



GUYANA CIVIL RECOVERY GUIDE

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AML/CFT/PF NATIONAL COORDINATION COMMITTEE

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1. Introduction¹

Civil recovery legislation has evolved in response to the growing threat from serious, organised criminals, whose wealth, power, and influence allow them to distance themselves from their criminal activity; making criminal prosecution and confiscation extremely difficult, and in many cases impossible.

In some cases, prosecution is not possible because the offender is deceased or has absconded from the jurisdiction.

Civil recovery operates to allow the office of the Director of Public Prosecutions (DPP) and other relevant competent authorities to recover criminally acquired property, even if the owner themselves has not, for whatever reason, been prosecuted for the criminal offence.

The legislation operates in rem (against the property) as opposed to criminal confiscation which operates in personam (against the person).

The DPP or other relevant competent authority can apply to the High Court to recover property that he can prove, to the civil standard, is, or represents, property which has been obtained through unlawful activity, or is tainted.

The legislation also provides for recovery of cash in proceedings in the Magistrates' Court, if the cash represents property obtained through, or intended to be used in criminal activity. This Guide will only address the former scenario, civil proceedings before the High Court to recover property, as Guidance on legislation is provided in the Forfeiture of Instrumentalities and Cash Guidance 2023.

Serious, organised crime is a global problem and in order to combat it, every country must play its part. The most effective weapon against crime is not detection but prevention; the removal of the incentive to commit the crime in the first place.

Without the financial rewards on offer, few, if any people would be motivated to ship drugs across continents, launder the proceeds of crime or defraud or steal from others.

In Guyana, civil recovery will play an essential part of the fight against crime. It is hoped that this Practical Guide will provide assistance when dealing with civil recovery cases. The Guide has been drafted specifically for Guyana. It is based upon domestic legislation and attempts to address some of the issues which may arise in the legal system.

¹ Introduction is based on the Introduction of the Civil Recovery Guide for Dominica (2015) by Ms. Nicola Suter

This Guide provides the statutory provisions, as well as actions that can be taken under the MACMA for asset recovery.

Case law is also a very important tool, and would have been included in this Guide.

2. CIRCUMSTANCES FOR CIVIL RECOVERY

There are many circumstances where civil recovery proceedings may be appropriate:

(a) There has been no prosecution for whatever reason (there may be insufficient evidence to establish criminality beyond a reasonable doubt, a witness may have died or the defendant may have absconded).

See *The Director of the Assets Recovery Agency v Taher and Ors* [2006] EWHC 3402 for an example of a case where the Crown Prosecution Service took the decision not to proceed with the criminal case due to the fact that certain evidence could not be disclosed.

Subsequently, the Asset Recovery Agency (the Recovery Authority in the United Kingdom at the time) applied for a recovery order.

(b) The defendant may have been tried for an offence but acquitted, or convicted of an offence, but the conviction quashed and no retrial ordered.

In *SOCA v Gale & Ors* [2011] UKSC 49 the Supreme Court considered whether or not the State should be either barred, or subject to the criminal standard of proof, if they sought to rely upon evidence in civil recovery proceedings, that had already been relied upon in earlier criminal proceedings, which had resulted in the defendant's acquittal.

In that case, it had been held in the lower court that the property that was subject to the recovery order had been derived from criminal activity on the part of one or other, or both, of the appellants, in the form of drug trafficking, money laundering and tax evasion in the United Kingdom, Spain, Portugal and other jurisdictions.

The judge so found, notwithstanding that Mr. Gale had never been convicted of drug trafficking – albeit that in Portugal he was prosecuted and acquitted of drug trafficking, and in Spain criminal proceedings against him for drug trafficking were brought but discontinued. In the Supreme Court, the appellants pleaded a breach of Article 6 of the European Convention of Human Rights (the right to a fair trial).

They argued in that, in effect, the Portuguese case was being re-tried without the benefit of ready witness availability, and in defiance of the verdict of the overseas court. The Supreme Court ruled in favour of SOCA.

In his judgment, Lord Phillips reviewed the Strasbourg jurisprudence in detail. In particular, His Lordship considered numerous decisions on whether certain proceedings, which were subsequent to the criminal proceedings, should be considered 'a consequence and the concomitant of the

criminal proceedings'. If subsequent proceedings were considered sufficiently linked to be a concomitant of the criminal proceedings, Article 6(2) of the ECHR (the presumption of innocence) would be engaged.

