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COUNTERING CYBERCRIME THROUGH MONEY LAUNDERING REGIMES



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INVESTIGATIVE AND
ASSET RECOVERY TOOLS –
A JAMAICAN FRAMEWORK

Investigative Tools



Investigative Tools

- In recognising the complex and far-reaching nature of financial crimes, Parliament has provided a range of court sanctioned investigative tools to assist in its reduction and eventual eradication.
- Some of these investigative tools are found in the Financial Investigations Division Act and the Proceeds of Crime Act.

The Financial Investigations Division Act

- The Financial Investigations Division Act (FIDA) establishes the Financial Investigations Division (FID) which has the primary responsibility for investigating financial crimes.
- A financial crime is defined as “ any offence involving money or other benefit and includes any offence involving fraud, dishonesty, money laundering or the financing of terrorist activities.”

Investigative Tools under the FIDA

- In order to fulfil its mandate, the FIDA provides the FID with certain investigative tools.
- One such tool is the ability to apply to the court for certain investigative orders. These orders are:
 - ❖ Production and Inspection Orders; and
 - ❖ Account Monitoring Orders

Investigative Tools under the FIDA

Production and Inspection Order:

❖ This order may either:

- compel a person having possession of any information, book, record or document, which is relevant to the investigation of a financial crime, to produce the information, book, record or document to an authorized officer; (to be explained later in this presentation).
- Compel a person to make such information, book, record or document available to an authorized officer for inspection; or
- Require a person to answer questions.

Investigative Tools under the FIDA

Account Monitoring Order:

- ❖ This order compels a financial institution to provide certain account information on a specified person for a period not exceeding One Hundred and Eighty (180) days.

Investigative Tools under the FIDA

Who can apply for these orders?

- An application for a Production and Inspection Order or an Account Monitoring Order must be made by an “authorized officer”.
- An authorized officer is defined in the FIDA to mean:
 - ❖ The Chief Technical Director;
 - ❖ Any officer of the FID authorized as such by the Chief Technical Director; or
 - ❖ Any member of the Jamaica Constabulary Force so designated by the Commissioner of Police.

Investigative Tools under the Proceeds of Crime Act

- The Proceeds of Crime Act (POCA) also makes provision for critical investigative tools in the form of investigative orders as follows:-
- Investigative Orders:
 - ❖ Customer Information Order;
 - ❖ Disclosure Order; and
 - ❖ Account Monitoring Order.

Investigative Tools under the Proceeds of Crime Act

Customer Information Orders:

- Compels a financial institution to provide “customer information” concerning an individual against whom an investigation is being conducted.
- Customer information is defined to mean information as to whether a person holds, or has held any account at or, has during a specified period, conducted any transaction with the financial institution. Details of the accounts and transactions are required if the response is in the affirmative.

Investigative Tools under the Proceeds of Crime Act

Disclosure Order:

- This order may either:
 - compel a person to produce information or material to an appropriate officer for the officer to take away;
 - Require a person to give an appropriate officer access to information or material; or
 - Require a person to answer questions.

Investigative Tools under the Proceeds of Crime Act

Account Monitoring Order

- This order compels a financial institution, for a period which initially does not exceed Ninety (90) days, to provide information on accounts held by a person of interest or transactions conducted by such person to an appropriate officer. This period can be extended by an application to the court for a further Ninety (90) days.

Investigative Tools under the Proceeds of Crime Act

- There are three circumstances in which a court may grant any of the three aforementioned orders:
 - Money Laundering Investigation - If the investigative order is sought for the purpose of a money laundering investigation and the court is satisfied that there are “*reasonable grounds to believe*” that the subject has committed a money laundering offence;
 - Forfeiture Investigation - If the investigative order is sought for the purpose of a forfeiture investigation and the court is satisfied that there are “*reasonable grounds to believe*” that the subject has benefitted from his criminal conduct; or

Investigative Tools under the Proceeds of Crime Act

- ▣ Civil Recovery Investigation - If the investigative order is sought for the purpose of a civil recovery investigation and the court is satisfied that there are “*reasonable grounds to believe*” that the property specified in the application is recoverable or associated property and the subject holds all or some of the property.
- ▣ In the case of any of the aforementioned investigations, the court should also be satisfied that there are “*reasonable grounds to believe*” that the information that may be provided in compliance with the order is likely to be of substantial value to the investigation and that it is in the public interest for the information to be provided given the likely benefit to the investigation.

Investigative Tools under the Proceeds of Crime Act

Reasonable Grounds to Believe –

“Reasonable grounds for believing a primary fact, such as that the person under investigation has benefitted from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof. The test is not concerned with proof but with the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds...a well-understood objective standard, of which the judge is the arbiter.”

