

FORFEITURE OF SEIZED CASH TURKS AND CAICOS ISLANDS CHAPTER 3.15 - PROCEEDS OF CRIME ORDINANCE (POCO)



CASH FORFEITURE DOES NOT INFRINGES A PERSON'S RIGHT TO PROPERTY

“The underlying assumption of POCA is that the Crown has the right, duty and obligation to undermine the capacity of criminals to continue their criminal lifestyle by weakening their economic viability.”

► Sykes, CJ - Assets Recovery Agency v Ewart Fowler, [2021] JMSC Civ 11



Cash Forfeiture – Section 110 POCO

- ❑ Pursuant to **section 110 of the POCO** cash forfeiture orders relative to cash seizures can be made in the absence of any criminal conviction or criminal proceedings.
- ❑ At the stage of the hearing of the application for forfeiture of the seized cash, the court is not looking behind the procedures or lack thereof.

CASH FORFEITURE- THE LAW

- ▶ **The Forfeiture Application:**

- ▶ **SECTION 110 (1)** - While cash is detained under section 107, an application for the forfeiture of the whole or any part of it may be made to the Magistrate's Court by a police officer.

- ▶ **SECTION 110(2)** - On an application under subsection (1), the Magistrate's Court may order the forfeiture of the cash, or any part of it, if satisfied that the cash or part-

- ▶ (a) is recoverable property; or

- ▶ (b) is intended by any person for use in unlawful conduct.

THE FILING OF AN APPLICATION FOR FORFEITURE STOPS TIME ON THE DETENTION

- ▶ **SECTION 110(4)** - Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Part) until any proceedings pursuant of the application (including any proceedings on appeal) are concluded.

(Amended by Ord. 19 of 2010)

APPEAL AGAINST A FORFEITURE ORDER

- ▶ **SECTION 111(2)** - Appeals against orders made under section 110 are to be made within 30 days of the day the order was made.
- ▶ **SECTION 111(1)** – Appeals are made to the Supreme Court.
- ▶ **SECTION 111(3)** – An appeal under subsection (1) is to be by way a rehearing by the court which may make any order that it considers appropriate.
- ▶ **SECTION 111(4)** – If the Supreme Court upholds the appeal, it may order the release of the cash

WHERE DOES THE FORFEITED CASH GOES – SECTION 112

- Cash forfeited under this Part, and any accrued interest thereon shall be paid into the Fund. (Amended by Ord. 19 of 2010)



APPLICATION BY VICTIMS AND OTHER OWNERS – SECTION 113

- ▶ Persons including, but not limited to, victims of lottery/relationship scams or fraud may apply under this section (**generally all persons who are victims of an acquisitive crime**).



APPLICATION BY VICTIMS AND OTHER OWNERS – SECTION 113

The court may release the cash to this owner/victim if it believes the cash belongs to him and that he was deprived of the cash by unlawful conduct.



COMPENSATION – SECTION 114

- ▶ **114(1)** - If no forfeiture order is made in respect of any cash detained under this Part, the person to whom the cash belongs or from whom it was seized may make an application to the magistrate's Court for compensation.
- ▶ **114(2)** – If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial detention of the cash for 48 hours, the cash was not held in an interest-bearing account while detained, the Magistrate's Court may order an amount of compensation to be paid to the applicant.
- ▶ **114(3)** - The amount of compensation to be paid under subsection **(2)** is the amount the Magistrate's Court thinks would have been earned in interest in the period in question if cash had been held in an interest-bearing account.

COMPENSATION – SECTION 114

- ▶ **114(4)** - If the Magistrate's Court is satisfied that, taking account of any interest to be paid under **section 108** of any amount to be paid under **subsection (2)**, the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional, the Magistrate's Court may order compensation (or additional compensation) to be paid to him. (Amended by Ord. 19 of 2010)
- ▶ **114(5)** – The amount of compensation to be paid under **subsection (4)** is the amount the Magistrate's Court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
- ▶ **114(6)** – Compensation is to be paid from the Fund.
- ▶ **114(7)** – If a forfeiture order is made in respect only of a part of any cash detained under this Act, this section has effect in relation to the other part.

Cash Forfeiture

Does it all have to be on one person?

- ▶ Separate sums of cash may be aggregated if they appear to have a common origin or destination.

