

Asset Recovery

Contributing editors

Jeremy Garson, Daniel Hudson and Gareth Keillor
Herbert Smith Freehills LLP



2019

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Asset Recovery 2019

Contributing editors

Jeremy Garson, Daniel Hudson and Gareth Keillor
Herbert Smith Freehills LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2012
Seventh edition
ISBN 978-1-912377-15-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between July and September 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Jersey	74
Jeremy Garson, Daniel Hudson and Gareth Keillor Herbert Smith Freehills LLP		Simon Thomas and William Redgrave Baker & Partners	
Australia	7	Korea	80
Tobin Meagher, Andrew Moore and Sophia Giardini Clayton Utz		Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim	
Bermuda	14	John P Bang and Seokchun Yun Bae, Kim & Lee	
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		Liechtenstein	86
Canada	19	Thomas Nigg and Eva-Maria Rhomberg Gasser Partner Attorneys at Law	
Maureen Ward and Nathan Shaheen Bennett Jones LLP		Monaco	92
Cayman Islands	25	Donald Manasse Donald Manasse Law Offices	
Angela Barkhouse and Kenneth M Krys KRyS Global		Nigeria	98
Cyprus	31	Babajide O Ogundipe and Nneka I Ofili Sofunde, Osakwe, Ogundipe & Belgore	
Andreas Erotocritou, Antreas Koualis and Irena Markitani AG Erotocritou LLC		Serbia	103
England & Wales	38	Tomislav Šunjka ŠunjkaLaw	
Jeremy Garson, Daniel Hudson and Gareth Keillor Herbert Smith Freehills LLP		Switzerland	110
Greece	48	Marc Henzelin, Sandrine Giroud and Maria Vinogradova Lalive	
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		Ukraine	118
Hong Kong	54	Vitaliy Kasko and Andrii Sliusar Vasil Kisil & Partners	
Nick Gall and Ashima Sood Gall		United Arab Emirates	124
Ireland	60	Ibtissem Lassoued Al Tamimi & Company	
Gavin Smith and William Greensmyth Walkers		United States	129
Italy	65	Carrie A Tendler, Jef Klazen and Clinton J Dockery Kobre & Kim	
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano			

Preface

Asset Recovery 2019

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Asset Recovery*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Jeremy Garson, Daniel Hudson and Gareth Keillor of Herbert Smith Freehills LLP for his assistance with this volume. We also extend special thanks to Jonathan Tickner, Sarah Gabriel and Hannah Laming of Peters & Peters Solicitors LLP, who contributed the original format from which the current questionnaire has been derived, and who have helped to shape the publication to date.

GETTING THE 
DEAL THROUGH

London
September 2018

Cayman Islands

Angela Barkhouse and Kenneth M KryS

KRyS Global

Civil asset recovery

1 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

Parallel proceedings in civil and criminal matters that are based on the same set of facts are permissible.

However, a court may stay a civil proceeding if a defendant would be unjustly prejudiced by providing information in said proceeding that may incriminate him or her in future or current criminal proceedings.

Of persuasive authority is the case of *Panton v Financial Institutions Services Limited* [2003] UKPC 8, in which the Privy Council concluded that in order to obtain a stay of parallel civil proceedings, the defendant would have to show that he or she would suffer unjust prejudice in the ongoing criminal proceedings if they were to continue, taking into account competing considerations between the parties.

In particular, the burden of proof (should there be a stay in proceedings) will lie with the defendant, who must point to a real and non-notional risk of injustice: 'A stay would not be granted if it was deemed to be simply to obtain a tactical advantage by a defendant in criminal proceedings.'

2 Forum

In which court should proceedings be brought?

The structure of the court system is hierarchical, with appeals lying to the court above at each stage. The Summary Court is the first in the hierarchy, dealing with matters up to CI\$20,000, followed by the Grand Court, the Court of Appeal and, finally, Her Majesty's Judicial Committee of the Privy Council.

The Grand Court tries most types of civil disputes. In particular, the Financial Services Division hears complex commercial and trust disputes, which often arise in respect of corporate or trust entities, including the following:

- Cayman Islands-registered investment funds and exempted insurers;
- proceedings under the Companies Law;
- local and foreign bankruptcy proceedings; and
- proceedings for enforcing foreign judgments and arbitral awards.

