

Civil Seizure, Detention, Freezing and Forfeiture in Criminal Proceedings.

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Introduction

Guernsey's last MONEYVAL Evaluation Report, issued in September 2015, noted Guernsey's robust civil forfeiture framework. However the Report also found that the powers of civil forfeiture had not, at that time, been adequately applied and tested in tackling serious economic or other crimes related to Guernsey's financial industry. The Report encouraged law enforcement to step it up in using these mechanisms.

In response to that recommendation, and in furthering plans already well underway at the time of the MONEYVAL inspection, Guernsey has now established a dedicated asset recovery team resourced by law enforcement officers and financial investigators. The International Cooperation and Asset Recovery Team (**ICART**) sit within the Financial Investigation Unit (**FIU**). ICART aims to be proactive rather than reactive in taking asset recovery measures and was intended to recover its £2m set up costs, become self-financing and contribute surplus funds not subject to other obligations to Guernsey's seized asset fund.

ICART has been keeping itself busy. A high profile success was published in December 2017 regarding the sharing with the United States government USD \$14.3m recovered by Guernsey assisting on two US criminal cases in which money was laundered via Guernsey.¹ We are also seeing more enquiries as to how orders for asset recovery and detention are to be handled.

What then are the powers available to Guernsey authorities in their asset recovery efforts and what should financial services businesses (**FSBs**) be alert to when subject to these powers? This Guide considers the police's powers of civil seizure, detention, freezing and forfeiture in criminal proceedings, together with the connected orders and issues which may arise.

Parallel Provisions

This Guide focuses upon The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (the **Forfeiture Law**). However there are parallel powers in the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002.

The Forfeiture Law regime is limited to money. This is in part due to the extra resources required to ascertain and manage other assets (such as real property, investment portfolios etc) pending realisation of their value. There are post-conviction forfeiture powers applicable to property not limited to money under The Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006. There are also powers of seizure, detention and forfeiture of property not limited to money under The Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972. These latter two laws are however outside the scope of this Guide.

¹ <https://www.gov.gg/article/162871/Guernsey-Law-Officers-announce-first-time-forfeited-asset-sharing-with-the-United-States>

Powers under the Forfeiture Law are exercisable for domestic matters and for the enforcement of foreign non-conviction based forfeiture orders, subject to certain conditions. At present these are limited to orders from England, Scotland, Wales, Northern Ireland and the USA.

The Forfeiture Law

Two key features of the Forfeiture Law regime are that:

- It provides for non-conviction based remedies, i.e. the powers may be triggered without a criminal conviction having been obtained.
- The process is a civil one, facts need to be proved to the lower civil standard of 'on the balance of probabilities', rather than to the criminal standard of 'beyond reasonable doubt'.

The powers of seizure, detention, bank account freezing and forfeiture are subject to a minimum amount of £1,000 or equivalent in another currency.

Seizure, Detention, Freezing and Forfeiture

Seizure

The seizure of cash concerns the police taking physical possession of it. The police may seize cash where the officer has reasonable grounds for suspecting that cash is the proceeds of any person's unlawful conduct or that any person intends to use it for unlawful conduct. It does not matter that the person in possession of the cash at the time of seizure was not involved in the unlawful conduct.

Detention

Detention concerns the police keeping possession of cash seized. Seized cash may be retained for up to 48 hours (excluding weekends and public holidays). The power of detention is subject to the officer continuing to have reasonable grounds for their suspicion.

The period may be extended by a court order for 4 months at a time, up to a total of 2 years. The court does however have the ability to further extend the order if it is in the interests of justice.

Obtaining the detention order requires a court application, typically made ex parte in chambers. The order may be made subject to such terms and conditions as the court thinks fit and, while the application may be ex parte, the order must provide that those affected be notified of it.

The court may make a detention order if satisfied that there are reasonable grounds for suspecting that:

- either the cash concerned is:
 - any person's proceeds of unlawful conduct; or
 - intended by any person for use in unlawful conduct; and
- its continued detention is justified while its provenance is investigated or proceedings are being considered or have been brought but not concluded:
 - in any jurisdiction against a person for an offence connected to that case;
 - in Guernsey or a specified jurisdiction for civil forfeiture.

Freezing

The court also has the power to order that funds held in bank accounts be frozen, meaning that those funds and any part of them cannot be transferred, withdrawn or otherwise paid out.

The requirements for the police to obtain a freezing order for a bank account mirror the provisions for obtaining detention orders, as do the time periods for which such orders may be made.

An account may be frozen in its entirety, or up to a specified amount. Where the account is frozen up to a specified amount, any surplus funds are not subject to the freezing order.

Civil Forfeiture

"Forfeiture" is the loss of property resulting from the breach of an obligation. In this context it concerns a person being deprived of their money where it is thought to be connected to unlawful conduct.

To obtain a forfeiture order, it is a pre-condition that the money in question is subject to detention or freezing, as detailed above.

Obtaining the forfeiture order requires a court application. On the application being made the money to which it relates is to be detained or frozen until the application process, including any appeal, has concluded. By contrast to orders for the freezing and detention, such applications are made on notice.

The court may make a forfeiture order if satisfied that the money concerned or relevant part thereof is any person's proceeds of unlawful conduct; or intended by any person for use in unlawful conduct.

On the order being made, and all appeals exhausted, the money and accrued interest are to be credited to General Revenues of the States of Guernsey or as otherwise directed by the Policy and Resources Committee (e.g. into a seized asset fund).

While the standard of proof is the civil standard, the burden rests on the police to demonstrate, to this standard, that unlawful conduct is concerned. Should a respondent be shown to have lied about the source or intended use of money, this may be relied upon as evidence in support of an application. Similarly where a respondent has been afforded considerable opportunities to adduce evidence or provide an explanation to rebut accusations, the court may draw inferences from a respondent's failure to provide such evidence or explanation.

