COLLAS CRILL

Arrest without reason: Jersey and Guernsey's anti-money laundering laws and the trial that never ends

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"Someone must have slandered Josef K., for one morning, without having done anything truly wrong, he was arrested" - The Trial, Franz Kafka

We might have simply filled the 1500 words of this article, in which we describe the current remarkable state of the anti-money laundering laws in Guernsey and Jersey, with a selection of quotes from The Trial. These laws, and the system they have created, are the very epitome of 'Kafkaesque'. Indeed, it is an epithet that appears in our written submissions more than once.

Picture this:

1. You have a large amount of money in a Channel Islands bank account (or trust, or investment portfolio).
2. A bank compliance officer picks up on something about you, or your money, that gives them concern the money is the proceeds of crime, or even if they are not concerned, might give some other compliance officer some concern.
3. The compliance officer makes a report to the authorities. They have to, really, because they risk going to jail if they don't. There is no risk to the bank if they report. It's an easy decision. However, it does mean they can't transact on the account until someone decides whether or not a crime has been committed – to do so would amount to money laundering. After all, they just reported their suspicion to the authorities.
4. The authorities don't decide whether or not a crime has been committed, or if the money is the proceeds of any crime. They say it's not their job. They do have a power to consent to transactions, but they have no interest in consenting and so don't. There is no time limit on any of this.
5. Your money is frozen, possibly forever. On the strength of no more than a compliance officer's 'concern', a public servant avoiding a decision and a healthy dose of self-preservation all round. A freezing order without ever going near a Court, without ever having an opportunity to confront your accuser, with the only way out through the backwoods of judicial review.

"He would try to mislead K. with hopes that were never specified and to make him suffer with threats that were never clear"

There is no need to take my word for any of this. From LB Marshall in the Royal Court of Guernsey in *LMNB V Credit Suisse* [2023] GRC026 (***Credit Suisse***).

> *"The then Deputy Bailiff (now the Bailiff) there drew attention to the plight of persons in the position of Mrs Liang there, and of the Plaintiffs here, when their funds or assets are informally 'frozen' by the effect of an SAR made by their bank or trust service provider of which they may not even be aware – and made, almost inevitably, on a 'play it safe' basis by such institution, in its own regulatory and commercial interests – which then becomes coupled with a subsequent 'no consent' (or, in practical effect, 'do not pay') instruction issued by the FIU, again probably on a 'play it safe' basis. All this can be brought about by the institution's getting wind of actual or alleged criminal activity by some other person, of which, or even possibly of whom, the customer may be totally unaware, and of which activity they regard themselves as perfectly innocent."*

As explained in *Credit Suisse*, the current system is the (perhaps unintentional) outcome of the interaction of the statutory money laundering regime, with low bar mandatory reporting requirements, widely drawn substantive money laundering offences, and no (express) requirement for the authorities to take a decision in any particular time or at all. There are two particularly insidious 'elements' to this system:

- First, unlike, for example the United Kingdom, which has in effect a 38 day statutory time limit from the date of the SAR beyond which consent to transact is deemed to have been given, there is no time limit in Guernsey or Jersey. No positive decision, one way or the other, ever need be made.
- Second, Guernsey and Jersey's broadly cast anti-tipping off laws mean that your bank cannot tell you why they cannot transact on the account. They cannot tell you what suspicions you need to address so you can. In practice, all you are told is that your transaction is held up for 'regulatory reasons'.

For most of us, our 'source of wealth' is clear. But what if your path to wealth was complex, or you (or your parents, or grandparents) generated the wealth a long time ago, or your former bank doesn't keep records going back far enough or even doesn't exist? What if you actually were investigated for a crime, and cleared, or what if someone whose name is the same as yours is a crook? All of these scenarios have come across our desk with us acting for clients who simply want to get their own money back.

Private law action

"The court doesn't want anything from you. It accepts you when you come and it lets you go when you leave"

Where the legislature has failed, the Courts have found a way through. Whilst not perfect and in some circumstances not easy, it offers at least some chance of getting your money.

This is the so called 'private law action'. In general terms there is no great magic to this claim. It simply means suing your bank (or trust company, investment manager etc), in contra-distinction to challenging the 'no consent' decision of the authorities in a public law action. The legal form of the claim is not particularly important and will follow the circumstances; it could be a breach of contract, breach of fiduciary duty or even possibly a straight declaratory claim.

The claim is simply a vehicle to get the substantive issue – are these funds the proceeds of crime – before the Court, so it can then go on to decide that question on the balance of probabilities.

These 'private law actions' don't play out like normal claims though. For a start, the parties' roles are a little curious.

The Plaintiff starts out with the job of proving its claim for breach. This is usually a straight forward matter of simply demonstrating the transaction instruction and the failure to comply. So far, so normal.

Then switch! The bank has to establish its defence. This is still a claim for breach of contract (or duty etc.) which the bank will want to defend. That said, the bank should have a rock solid defence to such a claim: they had a valid suspicion and so transacting would commit a criminal offence. The threshold for suspicion is desperately low:

> "... the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease could not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded'." (*R v Da Silva* [2006] EWCA Crim 1654.)

If the bank has been properly advised it will easily meet its burden. Typically (indeed in every reported decision) the Plaintiff will strategically concede the point.

"The right understanding of any matter and a misunderstanding of the same matter do not wholly exclude each other"

Then switch back! Normally, a successful defence would be the end of the matter. But no, the real genius in the 'private law action' is the recognition of the ability of the Plaintiff to then, notwithstanding the bank's defence, go on to prove to the civil standard that in fact the funds are not the proceeds of crime and that the bank's suspicion, whilst rightly formed and held, was wrong.

Although their job is notionally done, the bank retains a role in this phase as a contradictor – almost an amicus curiae – to test the positive case the Plaintiff is putting up as to provenance of the funds.

"Even the slightest uncertainty in the least significant of matters will always remain a cause of suffering"

It is this provenance phase that is at the heart of these actions and where the Plaintiff's efforts should be focussed as soon as lawyers are engaged.

In theory, what needs to be proved is that the money is not any person's proceeds of crime. Immediately one can see the potential difficulty of proving this proposition: it requires proof of a negative. This raises a number of difficult questions: is it just the crime triggering the bank's suspicion or is it any crime, anywhere, by anyone, at any time? What if the records simply do not exist? What if the knowledge does not exist?

So far, the first instance Courts have taken a practical approach in answering these questions. In *Credit Suisse*, LB Marshall recognised that:

> *"139…This is in a situation where they have very possibly not kept or preserved relevant records (not being aware that they might be required) possibly from many years previously, and they do not have the powers of law enforcement to compel production of relevant materials. They may therefore even be unable to produce sufficient*

> *evidence actually to satisfy the Court, on balance of probability that their funds are not the proceeds of crime, as required*
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> *140. Of course, in such a private law action, the Court will, in applying the burden and standard of proof and deciding whether the plaintiff has discharged it, pay appropriate regard to the likely or apparent difficulties which such a plaintiff may be facing, in endeavouring to gather evidence from persons over which he or she has no control, who may have no incentive to assist, and which evidence may well, in any event have been lost with the passage of time and the destruction or loss of records. The Court may well be sympathetic, therefore, to the burden placed on the plaintiff to surmount it."*

"One does not have to believe everything is true, one only has to believe it is necessary"

To date there have been six reported decisions on private law actions in Guernsey. All have ultimately been successful. There have been no reported decisions in Jersey, but a number have been through the Courts. In each case the account holder will have spend hundreds of thousands of pounds reclaiming their own property, but they have got their money back. There is, for the moment, a way through.

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