

Asset Recovery

Contributing editors

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2018

**GETTING THE
DEAL THROUGH**

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Asset Recovery 2018

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2012
Sixth edition
ISSN 2051-0489

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Civil asset recovery

1 Legislation

What are the key pieces of legislation in your jurisdiction to consider in a private investigation?

British Virgin Islands (BVI) laws are composed of English common law, equitable principles, locally enacted legislation and some English statutory law. English common law was extended to the BVI by virtue of the Common Law (Direction of Application) Act 1705, and the rules of equity are recognised in the BVI pursuant to the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80). A decision at the Privy Council level in respect of any Eastern Caribbean Court of Appeal decision on BVI law is binding. Below that level of authority, decisions of English higher courts are simply highly persuasive. Other Commonwealth jurisprudence (Australia, Canada, New Zealand and others) is also often relied on.

BVI statutes of potential relevance include the BVI Business Companies Act 2004, the BVI Insolvency Act 2003 and the BVI Evidence Act 2006.

In the asset-recovery context, it is worth noting that the Privy Council (hearing a Cayman Islands appeal in 2005) concluded that section 122 of the Bankruptcy Act 1914 – which requires courts in former colonial or Commonwealth territories to assist each other in bankruptcy matters – was still in force in British Overseas Territories despite its repeal in England (*Al Sabah and Another v Grupo Torras SA* [2005] UKPC 1).

Note that the implementation of legislation on beneficial ownership (Beneficial Ownership Secure Search System Act 2017) is a ‘false dawn’ in the sense of usable information for private actions, because the information can only be accessed by specific government bodies. Furthermore, there is no ‘sideways route’ to that information as held with such body or bodies via anything amount to freedom of information legislation.

2 Parallel proceedings

Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

There is no statutory bar, but rather discretion to stay (ie, suspend) the civil proceedings. The Civil Procedure Rules (CPR) restrict the use of documents disclosed in civil proceedings being used by the parties outside of those civil proceedings. However, BVI would follow the line of cases commencing (at least in modern times) with *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 at 904 and culminating in the English Court of Appeal decision in *Attorney General of Zambia v Meer Care & Desai* [2006] EWCA Civ 390 and in which the defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) were given the protection of the civil proceedings being ‘ring-fenced’ such that nothing in those civil proceedings could be used against the defendants in the criminal context. See also *Swallow v Commissioners for Revenue and Customs* [2010] UKFTT 481 (TC), John Walters QC.

Attempts to stay civil proceedings on the basis of concurrent criminal investigations have been seen in the Turks and Caicos Islands, following the commission of an inquiry by Sir Robin Auld. Such attempts have failed: see *Attorney General of the Turks & Caicos Islands*

v Salt Cay Devco Limited and others CL51/2010, TCI Supreme Court, as well as *Attorney General of the Turks & Caicos Islands v Emerald Cay Limited and others* CL192/2010. In the latter case, an application to access the embargoed decision from the former case was supported by the claimant (in that jurisdiction ‘plaintiff’), but nevertheless was refused. In *Emerald Cay and others*, the definition of the ‘defendant’ in the civil context was narrowly construed (to exclude an unserved defendant facing police interviews under caution), and an order for evidence to be given by video link was allowed such that the relevant hearing progressed that way in light of expressed fears of arrest in attending in person to give evidence (see also *Polanski v Condé Nast* [2005] 1 WLR 637).

3 Forum

In which court should proceedings be brought?

The principal trial court is the Eastern Caribbean Supreme Court (ECSC).

In April 2009, a new commercial division of the court was opened in the BVI. Generally, under Part 69A and 69B of the ECSC CPR (Application to the Virgin Islands) (Amendment) Order 2009, subject to a statutory discretion to include other (ie, ‘non-qualifying’) cases, a case is suitable for determination in the Commercial Court if it is a commercial claim, namely arising out of the transaction of trade or commerce, and the value of the claim exceeds US\$500,000. The discretion to include cases outside these qualifying criteria is exercised on the basis of the claim still being of a commercial nature and one that warrants being in the commercial list.

