

Guernsey introduces a summary civil forfeiture procedure: what does this mean for trustees?

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Guernsey has expanded its anti-money laundering arsenal by introducing a summary civil forfeiture procedure along similar lines to Jersey's. The summary procedure will apply where assets in a Bailiwick bank account have been the subject of "no consent" for at least a year.

There is already a civil forfeiture law in Guernsey, namely The Forfeiture of Money etc in Civil Proceedings Law, 2007 (the **Forfeiture Law**). As a reminder, key features of the Forfeiture Law regime are that:

- it provides for non-conviction based remedies, which means the powers may be triggered without a criminal conviction having been obtained
- the process is a civil one, meaning that the facts need to be proved to the lower civil standard of "on the balance of probabilities", rather than to the criminal standard of "beyond reasonable doubt"
- the powers of seizure, detention, bank account freezing and forfeiture are subject to a minimum amount of £1,000 or equivalent in another currency
- a standard forfeiture order can only be obtained over assets that have been previously detained or frozen
- on a forfeiture order being made and once all appeals have been exhausted, confiscated assets and accrued interest are credited to General Revenues of the States of Guernsey or as otherwise directed by the Policy and Resources Committee (eg into a seized asset fund)

The Forfeiture of Money etc, in Civil Proceedings (Bailiwick of Guernsey) (Amendment) Ordinance 2022 amends the Forfeiture Law by:

- introducing a summary forfeiture procedure for cases where the law enforcement authorities have refused to consent to a transaction involving particular assets (see below)
- reversing the burden of proof in standard civil forfeiture applications, so that where the court has frozen assets that are suspected to be linked to criminality and His Majesty's Procurer then applies for a forfeiture order, the court must make the forfeiture order unless satisfied on the balance of probabilities that the assets are not linked to criminality
- giving the Committee for Home Affairs the power to make Regulations to introduce a procedure under which a forfeiture order can be reconsidered if new evidence comes to light
- exonerating law enforcement authorities for costs or damages in respect of a civil forfeiture application, except for loss caused by an act or omission made in bad faith

What is the new summary civil forfeiture procedure?

Under Guernsey's anti-money laundering regime, it is possible for a person to request consent from the Financial Intelligence Unit (**FIU**) prior to undertaking a relevant act which they anticipate could result in them committing a money laundering offence. If the FIU consents, then the consent acts as a defence to the offence of money laundering. The refusal of consent has to date served as an informal freezing of the assets involved because the person generally will not proceed with the activity for fear of committing a money laundering offence.

The new summary forfeiture procedure will enable the court to make an order for the forfeiture of assets in a Bailiwick bank account where a relevant consent request has been made and refused at least 12 months previously. The order can only be made on the application of HM Procureur on the basis that she has reasonable grounds to believe that the funds in the account are linked to criminality (and the FIU's "no consent" is likely to satisfy that hurdle).

A summary forfeiture notice with details of the court hearing will have to be served on the bank account holder and the bank at which the account is held. If the account holder does not attend the hearing, the court may make a forfeiture order without further notice to the recipient. If the account holder does appear, they will have to either:

- satisfy the court that the funds are not the proceeds of unlawful conduct, or intended by any person for use in unlawful conduct, or
- request that that question be determined at such later date as the court may order

What does the new summary civil forfeiture procedure mean for trustees?

Where trust assets are the subject of a summary forfeiture notice, then it is likely to be the

trustee as account holder who is served with the notice. There will be many factors for the trustee to consider, including:

- to what extent should the trustee participate in the proceedings?
- what are the trustee's duties to the beneficiaries as a whole? If the target of the forfeiture order is a single beneficiary, do the interests of the other beneficiaries require a challenge to be made?
- if the procedure stems from a suspicious activity report (**SAR**) filed by the trustee, can the trustee demonstrate why the SAR was filed and that there are grounds for continuing to hold suspicion? It is worth noting that the balance of probabilities is a higher standard than that applied in deciding to file a SAR, where mere suspicion suffices. This applies to existing SARs, and any time that has passed between the FIU notifying the account holder of the refusal of consent and the commencement of the Ordinance will be taken into account in calculating the 12 month period

Conclusion

It is vitally important to Guernsey's reputation as a financial centre that it keep pace with other jurisdictions in the fight against financial crime, and it is no coincidence that these amendments come as Guernsey prepares for the 2024 anti-money laundering evaluation by Moneyval.

The summary forfeiture procedure might provide some relief to a trustee that finds themselves in limbo, holding assets that are informally frozen yet unable to tell unhappy beneficiaries why a distribution cannot be made for fear of committing a tipping off offence. It will, however, also mean that trustees will need to be very careful when deciding to file a defensive SAR in the first instance as there may now be more far-reaching consequences from doing so. Where SARs have been filed prior to the entry into force of the Ordinance, trustees should now carefully review the position to ascertain what steps they now need to take. For example, that may involve now proactively investigating the matter more carefully to ensure the trustee is well placed to address any summary forfeiture notice.

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