

Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007. Whether application by HMC to forfeit funds held in bank account overrides and renders nugatory prior application by account holder for release of funds. Inter-action of ss 10, 11 and 13 of the Law discussed.

[2024]GRC034

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Civil Matter 2496

Before:

HER HONOUR HAZEL MARSHALL KC, LIEUTENANT BAILIFF
(Sitting alone)

Between:

HM COMPTROLLER

Plaintiff

-v-

FIDELITY MANAGEMENT LIMITED

First Respondent

ROYAL BANK OF CANADA (CHANNEL ISLANDS) LIMITED

Second Respondent

Advocate for the Plaintiff:

ADVOCATE P. M. GRAINGE

Advocate for the First Respondent

ADVOCATE A. B. DAVIES

The Second Respondent was not represented.

Hearing: 27 February 2024
Judgment delivered 27 February 2024
Approved judgment handed down 24 April 2024

Legislation and authorities referred to.

Legislation:

Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, ss 10, 11, 13, 16 and 54

Cases:

Guernsey

JUDGMENT (approved)

LIEUTENANT BAILIFF MARSHALL:

The Applications

1. This has been the hearing of two agreed preliminary questions arising under two applications in a matter under the Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007 (“**the Law**”). This is an *ex tempore* judgment, which I said I would give and as I usually say on these occasions, it is of course subject to amendment in any subsequent written judgment that is provided as “approved”. I will be reserving the right to elaborate on my reasons. They will not change, and the decision will not change, but my reasons may well be expanded. However, as I have been able to come to a sufficiently firm conclusion at this hearing, I now give my basic reasons for the decision I have made.
2. The matter concerns a deposit of some US\$14.4 million in an account in the name of Fidelity Management Limited (“**FML**”) with the Royal Bank of Canada (Channel Islands) Limited (“**the Bank**”). The monies that have been held in the account have apparently represented payments that were made into that account by, on behalf of, or at the instance of, a Mr Frank Laport between 1996 and 2002. The monies themselves have actually been informally frozen in the account on the basis of the “no consent” regime which is explained as follows.

Background and legal framework

3. In about 2007, the Bank apparently had some concerns about suspicious activity in relation to the account. It reported these to the FIU, and as a consequence it was told it had no consent to effect any transaction - in fact, a particular transaction, but I take it any transactions subsequently - on that account at that time.
4. It was not until 3rd May 2023 that an application was actually made by His Majesty’s Comptroller (“**HMC**”) on behalf of His Majesty’s Procureur formally to freeze the relevant account under s. 10 of the Forfeiture Law. Notice was given to the account holder (FML) and the application was listed for hearing on 27th June 2023.
5. Section 10 of the Law reads as follows in so far as material:

“10. Where there are reasonable grounds for suspecting that the funds [that is, in a bank] 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.”

6. So, that is the basic jurisdiction to make a freezing order. The conditions then required for the making of such an order, are provided further in s. 10.

“(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... ”

and the further possibilities then listed are criminal proceedings in the Bailiwick, or proceedings in connection with the funds under Part III or Part V of the Law, which are civil proceedings, in fact civil forfeiture proceedings. I do not think I need read any more of this section. Further subsections require the justification of an order whilst there are investigations, or when criminal or civil proceedings have been started and have not been concluded.

7. (The second condition provided in s.10 (5) is a repetition of the first condition above, but on the basis of a suspicion that the funds are intended for use in unlawful conduct, rather than that they a person’s proceeds of unlawful conduct. I refer only to the former because that is all that I am concerned with in this case.)
8. At the hearing on the 27th June 2023 a freezing order was granted by me because the court was satisfied that the relevant requirements for making such an order were fulfilled. It is accepted that the qualification of a “reasonable suspicion” does not present a very high hurdle that actually has to be met. At the hearing, Advocate Grainge, on behalf of the HMC, said that at that stage, HMC was not ready to bring any forfeiture proceedings, and consequently it was a freezing order which was applied for and would take effect on the justification of further investigations (etc) being made while the possibility of bringing such proceedings was further investigated.
9. What then happened was that FML issued an application dated 21st July 2023 for an order releasing the funds in the account pursuant to s. 11 of the Law. This has been called the “Release Application”. Section 11 reads:

“(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.”

The remaining subsections are procedural.