That court physically sits in the BVI but takes cases from across the ECSC circuit, subject to complexity and value thresholds, to then sit as the court of Saint Christopher and Nevis, for example. The intermediate Court of Appeal is the itinerant appellate division of the ECSC and the ultimate court of appeal is the Judicial Committee of the Privy Council in London, England.

4 Limitation

What are the time limits for starting civil court proceedings?

Cause-of-action limitation periods are governed by statute and broadly follow the English framework. Thus, the statute of limitation will differ depending on the cause of action, as set out in the Limitation Act (Cap 43). For example, the relevant limitation period for claims based in tort or contract is six years; the same limitation period applies for the enforcement of a debt or an award.

Applicable limitation with respect to claims against trustees differs by reference to the way in which such a claim is characterised and whether the trust on which the claimant relies pre-exists the conduct relied on so as to found the cause of action. When a breach of fiduciary duty in the absence of deliberate concealment is based on the same facts as a claim for either or a claim in contract or in tort, then the same six-year period will apply.

However, when the fiduciary has deliberately concealed facts relevant to the cause of action, then the limitation will not apply (eg, an undisclosed interest in a transaction), but considerations of laches (unjustified delay causing prejudice to the defendant in defence of the claim) will still be necessary in respect of consideration of a claim.

5 Jurisdiction

In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

Freezing orders

Jurisdiction of the courts in the BVI is based on section 24(l) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80) and is ordinarily ancillary to the court's substantive jurisdiction.

In *Black Swan Investment ISA v Harvest View Limited et al* BVIHCV 2009/399, the Commercial Court held that it had discretion to grant stand-alone freezing injunctions in support of foreign proceedings in which the respondent was subject to the in personam jurisdiction of the BVI court. A defendant may still challenge jurisdiction on a freezing order based on the principles set out in *Yukos CIS Investments Limited & Ors v Yukos Hydrocarbons Investments Ltd & Ors* HCVAP 2010/028 (eg, the relief obtained in the main, foreign proceedings would not lead to a judgment that is enforceable against BVI assets owned or controlled by the defendant).

Receivership

Jurisdiction is based on section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act.

6 Admissibility of evidence

What rules apply to the admissibility of evidence in civil proceedings?

In broad terms, in civil cases, the law of evidence of England and Wales has been adopted in the BVI. The primary test is one of relevance; that is, evidence is admissible if, 'if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings' (section 63 of the Evidence Act 2006).

Sections 67 to 79 of the Evidence Act 2006 make admissible (in prescribed circumstances):

- hearsay documentary evidence;
- the statement of an unavailable witness who previously made an out-of-court statement;
- the out-of-court statement of an available witness while testifying;
- expert reports; and
- oral opinion evidence.

7 Publicly available information

What sources of information about assets are publicly available?

See comments at question 1 on the restricted use of information provided under the 2017 legislation.

Typical information available to the public includes:

- company information, including:
 - the present and historical status of a BVI company;
 - the identity of the registered agent;
 - the place of its registered office;
 - the date of its incorporation;
 - certificates of good standing (available to any member of the public for a BVI company);
 - the contents of its memorandum and articles of association; and
 - registered charges (if any);
- list of entities regulated by the BVI Financial Services Commission;
- court documents and judgments;
- Land Registry: can provide certain details including confirmation of the owner of BVI land or real estate upon application;
- BVI Ship Registry: certain information regarding vessels registered under a BVI flag; and
- list of disqualified directors.

8 Cooperation with law enforcement agencies

Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Because civil proceedings may be conducted in parallel with the criminal investigation and prosecution, the information obtained and

promulgated in a public trial can be used to justify civil proceedings subject to the caveats set out in question 2.

The sharing of information during investigative action is at the discretion of the Serious Crimes Unit of the Royal Virgin Islands Police Force and the Financial Investigation Agency, which is primarily responsible for investigating white-collar crimes. The BVI attorney general also has discretion in such matters, particularly relating to advising the government on requests for information or sharing evidence outside the territory (eg, with intranational groups such as Interpol).

