

## • INFORMAL FREEZES: GUERNSEY COURT GIVES AUTHORITIES COLD SHOULDER OVER 8 YEAR RESTRAINT

**Michael Adkins sees light at the end of the tunnel for those affected by an 'informal freeze' following disclosure to the financial crime authorities, when the Royal Court of Guernsey quashed a refusal to release funds after an 8 year restraint.**

Running an offshore financial services business can be a tough job sometimes. One of the hardest situations, from a regulatory risk perspective, is where you have had to make a disclosure to the financial crime authorities in relation to a client. Often the customer will be relatively wealthy and therefore an important client to the business. The compliance officer will have already had a few tense internal discussions emphasising the business' obligations to report and the risk (which can be personal if they are also the relevant reporting officer) if it does not.

Then the client wants to do something with their money. This starts a whole new round of internal discussions and almost invariably a request to the financial crime authorities for consent to engage in the relevant transactions. When the authorities refuse consent, the business is truly between a rock and a hard place. They cannot complete the transaction, for fear of potentially committing a criminal offence and in most circumstances they cannot say why not, for fear of committing a tipping off offence. However the client, somewhat understandably, is putting on an enormous amount of pressure and is threatening a breach of contract claim to which the business (in Guernsey at least) does not have a statutory defence to. Now comes the worst bit. This impossible situation, in Guernsey and Jersey, can go on indefinitely.

One of the key differences between the AML regime in the UK and that in force in each of the Channel Islands is that there is no legislative time limit placed on the financial authorities in which they are required to decide to make a formal (and eventually public) application for restraint of the suspect

assets. In the UK, the SFO has up to 35 days in which to make a formal restraining application. If no application is made, the business can proceed to implement the transaction without fear of criminal prosecution for a proceeds of crime offence. This situation has been the subject of adverse comment in a number of matters that Collas Crill has been recently associated with - foreign clients and lawyers are simply not able to understand how a system creating such an 'informal freeze' can be enacted and allowed to endure.

It seems though, there is a light at the end of the tunnel, thanks to the Royal Court of Guernsey.

### GARNET

In Garnet Investments v BNP Paribas, the Court considered a fact situation broadly similar, albeit substantially more convoluted, to that described above. For various reasons, it transpired that the client's funds were restrained for a period of approximately 8 years, with the financial authorities continuing to refuse to provide the finance business with consent to engage in the proposed transactions during this period. This was even after a civil freezing order over the funds, obtained by the alleged victim (a foreign government), was discharged.

Eventually, the client (Garnet) sought release of the funds through the mechanism of judicial review. In considering the client's application, which was made on several grounds, the Court found that the authorities' decision in refusing consent was both unreasonable, given there were no known investigations touching on the Garnet funds, and disproportionate given the length of time that Garnet's funds had been informally restrained. On that basis the Court quashed the decision, and presumably Garnet now has its funds at its disposal (although we understand the authorities have sought to appeal). Interestingly, the Court also found

that in those particular circumstances, Garnet had a right to obtain reasons from the authorities as to why consent was refused.

### OUTCOME

This was an action brought by the client, not the business and in most cases it is difficult to see where a business might be sufficiently motivated to bring their own judicial review proceedings. However it is important to be aware that the option is there, particularly where the interests of the business and the client are aligned, which might arise in certain trust situations. More broadly, the Court's criticism of the informal freeze situation (which was not without some sympathy for the authorities who are charged with having to apply and administer this law), should provide some impetus for legislative reform. Let us hope we do not have to wait 8 years like Garnet did.

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