Article

Civil Recovery of the Proceeds of Crime and Unlawful Conduct in Bermuda and the Cayman Islands: recent developments

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As leading international financial centres, both Bermuda and the Cayman Islands have detailed legislation in place providing methods for the civil recovery by Governmental agencies of the proceeds of crime and unlawful conduct, in the form of Bermuda's Proceeds of Crime Act 1997 and the Cayman Islands' Proceeds of Crime Act (2020 Revision) respectively, and associated procedural rules.

The Proceeds of Crime legislation provides the enforcement authorities in Bermuda and the Cayman Islands with an extensive armoury of legal tools by which to freeze, and to recover, property which is, or which represents, the proceeds of crime and unlawful conduct, applying just the civil standard of proof, even in the absence of a criminal prosecution or a criminal conviction.

These legal tools include, for example, the use of civil recovery orders, property freezing orders, interim receiving orders, and vesting and realisation orders.

The primary purposes of civil recovery proceedings are to ensure that property derived from criminal conduct is taken out of circulation and use, and to enforce a measure of recovery for the benefit of the state, and society at large.

As illustrated by the Cayman Islands' Director of Public Prosecution's Policy Guidance Notes dated 24 January 2020, civil recovery proceedings can be considered and pursued in a wide range of circumstances, including in cases where:

- the only known criminality has occurred outside of the jurisdiction, and the relevant offence does not attract extra-territorial liability so as to justify a local criminal prosecution;
- there is no identifiable living suspect who is within the jurisdiction, or who is realistically capable of being brought within the jurisdiction;
- proceeds of crime can be identified but cannot be linked to any individual suspect or offence;
- a law enforcement or prosecuting authority considers that there is insufficient evidence to justify a criminal prosecution or criminal conviction to the criminal standard of proof (i.e. beyond reasonable doubt), but sufficient evidence to satisfy the civil standard of proof (i.e. the balance of probabilities);
- a prosecution has been conducted, but has not resulted in a conviction, despite the apparent strength of the evidence;
- there appears to be an urgent need to take action to prevent offending, or secure the proceeds of crime, in advance of a future criminal prosecution;
- it is not practicable to investigate or prosecute all of those with a peripheral involvement in the criminal conduct, and a strategic approach is taken with respect to minor participants;
- the offender is being prosecuted in a foreign jurisdiction, and is expected to receive a sentence that reflects the totality of the offending, so that the public interest does not require a prosecution in the Cayman Islands.

The fact that no criminal convictions have yet been secured anywhere in the world in connection with the property that is the subject of the civil recovery proceedings has been held to be legally irrelevant, given the differing standards of proof between criminal

proceedings and civil recovery proceedings: see, for example, *Gale v Serious Organised Crime Agency* [2011] UKSC 49 and *Attorney-General and Minister of Legal Affairs (Enforcement Authority) v Zirkind* [2016] SC Bda 105 Civ[1].

Despite the fact that there have been a number of successful civil recovery proceedings to date (both by way of judgment and by way of settlement), there are signs in the recent case law that the Courts of Bermuda and the Cayman Islands are keen to ensure a level playing-field between enforcement authorities and defendants with arguable explanations or meritorious positions, having regard to the Constitutional right in each jurisdiction for every defendant to have a fair trial, in both criminal proceedings and in civil proceedings.

In its recent judgment dated 5 April 2022 in the case of *Attorney-General and the Minister of Legal Affairs (Enforcement Authority) v Patino* [2022] SC Bda 23 Civ, the Supreme Court of Bermuda has expressly acknowledged that "*Bermuda, as a leading international business jurisdiction, has a compelling interest in ensuring that companies incorporated in this jurisdiction are not used for the purposes of depositing proceeds of unlawful conduct even if the unlawful conduct took place outside the jurisdiction*".

On the particular facts of that case, however, Chief Justice Hargun dismissed an application by the Attorney-General for a Civil Recovery Order under section 36X of Bermuda's Proceeds of Crime Act 1997, relating to an investment account held with Sun Life Financial Investments in Bermuda, valued in the region of US$450,000.

Applying the civil standard of proof (i.e. the balance of probabilities), the Supreme Court of Bermuda held that it was unable to be satisfied, on the available evidence, and having regard to the defendant's explanations, that the relevant assets represented the proceeds of unlawful conduct or money laundering.

In a separate recent judgment dated 21 September 2021, in the case of *Director of Public Prosecutions v Arani et al*, POCA No 3 of 2020, the Grand Court of the Cayman Islands has sought to clarify an important point of statutory interpretation under sections 84 and 92 of the Cayman Islands' Proceeds of Crime Act (2020 Revision) regarding the potential use by defendants of frozen monies that are the subject of a Property Freezing Order for payment of reasonable legal expenses in their defence of the civil recovery proceedings, subject to the permission of the Court.

The Grand Court made clear in that case, that, in enabling the payment of reasonable legal expenses, the Court should adopt a restrictive or cautious approach, "*so as to preserve property pending the making of any final recovery orders*".

In doing so, the Grand Court has endorsed the approach taken by the English Court of Appeal in the case of *Serious Organised Crime Agency (SOCA) v Azam & Ors* [2013] EWCA Civ 970 to the effect that it is incumbent on a defendant to persuade the Court to permit the use of frozen monies for payment of that defendant's reasonable legal expenses, having regard to the defendant's disclosure of any other available assets from which to do so, and the interests of justice.

As the enforcement authorities in both Bermuda and the Cayman Islands become increasingly proactive in the commencement of civil recovery proceedings, it is likely that there will be an increasing number of assets located in Bermuda and the Cayman Islands that will become the subject of Property Freezing Orders, and, in turn, variation applications to enable the payment of defence costs. The Grand Court's recent judgment should provide defendants, and their lawyers, with an appropriate degree of comfort that they will have sufficient resources to contest the making of such orders, and civil recovery proceedings more generally, in appropriate cases, where there are no other available assets or sources of funding.

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[1] See also, in Bermuda, *Attorney General (Enforcement Authority) v Tito Jermaine Smith* [2018] Bda LR 50 and *Attorney General and Minister of Legal Affairs v Kenith Clifton Bulford* [2021] Bda LR 27.