10. So, that is the test, and at that stage FML applied on the basis of information supplied to it by those who are now entitled to the funds in the accounts, believing it could demonstrate that the conditions for a freezing order under s.10 were no longer met.
11. Some time in the meantime, Mr Laport had died, and his two daughters, who live in the United States, are entitled to the funds as his heirs. They had taken steps to get themselves registered as the relevant shareholders in respect of the assets that we are concerned with here, and hence they had made themselves – and there is no dispute about this – the apparent owners of the funds in the account.
12. The Release Application was therefore made, and was listed for a first hearing in this court on 28th July 2023, and the timetabling of evidence, etc, was then to lead to a full hearing in May 2024. It has now been postponed at least until September 2024.
13. An application for release is made by the person who is affected by the freezing order, ie here FML, and they seek to persuade the Bailiff that the conditions of s. 10 for the freezing of funds are no longer met. By common consent (and I think Advocate Grainge accepts this) that suggests that the burden of proof is on the person making the application. They seek to overturn the relevant condition, namely that there are “reasonable grounds” for suspecting that the funds are “any person’s, proceeds of unlawful conduct”, since that is the justification for the freezing order. So, what is intended by the legislature authorising an application of that kind is that the applicant should have the opportunity of allaying the suspicions that may have previously been entertained, by showing, by some means or other amounting to proof - and it would be on the usual balance of probability test, no doubt - that it is not the case that such suspicions are reasonably entertained because of evidence suggesting the likelihood that the funds in the account are not the proceeds of any unlawful conduct, ie that, on balance of probability, they have a lawful origin.
14. I should explain here that under the Law itself, a freezing order which is granted under s.10 is valid only for four months initially and it must then be renewed. The reason for that is no doubt that a freezing order cannot just be allowed to be continued, effectively indefinitely. Consequently, the Law lays down that HMC must renew a freezing order within four months, but this can be done repeatedly subject to an overall limitation of two years. After two years, the freezing order will lapse unless there is a further application made by HMC, positively demonstrating good grounds for continuing it, such that it can and should be extended.
15. In this case, while this Release Application was being prepared, the first four month time limit was due to expire and there was a renewal granted to HMC on 17th October. FML did not contest this, because it was still preparing its case on the Release Application, in accordance with the procedural directions that had been made.
16. But with matters continuing on this basis, on 25th January 2024, HMC now issued an application pursuant to s.13 of the Law to forfeit the funds. It is common ground that by virtue of Section 13(3) of the Law, the stated effect is that the funds remain frozen until any proceedings in pursuance of the Forfeiture Application are concluded. (That is accepted to mean, effectively, that the application is determined, and if necessary, any appeal or any appeals are concluded as well.)
17. The parties are not agreed, however, as to the impact of the Forfeiture Application upon the Release Application, and in particular, on the question of the directions for hearing

these and in particular the Release Application, which was extant at the time the Forfeiture Application was launched and, it is contended, is still extant.

18. So, on 26th January 2024 the matter was directed to be listed for a preliminary hearing to determine firstly, whether the Release Application has in effect now been superseded by the Forfeiture Application (as HMC contends), and if the Release Application has not been superseded by the Forfeiture Application, whether the Release Application should be heard first, and separately on its own, (as FML contends) - or generally, what directions should be given with regard to the future conduct of these Applications in the current situation. This has been that preliminary hearing.
19. It is now, therefore necessary to consider s.13 in more detail, to understand the effects of the Forfeiture Application. Section 13 reads:

“(1) Where money is frozen under Section 10, an application for forfeiture of the whole or any part of it may be made by Her Majesty’s Procurer.”

Subsection (2) reads:

“(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.”

I will come back to the history of that subsection in a moment. Subsection (3) reads:

“(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” [that is our case] “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.”

20. I should refer also to ss. 16 and 54 because they provide exceptions to the stipulation that monies “*may not ... be released under any power conferred by this Law*”. Section 16 deals with what I might call the “victim” situation because it is an application that can be made for release of the money by a victim or other owner of the money in the account, and it says:

“16. (1) A person who claims that any money... frozen under Section 10 or any part of it, belongs to him may apply to the Royal Court for the money or part to be released to him.”

Then subsection 16 (3) provides:

“If it appears to the Royal Court that

(a) the applicant was deprived of the money to which the application relates, or of property which it represents, by unlawful conduct,

(b) the money or property he was deprived of was not, immediately before he was deprived of it, any person's proceeds of unlawful conduct or intended by any person for use in unlawful conduct, and

(c) the money belongs to him,

the Royal Court may order the money to which the application relates to be released to the applicant.”

21. There is a provision of a similar nature in subs. (4), which relates to a situation in which the applicant is not the person from whom the monies were originally seized, or it appears that the money belongs to the applicant and the applicant was not the person from whom the money was originally seized. Provisions are there made as to whom the Royal Court may order the money to be released to.
22. In each case, it will be noted, the Royal Court must become satisfied that, although the money has been frozen, nevertheless, it is owned by somebody else, and either they were a victim themselves of a fraud and they were not themselves participating in the holding of proceeds of unlawful conduct, or alternatively, the money was held by a nominee (or some situation like that), in which therefore, the true owner ought to be able to recover back the funds. That is the ambit of s.16. Those are exceptions that enable people who are just not concerned with the money directly at all but are coming in and saying in effect that they have been victims, or they have been disadvantaged by matters that are not their fault and they are innocent, to get the money which they can prove is/was theirs, despite the forfeiture application.
23. Section 54 is a section applying to the funding of legal expenses of respondents and other parties, so that again is something that is entirely separate.
24. The upshot is that, under the terms of s.13, with only those two express and limited exceptions, the money is to be frozen and remain frozen, apparently, until the end of the s. 13 forfeiture proceedings, ie the conclusion of those proceedings. Expressly, it is not to be released under any power conferred by “this Law”, and that plainly, if is urged, must include the power of release under s. 11.
25. I need to come back to the history of s. 13. Section 13(2) was amended roughly a year ago, ie from 31st January 2023 by the enactment of an ordinance. Previously the Royal Court had a discretion to order the forfeiture of money because the wording of s. 13(2) in the Law was that the Royal Court “*may*” order the forfeiture of the money, not that the Royal Court “*shall*” order the forfeiture of the money. That changed in 2023.
26. But the other, perhaps even more significant, change was that the burden of proof in relation to whether the monies were the proceeds of unlawful conduct or not was reversed. Previously, the provision read that 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 is any person’s proceeds of unlawful conduct or is intended by any person for use in unlawful conduct”.

thus putting the burden of proving that likely provenance on to the applicant for forfeiture, ie on HMC. This has now been reversed so that the Royal Court

“shall order the forfeiture 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 is not any person’s proceeds of unlawful conduct or intended for use in unlawful conduct.”