3 Limitation

What are the time limits for starting civil court proceedings?

Limitation periods are imposed by the Limitation Law (1996 Revision). There are different limitation periods for different types of claims as follows:

- torts: six years from the date of the damage (three years for personal injury or if a motor vehicle caused the damage);
- contracts: six years from the date of the breach;
- claims by a beneficiary against a trustee for fraudulent breach of trust: no limitation period; and
- claims for the recovery of land: 12 years from the date when the right accrued (30 years if the claim is against the Crown).

Part III of the Law contains exclusions and extensions to ordinary time limits (eg, in cases of fraud, concealment or mistake as to when the wrongdoing becomes known).

As in other common law countries, it may be possible for a claimant and a defendant to mutually agree to a 'standstill', which would extend the statute of limitations. This may provide the defendant advance notice that the claimant will file a claim and therefore allow both parties an opportunity to resolve their differences without the limitations period becoming an issue.

4 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

Under section 11 of the Grand Court Law 2008, the Grand Court is a superior court of record of first instance, having unlimited jurisdiction in both criminal and civil matters; it exercises similar jurisdiction as is vested in and capable of being exercised in England and Wales by the High Court and its divisional courts.

The courts of the Cayman Islands have jurisdiction in the following circumstances:

- where a person resides in the Cayman Islands;
- where a company is incorporated in the Cayman Islands;
- where the dispute is about land in the Cayman Islands;
- where a trust is governed by laws of the Cayman Islands; and
- where a breach of contract or a tort has occurred in the Cayman Islands.

Personal service of a claim is required, or delivery to a registered office for corporate entities.

In addition, the court can permit service outside the jurisdiction if the defendant is not present in the Cayman Islands, subject to certain procedural practice. The court will not grant leave to such service unless the claimant provides a supporting affidavit setting out the cause of action demonstrating the following:

- it has a good chance of success;
- there is a real issue that the court should try;
- where the defendant is or is likely to be; and
- the method of service.

The method of service need not be in person, so long as it is in accordance with the law of the country in which service is to be effected.

A defendant can challenge jurisdiction, or argue that the court is the improper forum.

5 Time frame

What is the usual time frame for a claim to reach trial?

The time frame depends on the urgency of the application, the complexity of the matter and the availability of counsel, but the Grand Court has a good reputation for expediting matters when possible. Trials can occur within six months of the claim being filed, although a year is more likely.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

Part IV of the Evidence Law (2011 Revision) provides statutory guidance on what is admissible. However, the rules may also be influenced by English pre-1999 case law as the approach taken to admissibility is generally very similar. If required, the courts may also seek guidance from the Supreme Court Practice (1999 edition) (White Book).

7 Witnesses

What powers are available to compel witnesses to give evidence?

Most parties to litigation are from outside the jurisdiction, so the court has limited power or authority to compel witnesses to give evidence. The court can make an order upon individuals, entities and third parties for the following:

- examination of witnesses either orally or in writing;
- production of documents; and
- inspection, photographing, preservation, custody or detention of any property.

However, the court uses its authority to compel witnesses with caution, and will only do so when it is necessary and justified.

8 Publicly available information

What sources of information about assets are publicly available?

Generally, there is limited information about assets that is publicly available. Cayman Islands-exempt entities are not required to file audited accounts.

Entities licensed or registered with the Cayman Islands Monetary Authority (CIMA) are required to file audited accounts, but that information is not public.

Vehicle registration is not available to the public.

The following information can be made available for a fee or by physical attendance:

- status of standing;
- registered agent and office details;
- annual registration fee payment history;
- real estate property ownership; and
- legal records (those held in other archives, eg, court records).

The following information about an entity may be obtained through a court order:

- company registrar filings;
- articles of incorporation and memorandum of association;
- directors' and officers' register;
- members' register;
- details of the beneficial owner; and
- registered encumbrances.

9 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

The court can order the Financial Reporting Authority to provide information, documents or evidence to third parties pursuant to the Proceeds of Crime Law (2017 Revision).