Despite clearly stating that this 'confusing' area requires further examination by the Grand Chamber, Lord Phillips (with whom Lord Mance, Lord Judge and Lord Reed agreed) was of the opinion that in this case, the civil recovery proceedings in the 24 United Kingdom, were in no way linked to the criminal proceedings in Portugal, and Article 6(2) was not engaged.

He stated at paragraph 35: 'On no view does this jurisprudence support Mr. Mitchell's submission that the appellant's acquittal in Portugal precludes the English court in proceedings under POCA from considering the evidence that formed the basis of the charges in Portugal.

The link between the Portuguese criminal proceedings and the English civil proceedings, which Strasbourg would appear to consider so critical, is not there. Nor does this jurisprudence lend any support to the proposition that the criminal standard must be applied to proof of criminal conduct in proceedings under POCA.'

For an example of civil recovery proceedings following a conviction and subsequent acquittal, see *Serious Organised Crime Agency v Olden* [2009] EWHC 610).

(c) The defendant has died.

(d) The person in possession of the property has been convicted of an offence abroad (which would also constitute unlawful conduct had it occurred in Dominica).

(e) A confiscation order has been made but later quashed.

It is also important to note that in any case where there is a reasonable prospect of conviction, and it would be in the public interest to charge a person with a criminal offence, criminal proceedings should always take precedence over civil recovery proceedings. The Code for Prosecutors must be properly applied to each case.

There are four separate avenues for non-conviction-based forfeiture in Guyana:

1. Forfeiture orders pursuant to section 72 of the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009;
2. Civil forfeiture orders pursuant to section 82 of the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009; and
3. Freezing property of listed entities or persons pursuant to sections 68A – 68H of the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009.

4. The use of the Mutual Assistance in Criminal Matters Act with regard to asset recovery is also discussed below

3. Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009

A. Forfeiture Order

Section 72 of the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009 permits the DPP to apply to the High Court for a forfeiture order against terrorist property.

i. What can be Forfeited?

The High Court must forfeit any specified property related to the order that the court is satisfied is terrorist property.

ii. Terrorist Property

“Terrorist property” is defined under section 2 of the Act as:

- (a) proceeds from the commission of terrorism;
- (b) money or other property which has been or is likely to be used to commit terrorism;
or
- (c) money or other property which has been, is being, or is likely to be used by a terrorist group.

Section 2 also defines “Terrorist Act” and “Terrorist”.

iii. Applicant and Appropriate Court

The Applicant is the DPP, and the appropriate court is the High Court.

iv. Standard of Proof

The standard of proof for applications under section 72 is the balance of probabilities.

v. Notice

The DPP must provide written notice of the application to any person who is known to own or control (directly or indirectly, wholly or jointly) or have an interest in the terrorist property identified in the application. Furthermore, the court may give notice to any person that may have an interest in the property, or publish a notice in the Gazette or newspaper (section 73).

vi. Protection for Third Parties

Third party interests are protected by section 74 of the Act. If a person claiming an interest in property to which an application relates satisfies the Court that he: (a) has an interest in the property; (b) has, in the circumstances, exercised reasonable care to ensure that the property is not terrorist property; and (c) is not a member of a terrorist group, the court shall order that the interest shall not be affected by the forfeiture order.

Innocent purchasers of terrorist property are also protected, provided they can prove to the court that they are a *bona fide* purchaser for value, without notice.

vii. Vesting of Property and Registration

Where a Court makes a forfeiture order against any terrorist property, the property vests absolutely in the State, and the State is entitled to be registered as the owner of property.

The DPP has power on behalf of the Government to do or authorise the doing of anything necessary or convenient to obtain the registration of the State as owner, including authorizing the execution of any instrument by a person transferring an interest in property of that kind.

viii. Freezing Order

In order to preserve property pending proceedings under section 72 of the Act, the DPP may apply to the High Court *ex parte* under section 71 to freeze money in an account or other property. The DPP must have reasonable grounds to believe the money or other property is terrorist property, or held by a person on behalf of a terrorist or terrorist organization.

A person affected by a freezing order may apply to the court for a revocation of the order in relation to his property and the court must revoke the freezing order if it is satisfied that the account or other property, or the person's interest in it, is not owned, or held by, or on behalf of a terrorist or terrorist organisation. No person shall be held liable in any court for any good faith action or omission in accordance with this section.