So, that has reversed the burden of proof and imposed it on the person claiming the money to satisfy the court of the negative, ie that the provenance of the fund is not unlawful - and that is one of the reasons, in fact, probably the principal reason, why the Applicant in this case is extremely exercised by what has happened.

HMC’s case

27. What has happened in this case is that Advocate Grainge submits that the meaning of s. 13(3) is quite clear and unambiguous; once an application for forfeiture is made under that section, the money is to remain frozen until any proceedings in pursuance of that application are concluded. She submits that it is clearly the intention of the legislature that, the monies having been frozen, once a forfeiture application is issued, they remain frozen, and there is no possibility of releasing them (except for the very few exceptions, to which I have referred) until the forfeiture application itself has been disposed, and by an order made in the forfeiture application. She says that that is clearly the case, notwithstanding the fact that a release application may have already been issued, because nothing is said in the Law that specifies that situation as being an exception to the position.
28. Advocate Grainge refers to one of the only two (I think) Guernsey authorities in this area, the case of *HMC v Carter & Associates [2023] GRC015* although that point in fact was not taken; that was a forfeiture application case although it was accepted that there had already been a release application made. No point was taken about this, though, and the forfeiture application was simply treated as proceeding and having superseded it. It is fair to say, however, that that case was heard under the old law, so that the question of the reversal of the burden of proof did not arise, and also the court had a discretion as to whether or not to order the forfeiture, and thus in effect, whether or not to release. So that case does not really shed much light on the position here. Advocate Grainge’s submission, though, is that the s. 13(3) requirement as to monies remaining frozen (see above), remains in effect according to its terms, notwithstanding the change in s. 13(2) removing the court’s discretion.
29. I have mentioned that there was one other case. That is *Heykers v HMC*, Guernsey Judgment 14/2018. However that is not on a matter that is in point, and Advocate Grainge simply points to the fact that there really has been no authority in this subsection at all.
30. Basically, therefore, her fundamental position is that, while neither s.11 nor s.13(3) specifically states that, on the issue of a forfeiture application, an application for release is superseded and falls away, because s 13(3) provides that once an application for forfeiture is made, the money is to remain frozen and not be released until the forfeiture proceedings are concluded, that is inevitably the effect. She submits that, logically, this means that whether or not a release application falls away or is superseded, or is simply deprived of any effective force, makes no practical difference, the court cannot determine the release application in favour of the applicant for release until such time as it has considered the forfeiture application, or those proceedings have been concluded, because that would be

the only triggering condition that meant that there could be any question of the monies being released. They obviously will not be released if the forfeiture application succeeds, but if it does not succeed, (ie, the forfeiture application fails) then that determination will be the opportunity for their release in any event.

31. This, Advocate Grainge contends, is really both the beginning and the end of the matter. Nothing in the circumstances of this case changes that position. She understands that the nub of FML's contention and concern is that they should have the opportunity for their Release Application to be heard first because of the differing tests that will apply to the burden of proof (as will have been noted) in regard to the Release Application and to the Forfeiture Application, with the test on the Release Application being lower than for the latter (because it is simply that the judge - the Bailiff - must be satisfied that the condition in s.10 is no longer met, and that condition is only that there is a reasonable suspicion that the funds are the proceeds of unlawful conduct, but the burden of proof in that instance would effectively be upon the authority to show that the condition continued to be met, and hence the benefit of any doubt is gained by the person who makes the application).
32. Advocate Grainge nevertheless suggests that while FML's position may theoretically be that they are required to meet a harder test if they are obliged to contend with s. 13(3), that really cannot make any difference in practice. Whilst s.13(3) is absolutely clear in its terms, she submits that, while the burden may have been reversed on paper, in practice it is not going to be any more difficult to discharge than the burden of the test at the release stage, because when a forfeiture application is made and comes to be decided, it is hugely unlikely that the test of continuing suspicion, required for the maintenance of an initial freezing order under s 10, will not be being met. The forfeiture application test is higher than the freezing order test, but even though the burden of proof may have been reversed, in terms, all the facts, evidence and arguments will be before the court, in practice, and the court will be looking at everything. Any question of whether the court is or is not satisfied that the proceeds in the account are in fact the proceeds of unlawful conduct will all be determined on the basis of the totality of the evidence, as a positive finding, and the question of where the burden of proof lies is most unlikely to have any crucial determinative effect. She submits that the change in the burden of proof really makes no practical difference.
33. But she also says that, even if it does, the plain fact is that the wording of the Law in s. 13 is absolutely clear, and in that situation the court should order that the Forfeiture Application proceeds, and give effect to the practical consequence that the Release Application is superseded, or simply let the Release Application fall away.

FML's case

34. On behalf of FML Advocate Davies contests that the Release Application has been superseded as a result of the Forfeiture Application. She submits that the interpretation advanced by HMC is not the correct construction of the Law, and indeed, she goes so far as to say that it is actually contrary even to the First Respondent's convention rights under the European Convention on Human Rights, in particular (I understand) the right not to be deprived of one's property (Article 1 of the First Protocol). She also goes so far, in the end, as to submit that it is actually an abuse of the court's process for this application even to have been made at all by HMC, having regard to the manner in which it had dealt with the First Respondent's Release Application, launched previously, relying I think on matters that arose and as to which directions were given, at the previous hearing. I will deal with that later.

