to have been specifically argued. The Court observed:

> "It is enough to say that the statute creates a balanced regime under which allegations that money is criminally tainted may be properly tested. An application for forfeiture made in bad faith (were that ever to happen) could no doubt in principle be challenged by judicial review."

68. HMC's position is that the 2007 Law likewise creates a balanced regime. However, under the relevant provisions of POCA the onus on the forfeiture application was on the police to demonstrate a nexus between the cash and some relevant criminal activity. The legislation therefore lacked the feature to which FML objects in the 2007 Law, namely the power vested in HMC to curtail FML's challenge to the existence of that nexus, as a means of avoiding the need for FML to prove the absence of a nexus with criminal activity. It is therefore not possible to read across the conclusions of the Court in the *City of London Magistrates* case to the legislation in issue on this appeal.

69. As we have noted above, we think that Advocate Grainge is on stronger ground when she submits (picking up on the second sentence of the passage quoted above from the judgment in the *City of London Magistrates* case) that the appropriate route by which to challenge FML's loss of the right to challenge the existence of reasonable grounds of suspicion is to bring proceedings for judicial review.

70. We agree with Advocate Adkins that the EHCR case law emphasises the central importance in forfeiture proceedings of the need for a causal link between the asset being forfeited and some unlawful conduct. We also accept that this is something which the court considering the forfeiture must determine. Although the case law we have referred to does not say so explicitly, we also accept that in the ordinary way the asset owner should have the opportunity (in line with his rights under article 6, and in the light of the observations of the Court in *Shorazova* at paragraph 105 (quoted in paragraph 53, above)) to contest the state's case on causal linkage before the Court. The ECHR jurisprudence does therefore appear to support the two propositions we set out at the end of paragraph 52 above. While it is the case that the placing of the onus of avoiding forfeiture is not inconsistent with Convention rights, that should only be done where the state has first demonstrated some form of causal nexus between the asset to be forfeited and criminal or unlawful activity. And the existence of that causal nexus must be capable of being challenged by the owner of the asset.

71. However, the conclusion reached in the previous paragraph does not mean that the 2007 Law is incompatible with Convention rights. The 2007 Law does require the state to show a causal nexus, via the need to establish reasonable grounds for suspicion. And it does afford the right to challenge the existence of the reasonable grounds for suspicion, via the route of seeking to set aside the freezing order. While it is true that the right to challenge the freezing order can be curtailed by HMC, it can only be curtailed in a manner, and in circumstances, in which the account owner's Article 1 Protocol 1 rights are respected and preserved. Of course, the legislation does not say this in terms: had it done so the point would have been much clearer. But having regard to the application of the Human Rights Law to all public bodies and persons holding public office in Guernsey, it was unnecessary to make it explicit that the Law Officers had to exercise their powers having regard to the Convention rights of the account holder.

72. To put the matter another way, the mere fact that the Law Officers have a power to curtail an account holder's right to challenge the freezing order, does not automatically mean that the 2007 Law will operate inconsistently with the account holder's Convention rights, any more than the objectionable features of the Bulgarian legislation were assumed by the ECHR to lead to automatic breaches of Convention rights. There will no doubt be many cases where no exception could be taken to the exercise of the power to make a forfeiture application. The 2007 Law can only operate to contravene the account holder's Convention rights if it is assumed that the power will be exercised contrary to Convention rights. But the mere fact that legislation confers on a public body or the holder of a public office a discretion which is capable, if misused, of

contravening a person's Convention rights does not justify the Court modifying the legislation to eliminate that risk.

73. We think the approach outlined above preserves the essential structure of the legislation while preserving an account holder's Convention rights. There is much to be said for giving the Law Officers a discretion as to the point at which the forfeiture procedure begins, and the opportunity to challenge the existence of reasonable grounds for suspicion is curtailed. Where the account holder indicates that it does not wish to challenge the existence of reasonable grounds for suspicion, forfeiture proceedings can be quickly triggered. Where the account holder wishes to challenge the freezing order, then one would expect that they would be afforded a reasonable opportunity for that challenge to be heard.

74. Once it is appreciated that judicial review is the mechanism which gives an account holder the right to bring before the Court the question whether its right to challenge a freezing order has been curtailed in circumstances which are incompatible with its Convention rights, we think that the legislation can be considered to be a proportionate response to a legitimate objective, following the approach outlined by Lord Reed in the *Bank Mellat* case, referred to in paragraph 42 above.

75. If a challenge by way of judicial review had been made to the making of the forfeiture application in this case, we apprehend that a key issue would have been whether HMC had afforded enough opportunity to FML to challenge the making of the freezing order, in all the circumstances. We note that FML had some seven months from the date the freezing order was made, and more than eight months from when it was given notice of the application, in which to get its challenge to the freezing order before the Court. Against this FML says, in effect, that it was lulled into a false sense of security by HMC's acquiescence in the (rather lengthy) timetable FML asked for in the lead up to the projected hearing of its section 11 application. The Lieutenant Bailiff could not form a view on whether the decision to make the forfeiture application on the date, and in the circumstances of this case, was inconsistent with FML's Convention rights because no judicial review proceedings were before the Court. Because no judicial review challenge had been made, there was no evidence from HMC as to his reasons and justification for issuing the forfeiture application when he did.

76. It follows that we conclude that the Lieutenant Bailiff was right not to accede to FML's arguments that the legislation had to be interpreted so as to permit their section 11 application to be heard, notwithstanding the making of the forfeiture application. In the absence of any challenge on Convention grounds to HMC's decision to issue the forfeiture application, she had to accept that HMC's decision was valid. On that basis, for the reasons we have given, we consider that, subject to FML's abuse of process arguments, she was compelled by the wording of section 13 to determine that FML's section 11 application had been superseded by the forfeiture application.

Ground (3)

77. Under this ground FML argues that in making the Order, the Lieutenant Bailiff erred by failing to conclude that hearing the forfeiture application in advance of FML's section 11 application would constitute an abuse of the Court's process or a wrongful exercise of the Court's case management powers.

78. The short answer to this ground is that because we have concluded that the legislation mandated that the section 11 application should be superseded by the forfeiture application, no exercise of case management powers was involved in the Lieutenant Bailiff's order. Neither she, nor this Court, has any choice in the matter. The gravamen of FML's complaint is that it had not opposed an extension of the freezing order, and had proceeded to incur costs in preparing for the hearing of its section 11 application, in the belief that it would be allowed to pursue that application in

accordance with the timetable which had been laid down by the Court, and that HMC had never suggested that it would seek to curtail its right to set aside the freezing order by making a forfeiture application in advance of the hearing date. We agree with the Lieutenant Bailiff that this looks more like a claim that HMC should be regarded as estopped from making the forfeiture application than a complaint about the exercise of the Court's own powers, but that is not the basis on which the argument was advanced before the Lieutenant Bailiff, or before this Court. Ground (3) is not an attack on HMC's decision to issue the forfeiture application, but on the Court's decision to afford it the effect of superseding FML's challenge to the freezing order. It is not necessary to express a view on whether HMC's decision to make the forfeiture application could have been set aside for manifest unfairness, because no application by way of judicial review to that effect has been made.

Conclusion

79. For the reasons given above, we dismiss the appeal and uphold the order of the Lieutenant Bailiff.