Full and Frank Disclosure

When applying *ex parte* for a property freezing order, the DPP or relevant competent authority must keep in mind that he is under a duty of full and frank disclosure of all material facts (see *R v Kensington Income Tax Commissioners ex p de Polignac* [1917] 1 KB).

In *Siporex Trade SA v Condel Commodities* [1986] 2 Lloyd's Rep 428, Bingham LJ stated:

‘...an applicant must show the utmost good faith and disclose his case fully and fairly... he must, for the protection and information of the defendant, summarise his case and the evidence in support of it.... must identify the crucial points for and against the application...’

In *Director of Public Prosecutions v Shankiel Myland* (GDAHCV 2012/0251) Justice Taylor-Alexander considers the duty of full and frank disclosure in relation to an application for a restraint order. She states:

‘There is always an obligation on Counsel, on pain of violation of the practitioner's oath and of the overriding objective to be full and frank in the disclosure of information relevant to the proceedings without discretion. The importance of Counsel's obligation is increased where, as in this case, the application was without notice...’

In *Brinks Mat Ltd v Elcombe* [1988] 1 WLR 1350 Ralph Gibson LJ set out the following duties and principles that, in his opinion, encapsulated the duty of full and frank disclosure:

- (a) the duty of the applicant to make full and fair disclosure of all material facts;
- (b) the material facts are those which it is material for the judge to know in dealing with the application as made;
- (c) materiality is to be decided by the court and not by the applicant or his legal advisors;
- (d) the applicant must make proper inquiries before making the application;
- (e) the extent of the inquiries that are proper and necessary depend upon the circumstances of the case;
- (f) if a plaintiff obtains an *ex parte* injunction without full disclosure, they should not derive any advantage from the breach of their duty;
- (g) whether the non-disclosure is of sufficient materiality to justify immediate discharge of the order depends upon the importance of the fact that was not disclosed; and
- (h) an order will not automatically be discharged due to an omission.

The court has a discretion to discharge an order, continue an order, or make new terms.

B. Civil Forfeiture Order

i. What Can be Forfeited?

Section 82 of the Act empowers the Court to make a civil forfeiture order with respect to property, if it is satisfied that the property:

- (1) directly or indirectly constitutes the proceeds of crime; or
- (2) is property that was acquired, in whole or in part, with, or in connection with, property that directly or indirectly, constitutes the proceeds of crime.

The value of the property must be greater than two million Guyana dollars. Furthermore, such an order should not be made if there is a serious risk of injustice (section 82(8)).

ii. Proceeds of Crime

Section 2 defines “Proceeds of Crime” as any property derived or realized directly or indirectly from a serious offence. This definition includes, on a proportional basis, property into which any property derived or realised directly from the offence was later *converted, transformed, or intermingled. Income, capital or other economic gains* derived or realised from such property at any time since the offence are also considered “proceeds of crime” as are *income, profits or other benefits* from the proceeds of the crime, and property held by any other person and assets of every kind whether tangible or intangible.

“Serious offence” has the same meaning as for pecuniary penalty orders above. The amendment to the AML/CFT Act also includes unlawful conduct in section 2, linked to serious offence; as a result, any unlawful conduct is applicable with regard to civil recovery.

“unlawful conduct” means-

- (a) conduct occurring in any part of Guyana if it is unlawful under any law in Guyana; or
- (b) conduct which—
 - (i) occurs in a country outside of Guyana and is unlawful under the criminal law of that country, and
 - (ii) if it occurred in Guyana, it would be unlawful under any law in Guyana;

In *The Director of the Asset Recovery Agency v Green* [2005] EWHC (Admin) 3168, Sullivan J held that while the Director of the Asset Recovery Agency (the appropriate enforcement authority in the United Kingdom at the time) need not prove the commission of a specific offence, it was not sufficient to merely set out the matters that are alleged to constitute the unlawful conduct.

The Director must prove that the property was obtained by or in return for unlawful conduct of a specific kind or one of a number of kinds.

The issue of proving that property was obtained through unlawful conduct was considered further by the Court of Appeal in *The Director of the Asset Recovery Agency v Szepietowski & Ors* [2006] EWHC (Admin) 3228 where Moore-Bick LJ stated:

‘..It is sufficient in my view for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances and that the property was obtained by or in return for it. In my view Sullivan J was right therefore to hold that in order to succeed the Director need not prove the commission of a specific criminal offence in the sense of proving that a particular person committed a particular offence on a particular occasion. Nevertheless, I think that it is necessary for her to prove that specific property was

obtained by or in return for a criminal offence of an identifiable kind (robbery, theft, fraud or whatever) or..... by or in return for one or other of a number of offences of an identifiable kind..’