Release of Money

Money subject to the above processes may be released in four circumstances.

To the person last in possession of the money

A person from whom cash is seized then detained, or whose funds are frozen may apply to the court for the release of that money. The court may direct the release of the money, in whole or in part, if satisfied that any of the conditions for its, detention or freezing are no longer met. Such applications may be heard in chambers but require that HM Procureur be notified.

In the alternative, HM Procureur may authorise the release the whole or any part of such money if satisfied that the detention of the money to be released is no longer justified.

The most likely condition to be attacked is the suspicion that the money is the proceeds of any person's unlawful conduct, either because the suspicion of unlawful conduct has been eliminated or the applicant has demonstrated the money is unconnected to unlawful conduct.

Money seized or frozen in the hands of another

A person whose cash was seized from the hands of another, or whose funds are frozen in the account of another may apply to the court for the release of that money in whole or in part. The court may direct the release of the money, in whole or in part, to that applicant if satisfied that the money belongs to that person and any of the conditions for its, detention or freezing are no longer met.

Victims' recovery

A person who claims that money detained or frozen belongs to him may apply to the court for the release of that money in whole or in part. The court will order the release of the money to the applicant if satisfied that:

- the applicant was deprived of their money by unlawful conduct (i.e. is a victim of crime); and
- immediately before the applicant was deprived of it, the money was not the proceeds of unlawful conduct or intended by any person for use in unlawful conduct; and
- the money belongs to the applicant.

Failed forfeiture application

Where forfeiture is not ordered pursuant to an application the court will order the release of the money, either to the person from whom it was seized or whose account was frozen, or to an applicant who has satisfied the court that the money in question properly belongs to them.

In such circumstances the person to whom the money is to be returned may apply to court for compensation. Such compensation is typically limited to lost interest, but where the court is satisfied that the applicant has suffered loss and that the circumstances are exceptional the court may order that additional compensation be paid.

Issues

The Forfeiture Law is not without its difficulties, particularly where recipients of orders are FSBs who must have regard to their obligations to customers in addition to the authorities.

Prejudicing an investigation

These orders do not exist in isolation and will follow a period of prior investigation and may form part of an ongoing investigation. A potential offence exists should a person, knowing or suspecting that a civil forfeiture investigation is ongoing or pending, make a disclosure likely to prejudice such an investigation.

The threshold is whether the disclosure is likely to prejudice an investigation. For an FSB in these circumstances they are likely to hold sparse information making it difficult to assess whether an investigation may be prejudiced, and even more difficult to decide if that is a *likely* consequence. There is however not a firm prohibition on FSBs discussing matters with their customer/s or other interested parties.

But FSBs must be especially cautious where money laundering may be involved. In those circumstances tipping off provisions under other Bailiwick laws may be engaged, regardless of whether or not an investigation is prejudiced. As these orders are principally concerned with movements of money, money laundering risks are frequently engaged. Respondents should therefore approach the risk of tipping off with considerable caution and take legal advice.

Document retention policies

A further potential offence exists should a person, knowing or suspecting that a civil forfeiture investigation is ongoing or pending, tamper with documents relevant to that investigation. The potential offence for getting rid of documents is causing particular concern to businesses which have revised their document retention policies to ensure GDPR compliance.

The legislation does not articulate a test for suspicion, but in other contexts the bar is set quite low. There is a lack of clarity and a risk of the effect being akin to a back door document preservation order where a party is told that an investigation may be opened.

This is particularly uncomfortable for respondents having regard to their obligations to persons other than law enforcement, in particular to customers and regulators. There is no simple answer as to when documents may safely be retained or disposed of. Decisions will be fact specific. However emphasis is placed upon a party's intentions. It is a defence where there was no intention of concealing the facts disclosed by the documents from investigators. An FSB following its usual document retention procedures would therefore have a far lesser risk than an entity taking a targeted approach to file destruction. However, if an investigation seems like a possibility, this is a matter respondents may wish to carefully review.

Set-off and security interests

Unless the court orders otherwise, account freezing orders and/ or forfeiture orders do not impact upon pre-existing rights of set off and secured interests. However unsecured interests are not protected.

The court may however override pre-existing rights or set off and/ or secured interests should it find that the right or interest was not created in good faith, or that it is otherwise in the interests of justice to make an alternative order.

Other considerations

If served with an account freezing order or forfeiture order, FSBs should consider its contents give rise to other reporting obligations. In particular:

- Whether a suspicious activity report (**SAR**) to the FIU ought to be raised; and/ or
- If there are matters which ought to be disclosed to the Guernsey Financial Services Commission in accordance with Principle 10 of the Code of Principles of Conduct of Financial Business.

These are not automatic consequences of being served with such orders, but aspects which should be considered. A SAR may be particularly important where the order does not relate to the entirety of the funds held in the account and other transactions are contemplated.

All of these issues are complex and engage a variety of legislative provisions as well as private and public law obligations. Any recipient of such an order should take legal advice promptly given the potential consequences of errors.

The Future

The civil recovery regime in Guernsey appears to be being put to good use. We may reasonably expect the authorities to continue considering applying it as often as possible.

There are no proposals afoot in Guernsey to reform the forfeiture regime, but there are proposals in Jersey. The Jersey proposals go further than the Guernsey regime, proposing forfeiture of funds in bank accounts subject for 12 months or more to a 'No Consent' following, a SAR consent request. Similar proposals would be welcome in Guernsey to remove the burden on FSBs otherwise left holding potentially onerous funds for an unlimited time.

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