- ▶ ***Commissioners of Customs and Excise v Duffy and others [2002] EWHC 425 (Admin):***

*“In my judgment, **the words of the statute are silent as to where the cash is before it is seized**;*

- ▶ it may be with one individual,*
- ▶ it may be with more than one individual,*
- ▶ or it may be with no individual at all, as, for example, when it is in an unattended parcel or perhaps in a postal packet.*

What matters is **whether it is identifiably cash** which is being exported **which can be regarded as a single item** in order to, **first of all**,

- ▶ **examine its totality** (see s 42(1)(a)), and,
- ▶ **secondly, consider its origin or purpose** (see s 42(1)(b)).”

Cash Forfeiture

“So if the evidence shows only that there are various sums held by individuals who are apparently unconnected, those sums cannot be aggregated, but if it can be shown that the money comes from a common source or has a common destination, that may readily lead to the conclusion that in reality it is a single exportation of cash. The court asked to exercise its powers under s 42(2) is then entitled, in my judgment, to look to the reality.”

- Para 17 Duffy

Cash Forfeiture

- ❑ **Section 59(2)** - Cash forfeiture proceedings can be invoked whether or not criminal proceedings have been brought for a criminal offence in connection with the property and whether or not a defendant has been acquitted for an offence connected with the property.
- ❑ **Section 60(1) Definition of Unlawful Conduct** - The question for the court to decide is whether the cash was obtained through unlawful conduct or intended for use in unlawful conduct.
- ❑ **Section 60(2)** - The court in cash forfeiture proceedings must make its decision on a *"balance of probabilities"*.

THE BALANCE OF PROBABILITIES

Standard and Burden of Proof



The court must decide on a balance of probabilities whether the cash was obtained through unlawful conduct or is intended for use in unlawful conduct.

Balance of Probabilities = more likely than not i.e. only a 51% chance of success is needed.

CASH FORFEITURE

Meaning of “UNLAWFUL CONDUCT”

► **SECTION 60 (1)** “Unlawful conduct” is conduct which —

(a) if it occurs in the Islands, is unlawful under the criminal law of the Islands; or

(b) if it occurs in a country outside the Islands—

(i) is unlawful under the criminal law of that country, and

(ii) if it occurred in the Islands, would be unlawful under the criminal law of the Islands.

SECTION 60 (2) The court, or in respect of proceedings for the recovery of cash, the Magistrate’s Court, shall decide on a balance of probabilities whether it is proved—

(a) that any matters alleged to constitute unlawful conduct have occurred;

(b) that any person intended to use any cash in unlawful conduct; or

(c) that any person used, or intended to use, any property in, or in connection with, unlawful conduct. (Amended by Ord. 19 of 2010)

CASH FORFEITURE

Meaning of “property obtained through unlawful conduct”

- ▶ **SECTION 61 (1)** - A person obtains property through unlawful conduct, whether his own conduct or another person's conduct, if he obtains property by or in return for the conduct.
- ▶ **SECTION 61 (2)** - In deciding whether any property was obtained through unlawful conduct—
 - ▶ **(a)** it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct; and
 - ▶ **(b)** it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.

Cash Forfeiture

- ❑ The authorities concerning cash forfeiture proceedings have clearly established that in these proceedings, it is not necessary to identify or prove any criminal conduct.
- ❑ Instead of proving criminal conduct, what is important is the circumstances under which the cash was found and the explanation given by the defendant or any other individual which may lead to an inference on a balance of probabilities that the cash was unlawfully obtained or intended for an unlawful purpose.



FACTORS THE TRIBUNAL OF LAW AND FACT MAY TAKE INTO CONSIDERATION

Circumstances may include:

- ▶ The fact that there was an attempt to conceal the money, e.g. where the money was hidden in several pockets of jeans within the Respondent's suitcase; or behind a refrigerator.
- ▶ The fact that the Respondent knowingly is party to the attempt to conceal the money.
- ▶ Differences in accounts given by the Respondent and any third party for the purpose or intended use of the cash, e.g. where the Respondent claims some of the money to be his while a third party claims all of the money belongs to him.
- ▶ The fact that the explanation given by the Respondent or any third party as to the source or intended use of the cash was found to be untrue.