9 Third-party disclosure

How can information be obtained from third parties not suspected of wrongdoing?

There is no statutory basis for third-party disclosure or pre-action disclosure as is now possible under English procedural law (English Civil Procedure Rules 34.16 and 34.17). The remnant of the old equitable bill of discovery, the *Norwich Pharmacal* order, is possible in the BVI and most often obtained when a person, through no fault of his or her own, has become involved in the tortious acts of another and facilitates his or her wrongdoing. This gives rise to a duty to assist the person who has been wronged by giving them full information, including as to the location of assets (see *Al-Rushaid Petroleum Investment Company et al v TSJ Engineering Consulting Company Limited*, BVIHCV(Com) 37/2010), and disclosing the identity of the wrongdoers. This is subject to the usual provisos in respect of *Norwich Pharmacal* relief (including that it be relevant, necessary to enable the assertion of rights and not simply a mechanism for accelerating standard disclosure, and that it follow the 'mere witness rule'). *Norwich Pharmacal* orders have been made in the BVI in support of foreign proceedings and against the registered agents of respondent companies incorporated in the BVI (see, eg, *JSC BTA Bank v Fidelity Corporate Services Limited et al*, HCVAP 2010/035; *Jeremy Outen et al v Mukhtar Ablyazov*, HCVAP 2011/30) to disclose details of the BVI company's assets. Note that, as an equitable remedy, the grant of *Norwich Pharmacal* relief is subject to the exercise of discretion.

Disclosure orders can also be made ancillary to a freezing order in the BVI (as in England and Wales). The High Court has recently ruled that this is not, however, available as against a 'non cause of action' defendant (ie, in support of a Black Swan freezing order): *Bascunan v Elsaca* BVIHC (Com) 2015/0128.

10 Interim relief

What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

Freezing orders

These are granted if:

- the applicant has a good, arguable case;
- the court uses its discretion to decide whether an order is 'just and convenient'; and
- the defendant presents a risk of asset flight.

These orders are often coupled with a disclosure order regarding the defendant's assets to ensure that the freezing order is effective (ie, by which to 'police' the order). Orders can be granted ex parte, but cannot exceed 28 days. A claimant who successfully obtains an interim freezing order must give an undertaking for damages and costs with the object of compensating the defendants if the claimant should ultimately be unsuccessful at the trial and the court should later find that the defendants have suffered loss as a result of the grant of the order.

Appointment of a receiver

There are three requirements for appointment:

- there must be sufficient evidence to show a good, arguable case;
- there must be property to be preserved; and
- the claim must not be frivolous or vexatious.

There are two specific cases in which an appointment is made:

- when the applicant already has an existing right to the property to be preserved (the claimant must have a good prima facie title and the property that is the subject matter of the proceedings must be

in danger if left in the possession or under the control of the party against whom the appointment of a receiver is asked for); and

- when a receiver is appointed to preserve property to ensure its proper management pending litigation to decide the rights of the parties to that property.

The appointment of a receiver is often regarded as a remedy of last resort and they are usually appointed *ex parte* when the court is faced with allegations of fraud and immediate action is needed to prevent the court's orders from being rendered futile.

11 Right to silence

Do defendants in civil proceedings have a right to silence?

Privilege against self-incrimination may be available to a defendant pursuant to both the common law and the as-yet-untested provisions within the Evidence Act. On that basis, the defendant will be able to invoke privilege when a defendant may expose himself or herself to criminal proceedings or, when he or she has failed to comply with the order, contempt proceedings. As noted in question 2, tensions arise in respect of concurrent civil and criminal proceedings.

12 Non-compliance with court orders

How do courts punish failure to comply with court orders?