35. Advocate Davies says that in any event, the Release Application was first in time, and should therefore proceed, and be dealt with independently of the Forfeiture Application. Her reason for this, put simply, is because, if the Release Application is successful, the funds will no longer be frozen. As that is a condition for the making of a forfeiture application, the Forfeiture Application must then fall because it would then no longer have a lawful basis for being pursued. Although the funds may not be released until determination of the Forfeiture Application, since the Forfeiture Application is dependent, as a condition for its initiation on the funds being frozen, she submits that that logically also has to be a condition for its continuation. Consequently, she submits that the Release Application still has a point and has vitality; it should be allowed to proceed and should be dealt with separately, and as it was made first in time, it should be dealt with first in time.
36. She also submits that the different evidential tests for the court to apply in each case are important, as they could result in different directions in relation to the evidence before the court. Because of that, also, it should not be the case that the Forfeiture Application should simply be tacked on to a Release Application hearing. The Release Application should be dealt with entirely separately.
37. Now, I have already read the sections of the Law that Advocate Davies refers to, and I have noted the reversal of the burden of proof and so forth, which she says is particularly important, but she then reminds me of the background of the situation, which is as follows.
38. FML is a company that was incorporated in the Turks and Caicos Islands in 1989. The paperwork by which it opened an account with the Second Respondent Bank identified someone called Thomas Magill as FML's director and secretary, and Advocate Davies points out that the evidence shows that 11 deposits were subsequently made into the account, totaling some \$14 million odd with the final deposit being made in 2002.
39. Four outgoing payments were made from the account, the last of which was in 2004. Subsequently, it became known that a Mr Laport had died in 2005. Mr Laport had held bearer shares in FML and consequently when his affairs were dealt with, these were cancelled and reissued to his daughters who are therefore, as will have been seen, interested in this application.
40. Various things were found in Mr Laport's effects, including passports in his own name, but also that of a Mr Magill. From this it has been inferred that Mr Laport/Mr Magill was using this account under an alias. This suspicious circumstance was what apparently gave rise, therefore, to the "no consent" order mentioned above, ie that that was no consent to transact, which was the direction that was given on the 30th October 2007, and led to the informal freezing of the accounts.
41. However, Advocate Davies says, and it has always been FML's case in the Release Application (though in effect through the daughters), that FML would/will challenge that there is any evidence that Mr Laport was actually involved in any unlawful conduct at all or that the funds are the proceeds of unlawful conduct at all. It will invite the court in the circumstances to find that proving that the funds must be suspected of being the proceeds of unlawful conduct by Mr Laport was simply a bar that would not be met. It would be a case that would be contrary to the vast weight of the evidence which FML is planning to produce and various other matters, including, she suggests, that it has already been acknowledged by the US Internal Revenue Service that they have not found anything that suggests that the money proceeded from anything other than Mr Laport's legitimate businesses.

42. So, that is the background to the applications, and it is because of the point of the change in the burden of proof that the Respondents (here) feel they are badly dealt with, if in fact the Release Application is not allowed to proceed. It is one thing to have to show that the overwhelming preponderance of the evidence suggests that there is sufficient likelihood that the monies in the account are the proceeds of unlawful conduct, so that a suspicion that that is the case could not reasonably be entertained (the burden on the Applicants on a release application), and it is another to have to prove positively that the monies in the account are not, or could not be, the proceeds of unlawful conduct (the burden on them in a forfeiture application). That is because the only way of proving a negative, such as this latter proposition, is positively to prove a contrary affirmative case, and the only way of doing that would involve actually tracing and demonstrating the precise history of the provenance of the funds in the account to an indisputably lawful source, rather than simply demonstrating a sufficient preponderance of possible lawful sources from which they could have emanated. The former would be a far more difficult thing to do, certainly when requiring proof of events from many years previously, and it would, in effect, give the benefit of any doubt at around the balance of probabilities mark to the HMC. This contrasts, not only with the previous law, but also with the test on a release application with regard to holding suspicion, when FML would be able to pray in aid at least some of the benefit of any doubt.
43. Advocate Davies says that in such circumstances, the interpretation of the Law advanced by HMC, that there is an inevitable logical inference that any current Release Application pursuant to s.11 would fall away if HMC launched a Forfeiture Application under s.13, simply is not right. She says that taking this case, the Release Application was made, and has proceeded over the last eight months on the basis that it was what was going to be determined. Indeed, her client (the Applicant there) reasonably understood that it had the right to proceed to seek to obtain a release of the funds, and it effectively gave HMC notice that it would be doing so, by proceeding. On the basis of general principles of statutory interpretation Advocate Davies says it is not fair and not reasonable that FML should now be deprived of that right and the Law should not be interpreted as doing so.
44. The Law, Advocate Davies submits, clearly intended FML to have a right and ability to challenge the basis of the original making of a freezing order, and it would be irrational that it should then lose that right, and the ability to challenge that freezing order, under the relevant terms of the Law, through no fault of own, but simply because HMC steps in and launches a forfeiture application before FML has had time to get its Release Application heard, as it is entitled.
45. She cites the presumption in favour of a grammatical meaning, in respect, here, of ss. 10 and 11. She submits that if the legislature had intended that the court should lose the ability to release funds on the basis of an existing release application which was proceeding lawfully according to the procedural directions given for it, until it had decided a forfeiture application only made subsequently, then that would have been said explicitly. She suggests that provisions to this effect were actually inserted into s.16(4) of the Law, but in contrast there was no such express direction in s.13.
46. The analysis, she says, of HMC's interpretation of the Law requires his proposed result to be reached as a matter of necessary implication; indeed, Advocate Grainge submits as much, in arguing that the Release Application simply falls away automatically once the Forfeiture Application has been made, because it then becomes devoid of effect, and therefore purpose, and therefore, meaning. But, Advocate Davies says, the Law does not import any such necessary implication, because it can be interpreted as having effect

without any such “necessary” implication, in other words in a manner which does leave the Release Application still with a meaningful effect.