In *SOCA v Gale and Ors* [2009] EWHC 1015, Griffith Williams J gave some guidance about the inference that may be drawn from the fact that a respondent has no identifiable means to justify his lifestyle. He states:

‘While a claim for civil recovery may not be sustained solely on the basis that a respondent has no identifiable lawful income to justify his lifestyle, the absence of any evidence to explain that lifestyle may provide the answer because the inference may be drawn from the failure to provide an explanation, or from an explanation which was untruthful (and deliberately so) that the source was unlawful’

When deciding whether a person obtained property through unlawful conduct it is not only unnecessary to point to a specific type of conduct but is also immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct.

iii. Applicant and Appropriate Court

The application for a civil forfeiture order must be made by ‘the applicant’ (section 82). Section 79 defines the “applicant” as an officer who has applied to the court for the making of an interim order or a restraint order. An “officer” means a police officer not below the rank of Superintendent of Police, or a person authorised by the Director of the Financial Intelligence Unit (section 79).

The appropriate court to make a civil forfeiture order is the High Court. Upon request by either party and if the Court deems it proper, proceedings for an interim order or civil forfeiture order may be heard in private, and publication in respect of the applications may be prohibited (sections 86(3) and (4)).

iv. Officer’s Affidavit

Where an officer sets out the following information in their affidavit, it shall be taken by the Court as evidence of the matters to which it relates:

- the officer's belief that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime; or
- the respondent is in possession or control of specified property which was acquired, in whole or in part, with, or in connection with, property that, directly or indirectly, constitutes proceeds of crime; and
- the value of the property is not less than two million U.S. dollars.

v. Standard of Proof

The standard of proof required to determine any question arising under this Part VII is the balance of probabilities (section 86(2)).

The issue of reversal of the burden of proof and presumption of innocence was also considered in Gilligan and SOCA v Gale.

In Gilligan Counsel for the respondent argued that the Proceeds of Crime Act 1996 failed to protect the presumption of innocence and shifted the burden of proof in what is, in reality, a criminal or quasi-criminal matter onto the Plaintiff.

McGuinness J pointed out that it is in fact for the State to prove to the satisfaction of the Court that property has been obtained through unlawful conduct. It is only once that initial burden has been discharged that a person is obliged to furnish the Court with evidence to the contrary. At 84 that point, the respondent is free to discredit or challenge any evidence adduced by the State. He states at paragraphs 103 and 104:

‘It must be remembered that under Section 2 of the Act it is necessary before any Order can be made pursuant to either Section 2 or Section 3 for the State to establish to the satisfaction of the Court on the balance of probabilities that the Respondent is in possession or control of assets which comprise directly or indirectly the proceeds of crime. It is only when that initial evidential burden has been discharged by the State that any obligation is imposed upon a person to furnish any evidence to the Court. Secondly, a Respondent is free to challenge or discredit any evidence adduced by the State pursuant to the provisions of the Act. This can be achieved in a number of ways.

A Respondent is free to cross-examine the deponent of any Affidavit used to ground an application and thereby undermine the proofs adduced by the State. Alternatively, a Respondent may introduce independent "real" or Third-Party evidence which would indicate that the facts set out in the State's case are wrong. Alternatively, a Respondent is free to adduce evidence in the form of oral or Affidavit evidence of his or her own indicating that the evidence relied upon by the State is incorrect or unreliable’.

McGuinness J goes on to state that once it is accepted that proceedings are in fact civil, as he had in this case, there is no constitutional infirmity in a procedure whereby the onus is placed on a person seeking property, to negative the inference from evidence adduced, that a criminal offence has been committed.

He states: ‘In civil proceedings the creation of presumptions and the shifting of the onus of proof is much more frequent and is clearly permissible.’

In *SOCA v Gale & Ors* [2011] UKSC 49 the civil recovery proceedings relied chiefly upon evidence from previous criminal proceedings in Portugal, of which the defendant had been acquitted. The respondent argued that using such evidence was contrary to Article 6(2) of the European Convention on Human Rights.