Privy Council decision of Assets Recovery Agency (Ex-parte) (Jamaica), [2015] UKPC 1

Investigative Tools under the Proceeds of Crime Act

- Who can apply for these orders?
- An application for the aforementioned orders is to be made by an “appropriate officer”.
- The meaning of the term “appropriate officer” is dependent on the type of investigation being conducted - money laundering investigation, forfeiture investigation or civil recovery investigation.
- The term includes:
 - the Director of the ARA,
 - an officer of the ARA,
 - a constable
 - A customs officer

Asset Recovery Tools



Asset Recovery Tools

In addition to the provision of investigative tools, the POCA also empowers law enforcement officials to institute proceedings with the objective of depriving persons of the proceeds of crime.

The POCA provides three avenues by which proceeds of crime can be forfeited. These are:

- ❖ Forfeiture and Pecuniary Penalty Orders;
- ❖ Recovery Orders (known as Civil Recovery Orders);
and
- ❖ Cash Forfeiture Orders

Forfeiture and Pecuniary Penalty Orders

- Prosecution does not end with a conviction. After conviction, the Director of Public Prosecutions (DPP) or the Assets Recovery Agency (ARA) can apply for a forfeiture or pecuniary penalty order.
- A forfeiture or pecuniary penalty order is made after a defendant is convicted and is an order made by the Supreme Court.
- These proceedings are an extension of the criminal matter as they form part of the sentencing procedure. As such, they should be heard in the criminal jurisdiction of the Supreme Court; the Circuit Court.

Forfeiture and Pecuniary Penalty Orders

A forfeiture order is an order where:

- The court identifies property used in or in connection with the offence concerned and makes an order that that property be forfeited to the Crown; or
- The court identifies the property that represents the defendant's benefit from criminal conduct and makes an order that the property be forfeited to the Crown.

Forfeiture and Pecuniary Penalty Orders



- A Pecuniary Penalty Order is an order where the court orders the defendant to pay to the Crown an amount equal to the value of the benefit he received from his criminal conduct.

Forfeiture and Pecuniary Penalty Orders

- It is regarded as “*a financial penalty ... a penalty imposed for the offence of which he has been convicted*” -*HM Advocate and another v McIntosh*, [2001] 3 WLR 107
- “*Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises.*” *Phillips v United Kingdom*, [2001] CrimLR 817

Forfeiture and Pecuniary Penalty Orders

The application process in Circuit Court:

- A defendant is convicted or pleads guilty to an offence.
- The DPP or ARA makes an application for a forfeiture or pecuniary penalty order before the defendant is sentenced.
- The court may either postpone sentencing and deal with the forfeiture or pecuniary penalty order application; or postpone the forfeiture or pecuniary penalty order application and deal with sentencing.

Forfeiture and Pecuniary Penalty Orders

The application process in the Parish Court:

- A defendant is convicted or pleads guilty to an offence.
- Before the defendant is sentenced, the DPP or ARA makes an application for the defendant to be committed to the Supreme Court with a view to a forfeiture or pecuniary penalty order being considered.
- The Parish Judge commits the defendant to the Supreme Court in custody or on bail and sentences the defendant for the offence.

Forfeiture and Pecuniary Penalty Orders

- In order for applications for a forfeiture or pecuniary penalty order to be made, it is important for the prosecutor (Clerk of Courts or Director of Public Prosecutions) to identify appropriate cases from an early stage.
- Particular attention should be paid to offences where the defendant has received a benefit such as Money Laundering Offences, offences under the Cybercrimes Act and the Law Reform (Fraudulent Transactions) (Special Provisions) Act.

Forfeiture and Pecuniary Penalty Orders

Need for Communication with the ARA:

- Prosecutor to inform the ARA of appropriate cases from an early stage so that the ARA can begin investigations into the defendant's assets and financial affairs.
- Prosecutor to update the ARA on status of appropriate cases so that the ARA will know when judgment will be handed down and know when to make the application.

Restraint Orders



- In order to preserve property of a defendant that may be liable for forfeiture or needed to satisfy a pecuniary penalty order, the ARA or Director of Public Prosecutions may apply to a Judge of the Supreme Court for a restraint order.

Restraint Orders

- The condition to be satisfied is that there is reasonable cause to believe that an alleged offender has benefitted from his criminal conduct and:
 - ❖ A criminal investigation has been started in Jamaica regarding the offence;
 - ❖ Proceedings for the offence have been commenced in Jamaica but have not been concluded; or
 - ❖ An application has been made for a forfeiture or pecuniary penalty order which has not been determined.

Restraint Orders

- The majority of restraint orders applied for by the ARA are where proceedings for the offence against the defendant have been commenced but not yet concluded.
- A restraint order will be discharged if there is undue delay in the prosecution of the criminal proceedings.
- It is therefore important that the prosecutors and the ARA communicate on the status of the criminal proceedings as it is the criminal proceedings that are the very basis of the restraint order.

The objective of the legislation is to investigate, prosecute and ultimately, to deprive persons of the benefit they obtained from criminal conduct. It is important for all stakeholders – prosecutors, investigators and other law enforcement/ investigative agencies- to take a collaborative approach and work together for the achievement of this objective.

THANK YOU!