47. She observes, first, that the adverse consequences (as she would describe them) of HMC’s interpretation that a release application “falls away” are potentially widespread because they would affect all those who wished to challenge the making of a freezing order upon the test laid down in s. 11. Such an interpretation would in fact enable the FIU/HMC simply to step in and prevent a release application being pursued, simply by the expedient of intervening and making a forfeiture application immediately upon the occurrence of a release application. I will come on to the implications of that, which I think is in fact her main point later.
48. She also submits that common sense would surely dictate that the loss of the right to challenge a s.10 freezing order should not be dictated by external factors, including, therefore the actions of HMC in taking action to bring on a forfeiture application, but also, even, such fortuitous matters as directions for the timetabling of hearings, and so forth. It must (she submits) be intended that s.11 has worthwhile substantive effect, and the interpretation that HMC seeks to put on s. 13(3) of the Law would defeat that intention by potentially depriving it of any real effect in practice. She submits that any enactment should be construed so as to implement, rather than defeat its legislative purpose and she submits that the obvious legislative purpose of s. 11, is that an applicant should have a real (rather than illusory) opportunity challenge a freezing order under the terms if s.11 itself.
49. I mention this here, but it seems to me that the basis on which Advocate Davies mounts this main point is really derived from conclusions that she invites the court to draw from the Policy Letter that was written as the basis for promoting the change in Law to shift the burden of proof. The Policy Letter was conveniently exhibited by Advocate Grainge to her submissions. It was Policy Letter 73 of 2022 dated the 25th July 2022, and it related to amendments to the Criminal Justice Framework. I do not need to read early parts of that letter, but it dealt with the question of the changing the burden of proof in civil cases in its Section 6. This relates to the enforcement of forfeiture proceedings, in particular of the proceeds of crime, in civil proceedings and the implications for the 2007 Law.
50. It comments that civil forfeiture is an essential weapon in the fight against crime as it enables criminal proceeds to be removed from circulation in circumstances where it is not possible to bring a criminal prosecution, eg where the perpetrator of the criminality from which the unlawful assets are derived is out of the jurisdiction.
51. It comments in Section 6.2 that the implementation of civil forfeiture is often hampered by the difficulty of obtaining evidence about the source of the assets, and that therefore, for reasons such as this, there is an increasing trend for jurisdictions to place an obligation on persons in certain circumstances to demonstrate the source of their assets, in other words to impose the positive burden on persons with the assets to prove their legitimacy rather than placing the burden on the authority seeking to forfeit the assets to make out its case as to their illegitimacy. It then looks at the approaches that were taken in Jersey and also in the United Kingdom, and comments (Section 6.5) that consequently in both the UK and Jersey, the burden of proving the origin of assets rests in some cases with the owner of the assets, albeit this is in a more restrictive category of cases in the UK than in Jersey. It opines, also. that this is reasonable as the owner is obviously the person best placed to undertake this, and it suggests that the need for there to be an objective basis for doubting the legitimacy of specific assets prevents so-called “fishing expeditions” against a person. It suggests that safeguards which it sees as being in place, such as the right to apply to vary

or discharge an order, and the right of appeal against a forfeiture, means that human rights are protected.

52. Now, what Advocate Davies relies on, there, is reference to “*an objective basis for doubting the legitimacy of specific assets*” because she says that it is that which is what is provided by ss. 10 and 11. Effectively this “objective basis” is what is established by s.10 in requiring the authority first to freeze the funds, before it can make a forfeiture application, by demonstrating to the Bailiff that there are reasonable suspicions as to the unlawfulness of the source of the funds, and that the order is therefore justified, (and it is justified on the basis either of investigations still being carried out, or that one still needs this justification during the currency of a pending forfeiture application). That condition, she says, is what provides protection for people against the possibility of an arbitrary approach to forfeiture applications that could be adopted by an authority, ie simply making these for reasons that may or may not be good reasons, and which do not then have to be demonstrated..
53. Indeed, she hints that this is where she gets to the stage of saying that making a forfeiture application whilst there is a release application proceeding could even be said to be an abuse of process. It is an abuse for the authority simply to try to side-step the release application procedure, because it could be that authorities will use this to deprive the presumptive owner of the funds of the possibility of allaying any suspicions as to the lawfulness of the funds in accordance with the test provided by s. 10, and getting its monies back, by issuing a forfeiture application without substantive real grounds, so as to take advantage of the shift in the burden of proof, thus changing the burden, and indeed the very nature of the case by which the applicant is otherwise entitled to obtain the release of his/its funds.
54. It is thus the protection of the objective foundation for any forfeiture which ss. 10 and 11 preserves, and therefore s.11 does retain a purpose, an effect, and a vitality that justifies allowing a release application under s. 11 to continue and be determined first, notwithstanding there may be forfeiture proceedings on foot which might suggest, at first blush, that the funds themselves could not be released until that forfeiture application has been determined. Because, she goes on to say, these remedies are so intertwined that they will have an actual effect on each other. Her submission is that if the Release Application is allowed to be determined according to its own terms, first in time as it should be, and it is successful, then the effect will be that the freezing order is lifted, and the Forfeiture Application must then fall away for having no qualifying condition.
55. Just dealing finally with the relevant sections of the Policy Letter, it was suggested by the Policy Letter that the measures outlined above (reversing the burden of proof) have been used with beneficial effects in other jurisdictions and it would be beneficial, therefore, for the Bailiwick to adopt the same approach. Consequently, (at 6.7) the advice was given that an amendment should be made to the Civil Forfeiture Law whereby the burden of proof was 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 unlawful nature of the assets, in the same way as in Jersey. It is suggested that there should be a provision put in place which is actually an independent provision to ensure that a forfeiture decision could be revisited in the event that new evidence came to the light. This was considered necessary once use had begun to be made of the reversed burden of proof, (and that in fact has been done).

