

UPDATE

Guernsey Court of Appeal considers forfeiture orders

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Guernsey, like other jurisdictions, has legislation in place to permit the forfeiture of the proceeds of crime in civil proceedings. This enables criminal proceeds to be removed from circulation by way of a court order forfeiting seized or frozen assets. In *Her Majesty's Comptroller v Fidelity Management Limited & Another* [2025] GCA064, the Court of Appeal has provided guidance on the application of the burden of proof for a forfeiture order. The decision is important for account holders and custodians subject to Guernsey's regulatory regime.

Background

The appeal concerned an application for a forfeiture order made by His Majesty's Comptroller (HMC) in respect of monies totalling USD \$14.4 million, plus accrued interest, held in an account with a bank by Fidelity Management Limited (Fidelity).

The account was opened in around 6 December 1995 by someone purporting to be Thomas Henry Magill, in his capacity as a director and secretary of Fidelity, using what transpired to be false identity documentation and an alias. His true name was Frank Laport. A couple of years after Mr Laport died in 2005, the executors of his estate sought to transfer the funds in the account to an account in Switzerland for the benefit of his two daughters, who had inherited the shareholding of Fidelity.

The bank sought consent from Guernsey's Financial Intelligence Unit to comply with the transfer request. Consent was refused. In 2023, HMC made an application for a freezing order over the account, under section 20 of the Forfeiture of Money etc in Civil Proceedings (Guernsey) Law 2007 (the **2007 Law**), on the basis that there were reasonable grounds for suspecting that the funds were any person's proceeds of unlawful conduct and that the making of the order was justified while the origin or derivation of the funds was further investigated or consideration was given to bringing proceedings. The Royal Court granted the application.

Fidelity took preparatory steps to contest the freezing order. However, before these were concluded, HMC made an application for a forfeiture order, which was held to take precedence over the application to contest the freezing order.

Burden of proof

Due to the timing of the proceedings, the application for forfeiture was made under the 2007 Law. Following an amendment to the 2007 Law in 2022, the burden of proof to show that funds to be forfeited did not represent the proceeds of unlawful conduct, or were not intended by any person for use in unlawful conduct, rested on the account holder.

The 2007 Law was subsequently repealed and replaced with the Forfeiture of Assets in Civil Proceedings (Bailiwick of Guernsey) Law, 2023 (the **2023 Law**), which also places the burden of proof on the account holder. Accordingly, although the judgment concerns the 2007 Law, it is relevant when construing the current regime under the 2023 Law.

Royal Court

Lieutenant Bailiff Marshall found that although the burden of proof under section 13 of the Law was on the account holder, HMC needed to establish a causal nexus between the account and some specified unlawful conduct (such as for example tax evasion or money laundering), or show that there was no plausible explanation but that the funds were the proceeds of some criminal conduct. She found that this had not been established in the present case.

She also found that, even if she was wrong in her interpretation of how to apply the burden of proof and instead applied the test put forward by HMC, the account holder had discharged the burden to proof. Even if using a forged passport was a crime, this would not have generated the proceeds in the account. The other possibility was that the proceeds derived from tax evasion, and, although the Lieutenant Bailiff had doubts about whether the funds originated from this source, those were allayed by the fact that an IRS investigation had concluded that there was no evidence of tax evasion by Mr Laport and that the funds in the account were the proceeds of his lawful business activities. Accordingly, she dismissed the application for a forfeiture order.

HMC appealed to the Court of Appeal.

Court of Appeal

The Court of Appeal disagreed with the Lieutenant Bailiff's approach to the burden of proof. All HMC was required to do, to obtain the freezing order, was establish reasonable grounds for suspicion that the asset targeted for forfeiture was either the proceeds of unlawful conduct or was to be used in unlawful conduct. In doing so, HMC was not required to identify the crime in question. The burden then shifted to the account holder as provided for in the relevant Law.

Applying this to the factual findings made by the Lieutenant Bailiff, the Court was not satisfied that Fidelity had satisfied the burden. The business activities for which the Court had evidence were not tainted with criminality, but they were not the source of funds in the account. The Lieutenant Bailiff had hypothesised that there were other activities which were not evidenced which could have been the source of the funds. The Court did not know if they were profitable and did not know if they were lawful.

Just because the transactions the Court knew about were not criminal, did not mean that the transactions it did not know about were not criminal. Accordingly, Fidelity had not discharged the burden and the forfeiture order was granted.

Takeaways

The wording of the legislation places a significant burden on an account holder which wishes to resist a forfeiture order. It was particularly difficult for the account holder in the present case due to the passage of time since the account had been opened and because records had been lost and / or destroyed. The Court pointed out that, had a challenge to the suspicion been made much earlier, evidence to prove the legitimacy of the source of funds was more likely to be available.

However it is important to note that the account holder does not need to prove the legitimacy of the funds with absolutely certainty; only on the balance of probabilities. As the Court observed, one obvious way of discharging the burden will be to demonstrate the source of the funds, and prove that they come from lawful transactions or sources. However, that is not the only way the onus can be discharged. If the funds can be shown to have originated from any person who can prove that they have a blameless record in all their financial dealings, the Court stated that may well go a long way to persuading the Court that there is a lawful source for the funds, even if a precise linkage between specific transactions and the funds in the account cannot be made out.

The decision highlights the importance of record-keeping and taking a proactive approach. If an account holder can alleviate the custodian's suspicions at an early stage, through the provision of information, this may obviate any application for a forfeiture order and avoid the higher burden on the account holder associated with such an application.

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