Lord Clarke summed up the opinion of the Lords when he said at paragraph 60 of the judgment;

‘Secondly, I note that in the recent case of *R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2011] UKSC 18; [2011] 2 WLR 1180, where some of these issues were touched on, Lord Hope said at para 111 that the principle that is applied in Strasbourg is that it is not open to a state to undermine the effect of an acquittal. It appears to me that that is indeed the underlying principle and that if, as here and indeed in *Adams*, the effect of the acquittal is not undermined, there should be no question of holding that there is any conflict with the presumption of innocence enshrined in article 6(2) of the European Convention on Human Rights’.

vi. Vesting of Property

If property is subject to a civil forfeiture order, it vests in a receiver or to such other person the Court sees fit (sections 82(1) and (4)). The receiver may sell or otherwise dispose of any property transferred to him at the direction of the Court. All proceeds of sale and any moneys transferred to the receiver must be paid into the Consolidated Fund (section 82(5)).

vii. Protection for Third Parties

Section 82(6) gives an opportunity to any person who claims ownership of property to be heard and to make representation about why a civil forfeiture order should not be made in respect of their property.

viii. Postponement

The court may adjourn proceedings under section 82 for up to two years if it is appropriate and in the interest of justice (section 82(7)).

ix. Bankruptcy and Winding Up of Companies

Where a person who is in possession or control of property is adjudicated bankrupt, any property subject to an interim order, a restraint order, or a civil forfeiture order, made before the order adjudicating the person bankrupt, is excluded from the property of the bankrupt person.

Similarly, where property that is the subject of an interim order, a restraint order or a civil forfeiture order is in the possession of a company and the interim, restraint or civil forfeiture order is made before the passing of the resolution for voluntary winding up of the company or the petition for winding up of the company by the Court, the functions of the liquidator or any provisional liquidator shall not be exercisable in relation to the property (section 91).

C. Interim Orders

i. What is the Effect of an Interim Order?

An interim order prohibits the person, or any other specified person, or any other person having notice of the order, from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value during the period of 56 days from the date of the making of the order. After 56 days, the interim order will lapse unless it is varied or discharged earlier or an application for a restraint order has been made or is pending (section 80(5)).

The provisions relating to registration of the interim order are set out in section 88 of the Act.

ii. Applicant and Appropriate Court

Section 80 of the Act provides that an officer may apply for an interim order to the High Court. These applications must be made *ex parte*.

iii. What Can be Made Subject to the Interim Order?

An interim order will be granted if the Court is satisfied that:

- the person is in possession or control of specified property and that the property constitutes (directly or indirectly) proceeds of crime; or
- the person is in possession or control of specified property which was acquired, in whole or in part, with, or in connection with, property that, directly or indirectly, constitutes proceeds of crime; and
- the combined value of the property is not less than two million U.S. dollars (section 80(1)).

Where a person has been adjudicated bankrupt, the interim order will not be exercised in relation to the property of the bankrupt person (section 89(2)).

iv. Standard of Proof

The standard of proof for these applications is the balance of probabilities (section 80(1)).

In *R (on the application of the Director of the Asset Recovery Agency) v (1) Jia Jin He and (2) Dan Dan Chen* (2004) EWHC Admin 3021, the court gave guidance on the appropriate standard of proof when deciding whether matters alleged to constitute criminal conduct have occurred.

Collins J stated:

‘...since it is necessary to establish that there has been criminal conduct in the obtaining of the property, the court should look for cogent evidence before deciding that the balance of probabilities has been met. But I have no doubt that Parliament deliberately referred to the balance of probabilities, and that the court should not put a gloss upon it, so as to require that the standard approach is that required in a criminal case.....It is plain that Parliament deliberately imposed a lower standard of proof as the standard appropriate for these proceedings.’

The standard and burden of proof was considered further by Griffith Williams J in *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB) where he states at paragraph 9:

‘The burden of proof is on the claimant and the standard of proof they must satisfy is the balance of probabilities. While the claimant alleged serious criminal conduct, the criminal standard of proof does not apply, although "cogent evidence is generally required to satisfy a civil tribunal that

a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not" – see Secretary of State for the Home Department –v Rehman [2003] 1 AC 153 at paragraph 55 per Lord Hoffmann.'

