Briefing Note 2 April 2019

Guidance on the Financial Intelligence Service's Consent Regime

This note is for information purposes only and is not intended to be legal advice.

With the recent judgments of the Royal Court of Guernsey in *Liang v RBC Trustees*, the spotlight has again turned to Guernsey's "consent regime" which, unlike jurisdictions elsewhere, can leave those affected in an indefinite state of limbo and uncertainty. Babbé LLP partner, Nick Robison and associate, Ryan Courtney, take a whistle-stop tour through the landscape to offer advice on the options available.

There are occasions when a bank or other financial institution will not comply with a payment instruction from its client. This may occur when the financial institution suspects that, in complying with the client's instruction, it may be facilitating money-laundering or assisting a person to retain funds which are the proceeds of criminal conduct. For the financial institution to prevent any complicity in money-laundering or similar it must:

- prevent the continued retention or control of the proceeds of criminal conduct by that client; and
- disclose the suspicion to a police officer, which has evolved into the filing of a Suspicious Activity Report ("**SAR**") with the Financial Intelligence Service ("**FIS**").

Once such an instruction has been reported the FIS has three options:

1. to give consent for the transaction to proceed;
2. to withhold consent and instruct the financial institution not to proceed with the transaction; or
3. to neither give nor withhold consent.

In circumstances where consent has been provided the financial institution will have complied with its obligations and the requested payment may be effected. Where consent has been expressly withheld the financial institution may not give effect to the payment instruction as to do so would constitute a criminal offence. More controversially (and quite typically) no consent will be provided but neither will the transaction be expressly prohibited. In these circumstances, the financial institution will be reluctant and, therefore, unlikely to give effect to the payment instruction due to the risk of criminal liability.

Judicial Review

Historically the received wisdom had been that a client, frustrated by a financial institution's unwillingness or inability to proceed with a payment instruction, should apply for a judicial review of the FIS's refusal to consent to the transaction. Increasingly, however, it has become apparent that the better course is to commence a civil law action against the financial institution holding the funds (or other property). This has become even more apparent over the past 12 months.

Current legislation provides no time limits within which FIS is required to conduct an investigation; make a determination; or take steps to restrain; withhold or release the funds of a person or entity under investigation. The financial institution and the FIS are under no obligation to provide information regarding the reasons for the FIS's decision and there are no recognised means of obtaining this information. Without the reasons for the FIS's decision regarding the funds it is unlikely that judicial review proceedings would be successful.

It is for these reasons that it has become increasingly apparent that a civil action should instead be brought against the person or entity holding the funds. Doing so will enable *"the status of the funds to be determined by a court*

in circumstances where… evidential issues may be fully explored and the fund owner and fund holder represented": The Chief Officer of Customs & Excise, Immigration and Nationality Service v Garnet Investment Limited [2011-12] GLR 250 (at [58]).

Civil Law Action

There are two avenues for a person whose funds are subject to a "no consent" decision.

The first is to challenge the validity of the financial institution's suspicion that the funds were the proceeds of crime. The holder of the funds would then bear the onus of proving that its suspicion was legitimate and more than fanciful. In most circumstances it is likely that the holder of the funds would discharge this onus. Where the holder of the funds fails to do so, or the owner of the funds proves that the suspicion was merely fanciful, it is likely that the owner of the funds would succeed in its claim for release of the funds.

The second avenue is to prove the provenance of the funds. The Royal Court has recently stated that *"…once the Defendant demonstrates that there was a suspicion, the Plaintiff is still able to succeed by establishing to the required standard that the provenance of the funds in the account is such that they are not the proceeds of crime:" Hazel Liang v RBC Trustees (Guernsey) Limited* (Royal Court judgment 20/2018) (at [20]).

This places a positive duty on the owner of the funds to prove to the Court that the funds devolved from a legitimate source and have not been tainted by involvement in criminal conduct. The burden of proof is lower than would be required to prove in a criminal matter and, if the owner of the funds can satisfy the Court, on the balance of probabilities, that the funds are not the proceeds of criminal activity, the owner of the funds would likely succeed in having the funds released by the holder.

The way forward

As ever, the prudent course – whether for a client whose funds are frozen or for the financial instruction that is being frustrated from fulfilling its mandate – is to act fast and to seek legal advice. Babbé LLP has recently been involved in a number of matters in this area and our advocates are ideally placed to assist with navigating, what is for many, a difficult and intimidating landscape.

Nicholas Robison
Partner
n.robison@babbelegal.com

Rob Fulman
Senior Associate
r.fulman@babbelegal.com

Ryan Courtney
Associate
r.courtney@babbelegal.com