56. But once again at Section 6.7 of the Letter the point is made of the importance which is attributed to the fact that the court has already been satisfied that there are reasonable grounds to suspect the criminal nature of the assets. This is the protection, for which Advocate Davies submits there is a continuing need, for protection of the person whose funds are the object of a forfeiture application. If it can in effect simply be removed, (she submits) by HMC simply commencing proceedings for forfeiture, such protection is illusory. It cannot, she therefore suggests, be the case that s.13 is intended to remove this protection (or rather more accurately, I think she submits that s.13 should not be construed as removing this protection). S.13 should therefore not be construed as simply having the effect that a release application be treated as being nugatory, as having no possible effect and simply being superseded, by the commencement of a later forfeiture application, and as this would be the effect of HMC's submissions, one must therefore look for another interpretation.
57. She also submits, I think I can say, that this interpretation would be incompatible with the human rights principles, in particular, Article 1 of the First Protocol, and therefore, the Court ought to adopt any other possible interpretation which would make it compatible with the such convention rights.
58. The principle is:

“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.”

That might be viewed as being circular in the sense that any restriction on FML's (or the daughters') rights to the funds in this instance is imposed by law, because Advocate Grainge relies on s.13. Nevertheless, Advocate Davies submits that in principle, the right to challenge a freezing order according to principles laid down could be viewed as at least an adjunct to a possession and in effect, therefore, a human right, and one should not be deprived of that right. In other words, therefore, the right to contest the freezing order and the validity of it should be protected and if the construction of s.13(3) can be construed in a way that prevents its destruction happening, it should be so construed.

59. She also relies on what she suggests is the unfairness of depriving FML of this right, but not merely because it exposes FML to the burden of proof reversal, which it would not have to meet on the basis of the Release Application. It also denies FML a fair trial in relation to the action of freezing the funds in the first place, which she says is also in contravention of Article 6 of the Human Rights Convention. On HMC's interpretation of s.13(3), FML's right to apply for the release of its funds has in effect been determined by HMC/the FIU taking an action which is asserted to side-step this right rather than by an independent and impartial tribunal's hearing and determining that right. So, Advocate Davies says, for these reasons also, which are the constraints that are imposed by respect for FML's human rights, one should look for a different interpretation of s.13(3) from that advanced by HMC.
60. As to that interpretation, she submits that that is to be found in the practical procedural effect of s. 13, namely that once a forfeiture application is made, it is no longer deemed to be necessary to re-apply for renewal of a freezing order every four months, or for special cause after 2 years; it is that which is the purpose and intention of the limits imposed by s. 13 (3). The necessity to renew the freezing application pursuant to s. 10(3) of the Law is now not required because s 13(3) has the effect that, if a forfeiture application is made, the

funds become frozen indefinitely without any limit of time, until any proceedings pursuant to the forfeiture application are concluded. One can therefore construe Section 13(3) as having that effect, ie relieving the need to keep renewing the freezing order so as not to institute it indefinitely, because there are (then) proceedings on foot which will in the end provide a determination of whether it should be continued or not

61. Therefore, Advocate Davies submits that, on that basis and because the protection that she has already referred to is a protection (of a right to apply to release) which is needed as a continuing protection (as argued above), the continued meeting of the (s.10) requirement (of objectively reasonable grounds for the freezing order to be maintainable) is a continuing requirement, and this shows that the legislation should be construed as continuing to allow it to be contested – and this can and should be done by permitting the s.11 Release Application to proceed.
62. As to the way in which this works, I have already foreshadowed this. Advocate Davies submits that in order for s 11 to be invoked, the court must be satisfied that the conditions in s.10 are no longer met. Therefore, an order that is made pursuant to a s.11 application, (ie a release application) in favour of an applicant will have the result that the funds are no longer frozen under s. 10. If that happens there will no longer be a basis in law on which HMC could continue to pursue the Forfeiture Application, because the fundamental requirement that such a freezing order should be in place would have been removed. The funds would not be frozen.
63. She emphasises that that is not ordering the release of the funds before the forfeiture application has been determined (which is what s.13 says may not happen as a matter of a court order) because what would happen would be three stages. Firstly, the court would order that the freezing order no longer subsisted, but that would not itself be an order that the funds actually be released, but, rather, the court making a declaration that the conditions in s. 10 are no longer met. It would then be necessary for the Forfeiture Application either to be withdrawn or struck out, because of the court declaring that the funds could no longer be considered frozen under s, 10, so that therefore there would be no basis for any further continuance of the Forfeiture Application. That would amount, therefore, to the formal conclusion of the Forfeiture Application and for this reason, at that point, the money could be released without in any way contravening s.13 of the Law.
64. So, by that route, Advocate Davies mounts an argument that in fact, at the end of the day, there is an interpretation of s.13 which does not mean that the Release Application should be treated as being superseded. It shows both a means by which a subsisting release application such as the present has some force, and a rationale for s. 13(3) as being aimed at removing the need to continue repeatedly reinstating the freezing order, showing that s. 13(3) does actually have a useful function. For the reasons previously given, it should be preferred.
65. She then goes on to the question of abuse of process and she suggests that she would also seek to argue this by reference to the way in which HMC dealt with FML's application, previously, in July. I think this amounts to a submission that HMC should be treated, in effect, as being estopped from arguing, if not that the Forfeiture Application should be pursued at all, at least that there should be no opportunity afforded to FML to have its Release Application considered.
66. It is said that, HMC, knowing that preparation was being made for the Release Application to proceed, and that costs were being incurred in pursuing this in good faith and that it was