Further, the Freedom of Information Law (2015 Revision) provides a right of access to information held by public bodies, except when disclosure of those records is exempt under Part III of the Law (ie, for reasons of national security, legal privilege and personal information).

10 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

Two types of discovery actions available to a claimant are *Norwich Pharmacal* and *Bankers Trust* orders.

Norwich Pharmacal orders

A *Norwich Pharmacal* order is typically pre-action and is granted against a third party that has been innocently mixed up in wrongdoing, to force the disclosure of documents or information, which may identify another person (for example a wrongdoer or a potential beneficiary), or to identify the nature of the wrongdoing, both of which may be the subject of subsequent legal proceedings.

To the extent the disclosure identifies additional wrongdoing by the third party, it may be possible to use those documents but that cannot be the purpose for which they were sought. Moreover, one can, where appropriate, apply for a 'gag order' when seeking disclosure, which directs the party not to disclose that they have been ordered to provide information to a third party. This is particularly helpful where the respondent is a bank or a professional who may have duties to give notice to their clients of such matters.

In order to obtain a *Norwich Pharmacal* order, applicants will need to show the following:

- that there is a 'good arguable case' that a wrongdoing has occurred;
- that the person against whom the disclosure request is sought is involved, albeit possibly innocently, in the wrongdoing as more than a mere witness;
- that the respondent is likely to have the information sought (ie, it is not a fishing expedition); and
- that the order must be necessary and proportionate, and in the overall interests of justice.

Bankers Trust orders

As the name implies, *Bankers Trust* orders are used to obtain information from banks. Following *Bankers Trust v Shapira* (1980) 1 WLR 1274, the court can order discovery as follows:

- when there is good reason to believe (eg, as a result of tracing) that property held by the bank is, in fact, the property of the claimant;
- when documents produced by the bank will be used solely for the purpose of tracing money and not for any other purpose;
- when the claimant gives an undertaking in damages; and
- when the claimant undertakes to pay any and all expenses resulting from the bank giving discovery.

However, the following types of documents may be prevented from being disclosed:

- documents protected by legal professional privilege;
- documents tending to incriminate, or expose to forfeiture, the party who would disclose them;
- documents privileged on the grounds of public policy; and
- documents whose disclosure would breach the law (eg, confidentiality laws).

11 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

Interim relief is available in the following forms:

- *Mareva* injunctions (freezing orders) to prevent dissipation of assets;
- *Anton Piller* orders requiring access to a defendant's property to search for and remove, or take copies of, documents or property, or both; and
- in the case of insolvency proceedings, an order appointing a provisional liquidator in company winding-up proceedings to prevent dissipation of the company's assets, or misconduct by the company's directors.

Mareva injunctions freeze the assets of a party pending further order or a final resolution of the court. To the extent the respondent is in a common law jurisdiction and he or she seeks to move or transfer assets without approval of the court, he or she can be found in contempt and, in some extreme cases, be denied the ability to provide a defence until he or she complies.

In addition, a *Mareva* injunction will normally compel an accounting from the respondent of his or her assets. However, the court can require that the party applying for the order provide security or a bond, also known as a cross-undertaking. The rationale for this is that

because it is such a draconian remedy, if the claim is not successful then the respondent may be entitled to damages for financial or reputational loss caused by having the injunction placed upon him or her.

An *Anton Piller* order can be obtained providing the right to search premises and seize evidence that is the subject matter of the dispute without warning the defendant. Applications for *Anton Piller* orders are made ex parte.

In order to obtain an *Anton Piller* order, the following must be demonstrated:

- that there is prima facie evidence of the wrongdoing;
- that the potential or actual damage is be very serious;
- that there is clear evidence that the respondent has incriminating evidence in his or her possession; and
- that there is a real possibility the respondent may destroy this material if he or she were to become aware of the application.

An *Anton Piller* order can prevent destruction of relevant evidence, and is particularly useful in ensuring electronic evidence on computers or mobile devices is preserved.

