

UPDATE

Recent Guernsey case sheds light on the role of a business holding assets subject to a 'Suspicious Activity Report'

Update prepared by Christopher Edwards, Iona Mitchell and Marco Nel (Guernsey)

A note on *Jakob International Inc v HSBC Private Bank (Suisse) SA, Guernsey Branch* [2024] GRC 045.

The Royal Court recently found that assets in bank accounts were not the proceeds of crime and ordered that the bank return the funds to its customer.

Introduction

In Guernsey, it is an offence for a business to deal with property it knows or suspects to represent the proceeds of criminal conduct, unless it has obtained Guernsey's Financial Intelligence Unit (FIU)'s prior consent to any such dealings. Without such consent from the FIU, the business is unable to deal with the property without the risk of committing a criminal offence. Due to the risk of 'tipping off', the business is also often unable to disclose the reasons it cannot deal with the property to its customer.

These circumstances may give rise to a 'private law action' being brought by the customer against the business. In the action, the customer requests an order from the court declaring that the property does not constitute the proceeds of crime. In *Jakob International Inc v HSBC Private Bank (Suisse) SA, Guernsey Branch* [2024] GRC 045, Deputy Bailiff Jessica Roland granted the customer's request for such a declaration and found that the bank should deal with the property as directed by the customer.

We recently wrote about similar judgments that can be found in our Updates [Guernsey court found monies in bank account not the proceeds of crime](#) dated 19 April 2023 and [Suspicious activity reports and 'no consent' – recent Guernsey court decision](#) dated 26 July 2023.

Background

The Plaintiff held a bank account with the Defendant. There was a concern that the source of monies held in the bank account was derived from Mr Mazam Ali Khan (**Mr Khan**) who was convicted of VAT fraud in Belgium in 2007 and held a power of attorney in respect of the account. As a result, the Defendant's MLRO filed a 'Suspicious Activity Report' (**SAR**) with the FIU. The FIU did not permit the bank to deal with the funds or close the account of the Plaintiff.

A private law action was then commenced by the Plaintiff.

Usually, in a private law action, a defendant would state a positive alternative case backed by expert and other supporting evidence before the court for consideration against the version submitted by the plaintiff. However, due to the legal framework surrounding SARs, this approach is not followed.

A defendant in the context of a SAR (often a bank or other asset holder) would likely only have limited documents and correspondence on file in relation to the monies it is holding on behalf of the plaintiff. It would generally be documents and correspondence it has obtained from the plaintiff or information otherwise in the public realm.

Accordingly, once it has been established that a defendant held the requisite suspicion, the plaintiff makes a case that the monies are not the proceeds of crime and the defendant's role is usually limited to testing

opposing witness testimony through cross-examination and the plaintiff's case generally through the highlighting of inconsistencies and gaps. The court then proceeds to deliberate whether the plaintiff's version is probable.

Decision

As the Plaintiff and the Defendant had agreed that the Defendant had the requisite suspicion that the monies held in the bank account directly or indirectly represented the proceeds of crime, the onus was on the Plaintiff to prove on a balance of probabilities that the monies were not. This involved the Plaintiff providing evidence to show that the provenance of the monies was not related to criminal activity.

The Plaintiff provided witness testimony and documentary evidence (including bank account statements) to show that the funds that arrived in the account derived from a source that was untainted by criminal conduct. This involved evidence from an expert in forensic accounting reviewing over 30 years' worth of transactions. The evidence put to the court had noticeable gaps, such as a period of around six months where there were no bank statements for one of the companies that the funds passed through. It was submitted on behalf of the Plaintiff that this was in part due to floods that occurred in the relevant region of Pakistan where documents were stored and in part due to the protracted period that had lapsed since the relevant transactions took place. This was found not to be fatal. There was no evidence of the funds coming from anywhere other than their stated source and, in particular, from Mr Khan, and the value of the companies' accounts at the relevant time supported their stated source.

The court ultimately found that on a balance of probabilities the monies held by the Defendant were not the proceeds of crime. The Defendant was ordered to transfer the funds to the Plaintiff, less a sum of monies to cover the Defendant's costs pursuant to a contractual indemnity.

Comment

Custodians and account holders will be reassured that the court did not need to see documentary evidence of every transaction in the history of the flow of the funds to be satisfied that the funds in the account were not the proceeds of crime. This case is a helpful reminder that whilst extensive evidence is required, the court can draw inferences and come to common-sense conclusions.

Contacts



Christopher Edwards
Partner | Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 739 320
christopher.edwards@mourant.com



Iona Mitchell
Knowledge Lawyer | Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 731 406
iona.mitchell@mourant.com



Marco Nel
Associate | Attorney (South Africa) non-practising
Mourant Ozannes (Guernsey) LLP
+44 1481 731 482
marco.nel@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. You can find out more about us and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2024 MOURANT ALL RIGHTS RESERVED