being pursued as an independent right to object to the making of the freezing order, it would not be right to allow that procedure to be withdrawn from FML by now acceding to Advocate Grainge's application that the Forfeiture Application should supersede the Release Application.

Discussion

67. I do not consider that there are any grounds on which Advocate Davies can argue that any estoppel arises against HMC in the present situation. It does not seem to me that the way in which HMC has proceeded in relation to the Release Application could in any way estop him from proceeding to take whatever steps he now thought were thought reasonable and appropriate, according to the law, in relation to pursuing the rights of HMC with respect to forfeiture proceedings or otherwise. The plain fact is of course that the work that was actually done by Advocate Davies' clients in that time was done in what they perceived to be their own interests in the situation as it then pertained. I accept that that was, of course, that there was then no forfeiture application on foot, but I do not see how that could be argued to prevent HMC from bringing on a forfeiture application, as and when he thought appropriate, and doing so according to whatever points of law and procedure might then be perceived as being relevant and appropriate.
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.
69. Indeed, as I remarked during the hearing, I do not think it is possible to estop oneself out of statutory rights. Those rights are vested in authorities for a purpose, and I do not think such authorities could estop themselves from exercising them. That certainly applies as to any question as to whether they should be entitled to advance their Forfeiture Application as and when they see fit, and in my judgment it covers procedural aspects as well. If it is appropriate the court can control procedural points and it can also remedy any unreasonableness in this regard in costs.
70. I also take the view that in any event, the work that has been done by the FML in preparation for the Release Application, is hardly likely to have been wasted. In the arguments that it would seek to mount simply on a Release Application, the burden would be upon it to allay the suspicions that the Court had previously been persuaded were reasonably entertained, and to conclude that on examination of further evidence those suspicions were in fact groundless. That task could be approached and attacked in various possible ways. It could be attacked simply by arguing that on the balance of probabilities the evidence produced just did not support that there could be any reasonable suspicion that the funds in the account had originated in the proceeds of unlawful conduct. This could be done by way of looking at the timing of the payments, and the timing of any unlawful activity, looking at what actually happened and possibly arguing that on the balance of probabilities the funds could not have originated in the unlawful activities.

Equally, as I think has been done in other cases, it could be argued by conducting a tracing exercise looking at the quantum of monies that could be seen to have been lawfully obtained and the quantum of monies in the account and raising arguments such as that the events showed that there was no sufficient probability, on balance, that the funds in the account could actually be logically held to “be” the proceeds of unlawful conduct.

71. Whatever exercise is adopted to gather evidence and argue the inferences to be drawn from it, though, demands examining the origin of the funds in the account, and the effects of the alleged unlawful activity and seeking to show that they are not linked. If the reversal of the burden of proof applicable on a forfeiture application now suggests that, in effect, the only way of proving, even on balance of probability, that the funds are not the proceeds of unlawful conduct is to prove their actual origin and demonstrate that that is legitimate, (I am not to be taken to be holding that this is the only way, but it has, I think, been suggested) then the kind of evidence needed to demonstrate this is very likely I should have thought, to have been uncovered and used, anyway, in pursuing the exercise of proving the less stringent requirement of negating any “reasonable suspicion”.
72. The important point I am making for the present is that I think there may well, in practice, be something in Advocate Grainge’s submission that, although the burden of proof has been reversed, in reality this would not make a great deal of difference to the relevant work to be done. At the end of the day the evidence would all be there for what it was worth, and one would consider it in the round, on either basis. The likelihood must be that the same evidence would in practice be gathered, whether the objective was that of refuting there being a reasonable suspicion that the monies in the account were the proceeds of unlawful conduct or that of proving (on the balance of probabilities) that those monies were not the proceeds of unlawful conduct by proving (again on balance of probabilities), where they had actually come from. It seems to me to be quite doubtful that that difference would actually give rise to any different approach to evidence gathering, because at the end of the day, the likelihood, that any finding would actually depend on evidence at around the balance of probability mark, such that there was a real risk that the change in the burden of proof could be decisive, would seem very unlikely. I have to accept though that, logically, it could exist. It can be the situation that this difference could put the applicant party at a disadvantage that they were otherwise not subject to, and I ought to factor that into my reaction to the submissions that were made.
73. Essentially, in my judgment the difference between the parties’ competing submissions is quite simply that Advocate Grainge submits that the wording of the Law in s. 13 is absolutely clear and to the effect that one cannot release the funds from a freezing order now that a forfeiture application is under way at all, (apart from the irrelevant express exceptions) and therefore, in effect, any Release Application simply falls away, and there is just no point keeping it on foot. There is no possibility that the funds can be released under s.11 because the Law at s. 13(3) effectively expressly says as much. She submits that therefore, the contention that is put forward by Advocate Davies simply has no prospect of succeeding.
74. Having said that, and having considered Advocate Davies’ arguments, I can understand the logic of the position that she puts forward. The subtlety of her argument is that if the Release Application proceeds, in the order to which she submits it is entitled, and it succeeds, the funds will not be being released under s.11 at all, but will be released upon the conclusion of the forfeiture application, because it will lose its required foundation and have to be withdrawn or struck out.