Griffith Williams J went on to make the following comments about the burden of proof:

'While there is no burden on a respondent to provide answers, clearly, if an answer is not provided to an important question, and the court is satisfied that the respondent had the knowledge to answer the question and chose not to, an inference adverse to that respondent may be drawn, but any decision as to a failure to answer must have regard to delay, which must be ruled out as a possible explanation for the failure to answer before any adverse inference may be drawn'

v. Notice

Notice of the order must be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain their whereabouts (section 80(2)(b)).

vi. Protection for Third Parties

Section 80(3) protects innocent owners of property, provided they can show that the property does not meet the conditions for making an interim order or is not valued at two million U.S. dollars or more. In such cases, the interim order may be varied or discharged (section 80(3)).

vii. Exclusions

Section 84 provides for property subject to an interim order to be excluded from the order to permit payment of reasonable living expenses, legal expenses, and costs related to carrying on a business, trade or profession. Such an exclusion may be ordered by the Court on the application of the respondent or any person affected by the order.

viii. Appointment of Receivers

Where an interim order or a restraint order is in force, the Court may (at any time) appoint a receiver to take possession of property to which the order relates, or to manage, keep possession of, dispose of, or otherwise deal with the property. The powers of the receiver may be made subject to certain exceptions or conditions (section 85).

Interim Receiver Orders

The interim receiver has a broader range of duties and powers than the receiver appointed under a management receiving order.

There is a management role, similar to that of a receiver granted under a management receiving order (detaining, taking custody of, or preserving property to which the interim receiving order applies) and there is also an investigative role.

As part of their investigative duties, the interim receiver must act on behalf of the court to determine the following:

- (a) whether the property to which the order applies is recoverable property or associated property;
- (b) whether there is any additional recoverable property that is related to the same unlawful conduct, and if so, who holds it; and
- (c) whether there is any additional tainted property that is related to the same unlawful conduct, and if so, who holds it.

In *Director of the Asset Recover Agency v Wilson and Wilson* [2007] NIHC (HIGF5852) Higgins J observed:

‘The role of the Interim Receiver is that of a Court-appointed expert to investigate the origin and ownership of assets and to report to the Court on those assets. In the absence of evidence to the contrary, such a report will be compelling evidence in any application based upon it. Its detailed contents relating to accountancy matters are accepted as fact unless shown otherwise’.

In *The Director of Asset Recovery Agency v Jackson* [2007] EWCA (QB) 2553 King J highlighted the independent role of the interim receiver by saying this:

‘...the Receiver is not the agent of any of the parties. In my judgment, she is akin to an officer of the Court and is reporting and giving evidence to the Court in that capacity.....Further, in principle, I am prepared to accept that the Receiver’s findings as to recoverable property should be given considerable persuasive weight by the Court and to that extent her report enjoys special status...However this said, I also agree with the Respondent’s submissions that the Receiver’s findings of recoverable property are not binding on the Court...’

Case law – varying or setting aside interim receiver orders

When considering whether to vary or set aside an interim receiving order, the court must carefully balance that people are not wrongly enjoined, or enjoined for a longer period than necessary, against the overriding objective to preserve recoverable property.

The court must take care to avoid discharging an interim receiving order prematurely before all of the information necessary to making an accurate determination about the property is at hand.

In *The Director of Asset Recovery v Molloy* [2006] NIQB 49, Coghlan J dealt with an application to discharge an interim receiving order on the grounds that no unlawful conduct on the part of the respondent had been identified, nor had any property been identified that had been obtained as a result of unlawful conduct.

Coghlan J held that identification of property that represented the product of unlawful conduct could not be expected at such an early stage of the application, given the complexity of the property arrangements.

He stated:

‘...a good deal of progress has already been made and it has become necessary to amend Schedule 2 of the original receiving order so as to exclude a substantial amount of property which is no longer regarded as recoverable. However, at this stage, I remain of the view that there is a good arguable case that the property to which the order relates is or includes recoverable property...and accordingly, I dismiss this application’

ix. Disclosure

At any time during proceedings related to interim or restraint orders, or while such an order is in force, the Court (or, in the case of an appeal in such proceedings, the Court of Appeal), may by order direct the respondent to file an affidavit specifying:

- (a) the property of which the respondent is in possession or control; or
- (b) the income, and the sources of the income, of the respondent during such period not exceeding ten years, ending on the date of the application for the order as the Court concerned may specify, or both.

D. Restraint Orders

i. What is the Effect of a Restraint Order?