Insolvency mechanisms can also be used when a claimant seeks an order to appoint a provisional liquidator to secure the remaining assets for the benefit of creditors, particularly in cases where fraud or misconduct is alleged. Often, an application for a provisional liquidation can be made ex parte to avoid any 'tip-off' and dissipation or misuse of the company's assets.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

An individual or entity can also be found in contempt of court, which could result in a fine or imprisonment for up to two years, or both.

Ultimately, a court may rule in favour of the claimant if the defendant does not comply with disclosure orders or another order of the court.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

Information can be obtained through courts in other jurisdictions under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 subject to their being a contracting state party.

It is important to consider with local counsel what additional tools are available to foreign litigants seeking evidence in other jurisdictions and therefore available to claimants from the Cayman Islands. For example, a 'section 1782 discovery' is a tool available to a foreign litigant in legal proceedings being held outside the United States, seeking sanctions from an American court to obtain evidence for use in the non-US proceeding.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

The Grand Court Rules permit service of foreign proceedings under the Hague Conventions noted in question 13.

If seeking evidence from a witness who is present in the Cayman Islands, the foreign court must usually issue a letter of request seeking the assistance of the Grand Court, after which the witness may be examined before a judge of the Court and a transcript of the evidence is provided to the requesting court.

As set out in questions 10 and 11, the Grand Court can order the disclosure of documents for use in proceedings in another jurisdiction using *Norwich Pharmacal* and *Bankers Trust* orders, *Mareva* injunctions and *Anton Piller* orders to assist with asset preservation and evidence gathering.

However, a person cannot be compelled to give any evidence under an order that they would not have been compelled to give in civil proceedings in the Cayman Islands or in the country where the requesting court exercises its jurisdiction.

In addition, the Cayman Islands adopted the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, which provide a framework for strengthening court-to-court cooperation in cross-border insolvency cases. For example, a court may receive communications from a foreign court for the purpose of taking a matter under submission and rendering decisions, and may respond directly to them.

The Grand Court may make orders to do the following:

- recognise the right of a foreign representative to act in the Cayman Islands on behalf of a debtor;
- stay proceedings against a debtor;
- examine witnesses;
- have documents produced to it; and
- transfer property of a debtor to the representative.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

As a common law jurisdiction, the main causes of action include the following:

- breach of contract;
- fraud;
- tort; and
- suit in equity (eg, unjust enrichment).

Within insolvency mechanisms a cause of action available to a liquidator, under statute and with the authority of the court, is the ability to challenge transactions that have not benefited the company, such as unfair preference claims (eg, gifts or transactions to related parties), wrongful or fraudulent trading and transactions at undervalue. These remedies are only available within the context of a liquidation.

Proprietary claims (tracing at law and in equity) are available; however, in the case of *Ahmad Hamad Algosaibi & Brothers (AHAB) v Saad Investment Finance Corporation Ltd and Others*, 2018, the Grand Court held that although the law may infer necessary transactional links to give rise to a tracing claim where there is a scheme 'specifically designed' to subvert the ability of creditors to recover misappropriated funds, the general rule remains that it is necessary to establish a chain of transactions in order to trace funds.

The Court then went on to make a number of other important observations for the law of tracing, in particular with regard to jurisdiction where it held that given the alleged misappropriations took place in Saudi Arabia, the proper law governing AHAB's equitable claims was Saudi law. As Saudi law does not recognise a proprietary remedy in these circumstances, it was not possible for AHAB to establish a proprietary base on which to establish its tracing claim.

16 Remedies

What remedies are available in a civil recovery action?

The court may grant the following available remedies:

- damages;
- compensation in equity;
- interim and permanent injunctions;
- restitution of property where a party has been unjustly enriched;
- declarations that property or assets are held in constructive trust;
- account of profits improperly made from a breach of trust or fiduciary duty;
- specific performance;
- order rescinding a contract (for example, owing to misrepresentation, mistake, duress or undue influence);
- rectification of a written contract;
- declarations as to the parties' rights relating to the matter in issue; and
- orders allowing the claimant to follow, trace and recover from trustees or a third party property that has been applied or transferred in breach of trust.