FACTORS THE TRIBUNAL OF LAW AND FACT MAY TAKE INTO CONSIDERATION

Circumstances may include:

- ▶ The fact that the Respondent consistently lied about the amount of money he had.
- ▶ Any attempts by the Respondent to bribe the police officer to cause willful blindness as to the presence of the cash. Tantamount to Attempting to Pervert the Course of Justice.
- ▶ The Respondent's frequent foreign travels in the absence of proof of earnings to support that level of travel.
- ▶ The Respondent's refusal to answer questions in cross-examination which are aimed at securing particulars of his/her explanation of the source or intended use of the money.

Cash Forfeiture Case Law

Sandra Marie Cavallier v Commissioner of Customs, [2010] JMCA Civ 26

The court found that there were several circumstances to properly find that the money was unlawfully obtained or intended for an unlawful purpose. These circumstances were:

- ▶ The fact that there was an attempt to conceal the money; the money having been hidden in several pockets of jeans within the Respondent's suitcase.
- ▶ The fact that the Respondent knew that the money was in her suitcase and was party to the attempt to conceal it.
- ▶ The fact that the explanation given by the Respondent to the customs officer as to the purpose of the cash was completely different than the explanation given by the third party, a company, which had later come to claim that the cash belonged to it.
- ▶ The fact that the explanation given by the company as to the use of the cash was found not to be true.
- ▶ The fact that the Respondent had claimed some of the money to be hers while the company had claimed that all of the money belonged to it.

Cash Forfeiture Case Law

Leroy Smith v Commissioner of Customs, [2014] JMCA Civ 10

- ▶ The fact that the Respondent consistently lied about the amount of money he had. He initially told the customs officer that he did not have over US\$10,000.00, but he was found to have £14,000.00.
- ▶ The fact that the Respondent attempted to bribe the customs officer to prevent her from checking his luggage where some of the cash was found.
- ▶ The fact that the cash was concealed. Some of the cash was concealed in the Respondent's luggage and some in the groin area of the pants that he was wearing.
- ▶ The conflicting explanations given by the Respondent as to the source of the money.
- ▶ The unsatisfactory explanation about the intended use of the money.

Cash Forfeiture Case Law

Winston Pusey v Assets Recovery Agency, [2012] JMCA Civ 48

- ▶ The fact that the cash was concealed in clothing in Mrs. Mahabeer-Barrett's suitcase.
- ▶ Mrs. Mahabeer-Barrett's failure to declare the cash and the lies told as to the quantum.
- ▶ The different reasons given for the purpose of the cash.
- ▶ The fact that Mrs. Mahabeer-Barrett claimed that US\$12,000.00 belonged to her yet the entire sum was claimed by the Appellant.
- ▶ The Appellant's evidence of his preference for cash transactions being a person with so many alleged business interests.
- ▶ The Appellant's past criminal drug activities.

FACTORS THE TRIBUNAL OF LAW AND FACT MAY TAKE INTO CONSIDERATION

See:

- ▶ Sandra-Marie Cavallier v Commissioner of Customs [2010] JMCA Civ 26;
- ▶ Winston Pusey v Assets Recovery Agency [2012] JMCA Civ 48;
- ▶ Leroy Smith v Commissioner of Customs [2014] JMCA Civ 10;
- ▶ R v Anwoir and others[2008] EWCA Crim 1354;
- ▶ R v El Kurd (unreported CA 26th July 2000);
- ▶ R v Jephthah Ford for 'Attempting to Pervert the Course of Justice' Info: 8029/14 et al; and
- ▶ Detective Sergeant Franklyn McLaren v Roshen Daniels et al Plaintiff No. PC 5/2014

The Case for Less Cash or Cashless

R (on the application of the Director of Assets Recovery and others) v Green and others,

[2005] EWHC 3186

*“...The decisions are no more than a reflection of the fact that **in today’s “cashless society”, the ordinary law abiding citizen does not normally have any need to keep large numbers of banknotes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest), and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of banknotes. ...***

*Just as the law-abiding citizen normally has no need to keep large amounts of banknotes in his possession, so **the criminal will find property in that particular form convenient as an untraceable means of funding crime...**The four decisions do no more than recognize that **conduct consisting in the mere fact of having a very large sum of cash in the form of banknotes in one’s possession in certain circumstances (eg at an airport) may well provide reasonable grounds for suspicion and demand an answer.**” (emphasis supplied)*

THANK YOU!