The applicant, appropriate court, conditions for making the order, effect of a restraint order, notice provisions, exclusions, receivers, disclosure, registration and protections for third parties are largely the same as those for an interim order.

The evidence in support of the application for the restraint order should be tendered by the officer in the same manner as evidence tendered in support of a civil forfeiture application (sections 81(1) and 86).

The primary difference between the interim order and restraint order is that the restraint order remains in place until a civil forfeiture order is made (or the period for an appeal against a civil forfeiture order has lapsed or the appeal has been dismissed or determined).

E. Freezing Property of Listed Persons or Entities

Sections 68A through 68H of the Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009 deal with the freezing of property belonging to a listed person or entity.

The term “listed person or entity” means a person or entity specified in section 2(2) by the Minister responsible for Finance pursuant to United Nations Security Council Resolutions 1373 and its successor resolutions, and a person or entity designated by the United Nations Security Council pursuant to United Nations Security Council Resolution 1267 and its successor resolutions.

Section 68 of the Act makes it an offence for any person or entity to deal (either directly or indirectly) with property of a listed person or entity. It is also an offence to enter into or facilitate

a transaction in relation to such an entity or person, provide financial or other related services with respect to their property or make any property or financial service available, directly or indirectly, for the benefit of a listed person or entity.

If any person reports a request to deal with property of a listed person or entity, the DPP must immediately (within 5 days) apply to a Judge in Chambers for a freezing order over the property (section 68A(5)(a)). The appropriate court to hear such an application is the High Court. The Court must make the order if it is satisfied that the person or entity is in accordance with section 68A(6A)(a) and (b).

Section 68B gives the Minister the power to unfreeze funds or other property for reasons including: that the person or entity no longer meet the criteria, or for the payment of basic expenses or certain fees. Section 68C provides access to frozen funds or other property for the purpose of meeting reasonable legal expenses, living expenses, or the payment of certain debts.

By virtue of section 68A(1), the provisions of sections 71, 71(3) – (8), and 72 – 75 must then apply to funds and property frozen under section 68A of the Act.

Sections 68E – H of the Act contain similar provisions that deal with United Nations Security Council Resolution 1718 (2006) and its successor resolutions and United Nations Security Council Resolution 2231 (2015) and its successor resolutions.

Table²:

CIVIL FORFEITURE ORDER	FORFEITURE ORDER	FREEZING ORDER
<p>Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009 (section 82)</p>	<p>Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009 (sections 46 and 72)</p>	<p>Anti-Money Laundering and Countering the Financing of Terrorism Act of 2009 (sections 46 and 68A)</p>
<p>Proceeds of Serious Offence</p>	<p>Terrorist Property</p>	<p>Listed Person or Entity</p>
<p>Application to the High Court</p>	<p>Application to the High Court</p>	<p>Application to the High Court</p>
<p>The applicant is the DPP</p>	<p>The applicant is the DPP</p>	<p>The applicant is the DPP</p>
<p>Applies to property that:</p> <ul style="list-style-type: none"> • directly or indirectly constitutes the proceeds of crime; or • is property that was acquired, in whole or in part, with, or in connection with, property that directly or indirectly constitutes the proceeds of crime. 	<p>Applies to property that is terrorist property. This includes:</p> <ul style="list-style-type: none"> • proceeds from the commission of terrorism; • money or other property that has been, or is likely to be used to commit terrorism; or • money or other property which has been, is being, or is likely to be used by a terrorist group. 	<p>Freezing of property belonging to a “listed person or entity” meaning:</p> <ul style="list-style-type: none"> • a person or entity specified in section 2(2) by the Minister responsible for Finance pursuant to United Nations Security Council Resolutions 1373 and its successor resolutions; or • a person or entity designated by the United Nations Security Council pursuant to United Nations Security Council Resolution 1267 and its successor resolutions.
<p>The value of the property must be greater than two million U.S. dollars.</p>		

² Errata – two million US dollars in the first column should be two million **Guyana dollars**

4. Mutual Legal Assistance

The provisions of the Mutual Assistance in Criminal Matters Act No. 38 of 2009 apply to asset recovery. Section 2 states that Parts 2 and 3 of the Act (which relate to requests by Guyana to Commonwealth countries for assistance (Part 2) and requests by Commonwealth countries to Guyana for assistance (Part 3)) include:

- (i) forfeiture proceedings;
- (ii) proceedings to restrain dealings with property;
- (iii) proceedings for the confiscation of property; and
- (iv) proceedings for the imposition of pecuniary penalties, calculated by reference to the value of property, arising out of criminal proceedings, whether such proceedings be characterised as criminal or civil proceedings.