Although damages are generally intended to be compensatory, the court has the jurisdiction in limited circumstances to award aggravated damages if the defendant is shown to have acted deliberately or out of malice towards the claimant, and exemplary or punitive damages

where there are cases of oppressive, arbitrary or unconstitutional conduct by government agents, the defendant's actions were calculated to make a profit or where permitted by statute.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Both claimants and defendants can apply for a summary judgment, which is an expedited hearing of the dispute based on affidavit evidence only.

The defendant opposing the application must file an affidavit addressing the merits of the claim.

The Grand Court will grant a summary judgment after the claimant has served the defendant – who has also given notice of intention to defend – but will only do so if it is satisfied that upon the evidence placed before it the claim or the defence has no realistic prospect of success.

Where there are disputes between the parties in relation to matters of law or fact that merit investigations at trial, the court will not grant a summary judgment.

A default judgment can be obtained when the proceedings have been properly served on the defendant but the defendant fails to respond to them.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

The post-judgment relief available is the same as that of interim remedies, including the following:

- restitution of property;
- order to provide an account of profits;
- declaration of assets held in constructive trust;
- declaration as to the parties' rights;
- order allowing the claimant to follow, trace and recover from trustees or a third party property that has been applied or transferred in breach of trust;
- freezing orders;
- appointment of a receiver over a trust's or company's assets; and
- appointment of a liquidator to enable the orderly winding up of a company and disposal of its assets.

19 Enforcement

What methods of enforcement are available?

The following enforcement options are available once a judgment has been obtained:

- seizure and sale of the judgment debtor's goods to satisfy the debt and costs of the execution;
- garnishee proceedings (where a person indebted to the judgment debtor is required to pay moneys owed directly to the judgment creditor);
- charging orders (providing security to the judgment creditor over the judgment debtor's assets);
- attachment of earnings orders; and
- appointment of receivers to aid enforcement of a debt.

Alternatively, a judgment creditor may be able to petition to wind up a company based on a foreign judgment debt on the basis that it is 'unable to pay its debts' (*Lhasa Ins Ltd* [1996] CILR N-3).

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Contingency fee agreements are currently not permissible except where the court has sanctioned liquidators to enter into contingency agreements with foreign lawyers (and that they are enforceable in the jurisdiction). Lawyers in the Cayman Islands are currently not permitted to enter into contingency fee arrangements.

With regard to third-party funding agreements, traditionally, the Grand Court has restricted funding for insolvent liquidation estates. Liquidators have a statutory power to sell the 'fruits of an action' to a third-party funder, subject to the approval of the Court. The Court will consider in particular, whether the funder has the ability to control or interfere with the litigation, in which case the agreement will be void on the basis of maintenance and champerty.

Although the doctrines of maintenance and champerty have yet to be formally abolished in the Cayman Islands, the court in *A Company v A Funder* (November 2017), being mindful of the law of maintenance and champerty in other common law jurisdictions, concluded that overall, a proposed funding agreement was legitimate on the basis that 'it did not corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse' (J Segal). The relevant factors in the court's decision were based around the relationship between the funder and the claimant, and the ability of the funder to affect litigation strategy.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

The legal framework for interim measures in criminal asset recovery lies within the Proceeds of Crime Law (2018 Revision) (PCL). Interim and confiscation measures relating to proceeds of drug trafficking are dealt with according to the Misuse of Drugs Law (2017 Revision).

Pursuant to the PCL, the court can order the restraint of property as an interim measure if sufficient evidence is presented. Such orders prevent a person from dealing with realisable property held by him or her. The court may vary, set aside or make exclusions to the order.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Investigations to identify and trace assets by law enforcement authorities are initiated by the Customs Department and the Royal Cayman Islands Police Service (RCIPS).

The CIMA has powers to investigate entities regulated by them under the Monetary Authority Law (2018 Revision). It can initiate investigative procedures and bring enforcement action against an entity or an individual that is in contravention of the regulatory regime.