75. It does seem to me that this point is only having to be focused on, now, because of the implications of the reversal of the burden of proof. Albeit for reasons of public policy and reasons of the difficulty of fighting crime, the Law has made it more difficult for persons to demonstrate a case for the legitimacy of their funds, even if they are legitimate, because any gaps in their evidence, whether under their own reasonable control or not, can be treated as letting in doubt which will defeat their case. The new approach will now make the required evidence very much more fact-specific. I think it will clearly be more difficult to succeed against a forfeiture application by advancing general propositions of logic and probability, and those resisting a forfeiture application may well have, in effect, to prove affirmatively the provenance of the funds with more detailed factual evidence, which may well be difficult through no fault of their own, even if they are entirely innocent. Of course, any such difficulty may well come to be dealt with on the basis of the court's appraisal of the reasonable probabilities of being able to obtain evidence to demonstrate such a positive case, but how this approach may operate in practice remains to be seen.
76. As to my decision, my judgment, in the end, is that I accept Advocate Grainge's arguments, and her proposition that the effect of the Forfeiture Application is, and is intended to, have the effect that it really does take precedence over the Release Application and must proceed to be determined first.
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.
79. Having said that, I cannot say that Advocate Davies' argument is illogical, and it also has an appeal to a sense of fairness, that once an applicant has commenced a Release Application, they ought to be entitled to obtain an actual decision on the merits of it, and not have that process subverted, especially because the ability to achieve this is solely in the hands of the authority, and could even be manipulated. This is a factor which has some attraction, but ultimately, in looking at whether I prefer the arguments of Advocate Grainge

on behalf of HMC or Advocate Davies on behalf of FML, I come to the conclusion that I must prefer the arguments of Advocate Grainge.

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.

Decision

81. I therefore hold, although not without some slight reluctance, that the Forfeiture Application must proceed. My view is that it would, though, not be right to rule, and I do not rule, that the Release Application is dismissed, but I consider that the appropriate course for me to take in this situation is to rule that the Release Application should be stayed for present purposes while the Forfeiture Application proceeds.
82. If the Release Application is stayed it is possible for the Court at any moment where it seems that the Release Application should have some kind of independent validity, to consider and take action to restore and determine the Release Application because it has not actually been dismissed. It does seem to me, though, that, as a matter of common sense effect and purpose, the institution of the Forfeiture Application really puts that application to the fore, and it would not be right for it to be hampered or clogged up by procedural moves that were made in relation to the Release Application, which on the face of it, I do feel is intended by the Law to be given very much a second position, if not effectively superseded entirely by the institution of the Forfeiture Application, such as has happened.
83. So, in those circumstances, the order I propose to make is that the Release Application itself should be stayed. The timetabling that has so far been ordered, which would lead to a hearing of (effectively) an application that would determine what is going to happen to the funds in September should be continued.
84. If and in so far as Advocate Davies' clients feel that, now that they are faced with having to deal with the matter on the basis of the principles that apply to Forfeiture Application, they require more time because they need more time to obtain and get more evidence, then I would hear that sympathetically, and I think Advocate Grainge has suggested that HMC would also have sympathy with that. Consequently, any change in the current timetabling could probably be agreed between the parties and if it requires a postponement of the hearing that has been scheduled for September at the moment then so be it; that is a matter than can be dealt with by consent.
85. I think I also said that, bearing in mind that the Release Application is certainly an application that has been proceeded with, I would make it clear that the stay of the Release Application is not intended in any way to inhibit any of the arguments that might be advanced on the Forfeiture Application itself by Advocate Grainge or Advocate Davies' clients if so advised. Nor does it in any way inhibit the evidence that could be adduced and would be appropriate to be adduced on the Forfeiture Application by Advocate Davies'

clients. As I said, I do not think it necessary to put any of that in an order, but if it gives Advocate Davies' clients comfort, I would to so.

86. I do not think there is any other matter that therefore needs to be dealt with in terms of my approach to this at the moment. So, in summary, for the reasons I have given, I find that Advocate Grainge's application as to the true construction of s. 13(3) of the Civil Forfeiture Act carries the day, and means that the Forfeiture Application should now proceed, but I do not accede to any application that I should dismiss the Release Application (I will simply stay it) and I do not accede to any argument that the matters should be heard together. It seems to me that the appropriate way of dealing with the matter is what I have just said in this slightly rambling judgment. That is, therefore, the order I propose to make.

Hazel Marshall KC
Lt Bailiff

23 April 2024