

# Suspicious activity reports and 'no consent' – recent Guernsey court decision

UPDATE

Update prepared by Christopher Edwards and Iona Mitchell (Guernsey)

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The Royal Court recently found that assets in bank accounts were not the proceeds of crime, allowing the bank to transfer them to the customers.

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## Introduction

It is an offence for a business to deal with property where it knows or suspects that the property represents the proceeds of criminal conduct. If a business obtains Guernsey's Financial Intelligence Unit (FIU)'s consent to the proposed act, this provides a statutory defence to the act in question. If the FIU does not provide consent, the business is unable to deal with the assets without the risk of committing a criminal offence and is often unable to disclose the reasons to the customer at the risk of committing 'tipping off'.

To provide a solution to this impasse, the customer may bring what is described as a 'private law action' against the bank, seeking a declaration from the court that the assets are not the proceeds of crime. In *L and M and N and Mrs B v Credit Suisse AG, (Guernsey Branch)* [2023] GRC026, Lieutenant-Bailiff Marshall KC granted this declaration and found that accordingly the bank should transfer the funds and investments in the accounts to, or to the order of, the customers.

We recently wrote about a similar judgment in respect of another bank [here](#).

## Facts

The Plaintiffs were the three adult children and the widow of Mr B. They were the heirs to the estate of Mr B and held accounts with the Defendant into which monies coming from his estate were paid. The accounts were effectively 'frozen' after the bank developed a suspicion that they were the proceeds of criminal conduct. The concern centred around the alleged bribery by Company X of a state-owned natural resources company to obtain preferential bids for contracts and the suggestion that the proceeds of Company X ultimately made their way into the accounts. FIU refused consent for the bank to deal with the accounts.

The underlying action upon which the suspicion was based was not a criminal but instead a civil claim. However that did not prevent any proceeds being the subject of money laundering offences in Guernsey, because the test for such offences is that the relevant activity would be criminal in Guernsey (which it would).

## Decision

Lieutenant-Bailiff Marshall reviewed the evidence provided by the Plaintiffs as to the source of the funds – including expert evidence from chartered accountants as to the impact that alleged unlawful profits would have had on a Company X's value – and concluded that she was satisfied that they were not the proceeds of criminal conduct.

Her primary basis for reaching this conclusion was that even if any proceeds of criminal conduct enriched Company X at the time, there was no sufficient (or even any) connection of identity between the monies

that were paid into the bank accounts in question and the original proceeds of the criminal conduct. This was due to:

- the size of the company's enterprise as against any proceeds
- the length of time elapsed since the alleged proceeds of criminal conduct arose (around ten years), and
- the way the funds would have been used and mixed into the funds of an enormous, active, worldwide commodity trading company.

In essence, as a matter of '*common sense impression*', it was all too far removed and too remote. Any link had simply become too distant.

### **Deemed consent**

Lieutenant-Bailiff Marshall indicated that she favoured Guernsey adopting an approach similar to that taken in other jurisdictions, where the authority is deemed to have given consent if it does not respond to a consent request within a specified period. The relevant period in the UK is 31 days. The Guernsey Court of Appeal previously expressed concern about resourcing at the authority but if this remained an issue, Lieutenant-Bailiff Marshall suggested a longer period, such as three months, could be adopted. She endorsed the view previously expressed by the now Bailiff in an earlier Royal Court decision that Guernsey's legislature should consider amending the law on this basis.

In the meantime, the solution remains to bring the type of proceedings as were used in this case. Early advice is recommended, in order to ensure that as much as possible relevant documentation is preserved.

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