In addition, under the Anti-Corruption Law (2018 Revision), the Anti-Corruption Commission can receive, consider and investigate reports of any corruption offences as set out in the Anti-Corruption Law, as well as detect and investigate suspected corruption offences, attempts to commit an offence or conspiracies to commit an offence.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

Pursuant to the PCL, courts shall have the power to make an order to pay such sum as the court thinks fit, if:

- a defendant is convicted of an offence or offences in proceedings before the court;
- the Director of Public Prosecutions (DPP) asks the court to proceed under the PCL; or
- the court believes it is appropriate for it to do so.

To calculate the benefit figure, the following shall be decided by the court or summary court:

- whether the defendant has a criminal lifestyle;
- whether the defendant has benefited from his or her general criminal conduct; or
- where it decides that the defendant does not have a criminal lifestyle, whether he or she has benefited from a particular criminal conduct.

24 Confiscation procedure**Describe how confiscation works in practice.**

The court will hear evidence put before it regarding whether the defendant has a criminal lifestyle, or has received benefit from a specific criminal act or conduct.

The defendant has the right to respond and defend accordingly. If the court decides against the defendant, it has the power to make a confiscation order enabling law enforcement agencies to seize property belonging to the defendant. The confiscation value will be calculated as per question 23.

Orders can also be applied to third-party holders of the property (ie, banks or funds) if the defendant's property can be sufficiently identified and is not mingled with that of third parties.

25 Agencies**What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?**

The RCIPS and customs officers are the main agencies active in the confiscation of criminal proceeds, in conjunction with the Attorney General or DPP. The CIMA and the Financial Reporting Authority can initiate investigations, including asset tracing.

26 Secondary proceeds**Is confiscation of secondary proceeds possible?**

There is no distinction under the law between primary and secondary proceeds; confiscation is possible across all realisable property.

27 Third-party ownership**Is it possible to confiscate property acquired by a third party or close relatives?**

Property that is considered a 'tainted gift' is realisable against a third party in the same way as it would be against the defendant.

Section 70 of the PCL sets out whether property acquired by third parties is considered a tainted gift based on whether the gift was connected with the defendant's criminal lifestyle, or made by the defendant at any time after the date on which the offence concerned was committed.

28 Expenses**Can the costs of tracing and confiscating assets be recovered by a relevant state agency?**

There are no provisions in the PCL regarding the recovery of costs by agencies; as such, it is not clear whether they would be recovered by a relevant state agency.

29 Value-based confiscation**Is value-based confiscation allowed? If yes, how is the value assessment made?**

Where the court is satisfied the defendant has a criminal lifestyle, it shall decide the recoverable amount and make a confiscation order requiring him or her to pay the amount. The confiscation order is normally value-based.

Part 18(1) of the PCL specifies the available recoverable amount as the aggregate of the following:

- the total value (at the time the confiscation order is made) of all the free property held by the defendant minus the total amount payable in pursuance of obligations, which have priority; and
- the total value (at the time) of all tainted gifts.

If the available amount is less than the benefit, the court can order a lesser amount.

The court may also take into account any civil proceedings by a victim of an offence to which the criminal proceedings relate that have been, or will be, instituted.

30 Burden of proof**On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?**

In criminal matters, the burden of proof generally lies with the prosecution.

However, once the court has determined that the defendant has a criminal lifestyle or has benefited from criminal conduct, then property acquired or disposed of in the six years before the proceedings by the defendant will be considered for confiscation.

It will then be for the defendant to prove that the property was not acquired through a criminal lifestyle or from a criminal act in order to exclude it from any calculation.

31 Using confiscated property to settle claims**May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?**

Where the court grants compensation orders within criminal proceedings for victims of a crime, such orders may be satisfied from assets recovered through the confiscation process.

Though the court may take into account any information showing that a victim of an offence in criminal proceedings has instituted, or intends to institute, civil proceedings against the defendant, the court does not have express power to order that confiscated funds be used to satisfy civil claims.

32 Confiscation of profits**Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?**

The purpose of confiscation is to remove the value or benefit received from a criminal lifestyle or specific gain from criminal behaviour, therefore, any financial advantage or profit obtained is automatically caught within the available amount for confiscation.

33 Non-conviction based forfeiture**Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.**

The court can, in certain circumstances, enforce a judgment in rem against funds or assets to be recovered in matters involving proceeds of serious crime.

