

COLLAS DAY | DISPUTE RESOLUTION

Financial Services Regulation – an update

February 2009

As we all turn our minds to facing what promises to be one of the most challenging years for the financial services industry for some time, it is timely to consider the effect of some new Guernsey legislation touching upon the broader financial services sphere. As general market conditions deteriorate, it is likely that regulators will increase scrutiny on those they supervise, particularly where they have shiny new tools to do it with.

The first of these new laws provides for the imposition of 'on the spot' financial penalties by the Guernsey Financial Services Commission ("the Commission"). The discussion of these £200,000 parking tickets will be of central interest to those entities regulated by the Commission, and their directors and relevant officers.

Next, we discuss the Commission's new investigation powers, which go a long way to giving the Commission the teeth it needs to achieve its aims of protecting the investing public and enhancing Guernsey's reputation as a place to do business. Unsurprisingly, these powers may also be deployed in support of an investigation by an overseas authority.

Finally, we outline in some detail the provisions of the new civil forfeiture regime, pursuant to which the Royal Court can make orders to restrain and reclaim proceeds of crime.

Financial Penalties

The Financial Services Commission (Enforcement Powers) (Bailiwick of Guernsey) Law 2008 came into force on 30 July 2008.

Under this legislation, the Commission has the power to impose financial penalties of up to £200,000 where it is satisfied that a contravention of the legislation has been committed by a licensee, former licensee or relevant officer of the relevant entity; or that the minimum criteria for licensing specified in the legislation is not fulfilled by those persons. In addition to the financial penalty, the Commission can make a statement to the public, publishing the name of the transgressor and the amount of the penalty imposed.

The Commission would still have the power to make disqualification orders against auditors although the terms upon which these orders can be made has altered slightly.

There is a right of appeal against a decision made by the Commission. There are however, specific limited grounds for any such appeal and specific time limits. There is a further right of appeal to the Court of Appeal, however this would arise only on a question of law.

Usually, before you get to the penalty stage, there will be an investigation by the Commission.

Powers of Investigation

The Commission's powers of investigation and enforcement have been further extended and strengthened by the Protection of Investors (Bailiwick of Guernsey) (Amendment) Law 2007. It should however be noted that only certain provisions under this legislation are now in force.

The Commission has been given certain investigative powers in relation to any licensee to protect the interests of investors, the public or the financial reputation of the Bailiwick. Inspectors will be able to investigate the licensee and report back to the Commission. Associated persons of the licensee or company, for example partners, auditors, agents and shareholders, whether they be currently or previously associated, can also be required to disclose all documents within their custody relating to the licensee or company under investigation and can be required to answer any questions put to them by the inspector. The costs, fees and expenses of such investigations and the correlating reports are payable by the licensee under investigation.

Criminal offences are committed by those persons who do not comply with these investigative provisions, the offender being liable to a term of imprisonment of up to two years, an unlimited fine or both.

Foreign Assistance

The Commission will also be able to exercise their investigative powers if so requested by a relevant overseas authority in providing assistance in connection with the investigation of market abuse under this legislation. This provision is however, not yet in force.

Although the civil forfeiture regime does not solely apply to Guernsey's financial services businesses, these businesses will have a special interest in the operation of the legislation, as in most cases these companies will be in control of the property being restrained or seized.

New Civil Forfeiture Regime in Guernsey

The Forfeiture of Money, etc in Civil Proceedings (Bailiwick of Guernsey) Law, 2007 (the "Law") recently came into force and represents a major step forward in the ability of Guernsey's authorities to freeze and confiscate the proceeds of unlawful activities. The Law also facilitates greater international cooperation and assistance in dealing with the proceeds of unlawful conduct. In particular, foreign authorities will now find it much easier to request and receive assistance from H.M. Procureur (Guernsey's equivalent of the UK's Attorney General) and the Royal Court in doing so.

Forfeiture of Money

Where a claimant has reasonable grounds for suspecting that funds in a bank account are the proceeds of unlawful conduct, or are intended to be used in unlawful conduct, it can apply to H.M. Procureur for an order prohibiting the funds from being paid out of the account.

While any money is frozen, H.M. Procureur may make an application to the Royal Court of Guernsey for the forfeiture of the whole or part of the funds. The Royal Court may order the forfeiture of the money if it is satisfied on a balance of probabilities that the money is the proceeds of unlawful conduct or is intended for use in unlawful conduct. This lower burden of proof is the key difference between the new civil forfeiture regime and the existing criminal confiscation and forfeiture regime, which requires the much more onerous criminal burden of proof to be satisfied (i.e. beyond reasonable doubt).

At present, the Law only enables the forfeiture of money due to the fact that extra resources would be required to ascertain and manage other assets (such as houses, cars and boats) pending their disposal and realisation of their value. Those resources are unavailable at present. It is expected that once adequate resources have been allocated and suitable provisions put in place, the civil forfeiture regime will be extended to cover such other assets.

Investigatory Powers

The Law also brings into force a wide range of powers to assist the progress of civil forfeiture investigations, including the following:

Production Orders:

The Bailiff of Guernsey may, on an application by or with the authority of H.M. Procureur, make a production order requiring a person specified in the application as appearing to be in possession or control of material, to produce such material to H.M. Procureur or a police officer, or requiring that person to give H.M. Procureur or a police officer access to the material.

Customer information orders:

A customer information order is an order that a bank covered by the application must, on being required to do so by notice in writing given by or with the authority of H.M. Procureur, provide any such customer information as it has relating to the person specified in the application. Essentially, this information is likely to be whether the bank holds accounts for the specified person and, if so, his account numbers, name, date of birth and address etc.

Account monitoring orders:

An account monitoring order is an order that a bank specified in an application for an order must, for the period stated in the order, provide account information of the description specified in the order to H.M. Procureur or a police officer. This is in order to enable the police to monitor movements of money in and out of suspect accounts.

Disclosure orders:

A disclosure order is an order authorising H.M. Procureur to give notice in writing to any person whom he considers to have relevant information requiring that person, in respect of any matter relevant to the investigation for the purposes of which the order is sought, to answer questions, to provide information or to produce documents.

These investigatory powers are also available under the criminal confiscation and forfeiture regime.

The Law also introduces a new 'tipping-off' offence. If H.M. Procureur or the police are conducting an investigation into whether any money is the proceeds of unlawful conduct, with a view to commencing proceedings in connection with freezing such funds or seizing cash, a person commits a criminal offence if they make a disclosure which is likely to prejudice such an investigation. It is also an offence for somebody to falsify, conceal or destroy any documents which are relevant to an investigation.



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Assistance to other jurisdictions

Provided that it was granted by a 'designated country', an overseas forfeiture order may now be registered and enforced in the Bailiwick of Guernsey.

Under Section 53 of the Law, the States of Guernsey may designate any country for the purposes of the Law if it appears to the States that such country has legislation in force corresponding to the relevant provisions of the Law. These designated countries include the United Kingdom and Republic of Ireland.

Following registration of an overseas forfeiture order under the Law, the order has effect and is enforceable in all respects as if it were an order of the Royal Court for the forfeiture of monies made under the Law.

Conclusion

The Law significantly increases the powers of H.M. Procureur and the Royal Court to seize tainted property or assets. It will also give, for the first time, designated foreign jurisdictions the ability to seize such property without the need to apply to the Royal Court. Such significant advances in this area of legislation will assist the police and claimants alike in recovering assets obtained by, or to be used for, unlawful conduct.

For further information relating to financial services matters and the new civil forfeiture regime in Guernsey, please contact:

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