Section 14 of the Act relates to tracing of property. Specifically, the section pertains to requests to Commonwealth countries to provide assistance in identifying, locating, and valuing the proceeds of any person who has been charged with or convicted of a serious offence, or is suspected on reasonable grounds of having committed such an offence in Guyana.

Serious offence is defined under section 2 of the Act.

Sections 15 and 16 of the Act relate to property that is suspected to be located in a Commonwealth country that is the subject of a forfeiture order, confiscation order, or pecuniary penalty order in Guyana. The type of assistance that may be requested under this section is the enforcing of the order (and/or restraint of property) in the Commonwealth country. No such request may be made under this section in relation to property valued at less than one million U.S. dollars.

Sections 33 – 35 of the Act set out the assistance Guyana can render, at the request of any Commonwealth country, in relation to identifying, locating, or assessing the value of assets where they are suspected to be the proceeds obtained by a person who has either been charged with or convicted of a specified serious offence or is suspected on reasonable grounds of having committed a specified serious offence.

The AML/CFT (Miscellaneous) Regulations (No 12 of 2023), by regulations 9-11 provide a procedure of asset sharing with overseas authorities. The provisions are replicated below –

1. (1) Where a relevant agreement has been made with a convention State, the Minister may, by order, declare that the provisions of these Regulations in relation to-

(a) section 34 of the Mutual Assistance in Criminal Matters Act; or

(b) section 76 of the Act,

shall apply in respect of that state subject to such exceptions, adaptations or modifications as the Minister, having due regard to the terms of such agreement, may deem expedient to specify in the order for the purpose of implementing such terms.

2. (1) Forfeited property may be shared with a convention State only if the Attorney-General certifies in writing that it is proper for the property to be so shared.

(2) The Attorney-General shall, in issuing a certificate under subsection (1), have regard to the provisions of the Mutual Assistance in Criminal Matters Act, the Act and any other relevant law.

3. Forfeited property shall be paid into the National Forfeiture Fund and includes-

(a) any amount paid to the Government pursuant to the Act or any regulations made under the Act in relation to property which is the subject of a relevant agreement;

(b) the proceeds of the sale of any property to which a certificate under regulation 10 relates; and

(c) any amounts transmitted to Guyana pursuant to a relevant agreement.

5. LIMITATION AND RETROSPECTIVITY CONSIDERATIONS

There is no legislated limitation of an application for civil recovery, although there is such for forfeiture upon confiscation by section 46 of the AML/CFT Act. However, there is a caveat by sections 66 and 66A for the Court to have the power to determine, as far as possible, where a property may be considered tainted property and recoverable. This therefore provides an avenue for the Court to have full discretion in determining limitation and retrospectivity.

In *The Director of the Asset Recovery Agency v Szepietowski and Others* [2007] EWCA 766 the Court of Appeal held that where there is ambiguity, the burden was on the respondent to persuade the court that the limitation defence had such good prospects of success that it fatally undermined the enforcement authority's case.

This position was later affirmed in *Gale v The Serious Organised Crime Agency* [2010] EWCA Civ 795 where Lord Justice Carnwath stated at paragraph 25:

‘There is nothing unreasonable in putting the burden on the respondent to establish the necessary facts, since it is he who would be expected to have had the necessary knowledge. Conversely, there is nothing unreasonable in denying him a limitation defence, if his own conduct has made it practically impossible for anyone to discover the true source.’

In *The Director of the Asset Recovery Agency v Szepietowski and Others* [2007] EWCA 766 Court of Appeal also addressed the issue of concealment from the enforcement authority. In that case, the respondent failed to provide an explanation for the source of certain funds, making it impossible for the Court to determine whether property subject to the claim was obtained within the limitation period.

Their Lordships Waller, Wall and Moore-Bick agreed that where there had been concealment from the enforcement authority (in that case the Asset Recovery Agency) the limitation period should recommence on the discovery of the concealment.

In England and Wales, the limitation period that applies to civil recovery proceedings is set out in section 27A of the Limitation Act 1980. The limitation period (twenty years) can only be extended in the case of concealment, fraud or mistake, if it is accepted that section 32 of the Limitation Act 1980 applies to section 27A of that Act.

END