For the court to enforce in rem confiscation from overseas, it will, via formal request, seek a full description of the circumstances of the crime, the laws under which it is indicted (to allow for an assessment of whether the conduct would be criminal if committed within the Cayman Islands) and the reasons for believing that there is a connection with the Cayman Islands (eg, that there is relevant information to be obtained, or assets to be restrained and ultimately confiscated).

34 Management of assets**After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?**

The court may make a receivership order, which places assets in the custody of a receiver to preserve their status, or enforcement receivership in which a receiver enforces against assets held in respect of any realisable property to which a restraint order applies. Once relevant expenses have been paid, any amount remaining in excess of the order is usually returned to the defendant or other owners of the property.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Under the Criminal Justice (International Cooperation) Law (2015 Revision) (CJICL), the DPP is responsible for requesting mutual legal assistance from another country.

The Chief Justice is the designated central authority that can request mutual legal assistance based on the bilateral mutual legal assistance treaty with the United States under the Mutual Legal Assistance (United States of America) Law (2015 Revision).

The Cayman Islands can also implement legal tools provided within any of the United Nations conventions or other international treaties to which it is party. Although dual criminality is generally a requirement in all cases, technical differences in the categorisation of offences should not pose an impediment to mutual legal assistance.

The Cayman Islands is also party to the Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB), launched in 2017 to establish a network of contact points in the region and focus on all aspects of asset recovery activities and assistance. The network is an informal cooperative group based on the Camden Asset Recovery Inter-Agency Network, which is an effective law enforcement tool used among member countries for the expedient sharing of information, and use of multiple tools to trace, freeze or seize assets of an international criminal organisation. This can be useful for the process of asset recovery in providing information that can be used in a formal mutual legal assistance or letter rogatory process.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Legal framework

The main avenue for provision of assistance by the Cayman Islands is the CJICL, which enables mutual legal assistance to be provided at the investigative stage of a matter where the conduct would constitute an offence in the Cayman Islands. Designated countries for legal assistance are listed in the Annex to the CJICL.

The PCL governs the registration or enforcement of confiscation orders made by courts of other jurisdictions. Requests for the enforcement of such orders may be made only by countries listed in the Annex.

The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (EPOJ) enables the Grand Court to provide assistance to foreign courts in obtaining evidence in criminal and civil cases.

Requests are made through letters rogatory and can be requested by any country.

The Cayman Islands is party to certain United Nations conventions and other multilateral treaties (see question 37), which can form the basis of foreign legal assistance requests. It can also assist informally in accordance with the ARIN-CARIB network (see question 35).

Procedure

The DPP is charged with the responsibility for receiving and acting upon requests for assistance pursuant to the CJICL (for those countries listed in the Schedule to the CJICL) or the PCL.

The Attorney General will consider applications made under the EPOJ and the Misuse of Drugs Law.

The requesting court or tribunal must forward the letter of request to the Grand Court through the central authority as defined in the Hague Convention, although in practice the request is sent through diplomatic channels to the Governor of the Cayman Islands.

In preparing the letter of request the requesting court should ensure that the nature of the proceedings commenced against a person or entity is described in detail, and in the case of criminal proceedings the precise criminal charge brought against the accused person should be particularised. If granted, the evidence will be transmitted to the requesting court by the clerk of the Grand Court.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

As a British overseas territory, the Cayman Islands does not directly ratify treaties, instead where the United Kingdom considers it appropriate it extends treaties to which it is a party to the Cayman Islands by the mechanism of Orders in Council. These currently include the following:

- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the United Nations Convention against Transnational Organized Crime;
- the United Nations Convention against Corruption; and
- the Organisation for Economic Co-operation and Development's Anti-Bribery Convention.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

The DPP is the only person formally entitled to bring criminal asset recovery proceedings.



Angela Barkhouse
Kenneth M Krys

angela.barkhouse@krys-global.com
kenneth.krys@krys-global.com

PO Box 31237
Governors Square, Building 6, 2nd Floor
23 Lime Tree Bay Avenue
Grand Cayman, KY-1205
Cayman Islands

Tel: +1 345 947 4700
Fax: +1 345 946 6728
www.krys-global.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com