Non-compliance with court orders can be punished by holding a party in contempt of the court. This might include a punitive fine, sequestration of assets, or even jail time, depending on the seriousness of the non-compliance. Contempt proceedings are quasi-criminal in nature, regarding both the standard of proof and the strict observance of procedural requirements, such as personal service of the application to commit to prison.

The recent English Court of Appeal decision in *Dar Al Arkan Real Estate Development Co and another v Al Refai and others* [2014] EWCA Civ 715, gave a committal order extraterritorial effect. In this case, the court held that the principle against the extraterritorial application of legislation does not prevent a committal order under the CPR being made against a foreign director who was not within the jurisdiction and cannot be served in the country. The director was resident and domiciled in Saudi Arabia. In the context of asset recovery, a party can apply to commit a company director to prison – wherever in the world the director may be – as a handy weapon to enforce an order or an undertaking against the company. There is not yet a Caribbean equivalent case to *Dar Al Arkan*.

13 Obtaining evidence from other jurisdictions

How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

The BVI is a signatory to the March 1970 Convention on Taking Evidence Abroad in Civil or Commercial Matters, and it is pursuant to this convention that letters rogatory requests are usually pursued. The proceeding must be civil or commercial in nature and in respect of actual or contemplated proceedings in the BVI. The permissible breadth of such questions would obviously require input from legal practitioners in the receiving state. Typically, when there are asset-dissipation issues, such requests are not appropriate because of the notice of such provided to the target of the request. As a general proposition, no requests should be attempted out of the requesting court that could not be made or ordered in the (receiving) BVI court.

14 Assisting courts in other jurisdictions

What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

BVI courts have the power to stay (ie, suspend) their own proceedings after granting a freezing order so as to permit litigation to be conducted in another jurisdiction.

Under the BVI's Reciprocal Enforcement of Judgments Act of 1922 (the 1922 Act), final money judgments competently obtained in the High Court in England and Wales, Northern Ireland, or the Court of Session in Scotland (extended to the Bahamas, Barbados, Bermuda, Belize, Grenada, Guyana, Jamaica, St Lucia, St Vincent, Trinidad and

Tobago, New South Wales (Australia), and Nigeria) can be registered in the BVI if the court is satisfied with registration and it is made within 12 months of perfection of the judgment.

In cases in which a money judgment has been obtained in a country other than those listed under the 1922 Act, the judgment will be treated by BVI courts as the basis for a cause of action at common law called a 'suit on a foreign money judgment'. The judgment may be the subject of enforcement proceedings in the courts in the BVI under the common law doctrine of obligation by action on the debt evidence by the final money judgment of the competent foreign court, which does not require a retrial of the issues provided that the following conditions are satisfied:

- the foreign court must have had jurisdiction in the matter and the BVI defendant must either have submitted to such jurisdiction or must have been resident or carrying on business within such jurisdiction and was duly served with process;
- the foreign judgment must not be in respect of penalties, taxes, fines, or similar fiscal or revenue obligations;
- the judgment must not have been obtained by fraud; and
- if recognised or enforced, the judgment in the BVI would not be contrary to public policy.

The BVI will also accept letters rogatory for judicial assistance in the civil proceedings (ie, the inbound inverse of the outbound scenario in question 13); however, the nature and scope of the assistance given to the foreign jurisdiction is at the discretion of the BVI court. It will be refused in respect of enforcement of a non-BVI tax judgment in the BVI itself. Note, however, the decision in *Re: Norway* [1990] 1 AC 723, which is the judicial authority that the BVI courts will follow as to obtaining information via the BVI court for subsequent use back in the home jurisdiction or elsewhere out of the BVI, in respect of enforcement of a tax judgment. Such use will not fall foul of the well-recognised general rule against tax gathering for overseas sovereign states.

Finally, BVI courts will assist other courts in recovering assets in bankruptcy. At present, Part XIX of the Insolvency Act 2003 is not in force, so applicants are limited to ad hoc assistance under Part XVIII. This only applies to applicants from 'relevant countries' (Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and the United States of America at present). Section 122 of the (English) Bankruptcy Act 1914 is likely to apply in the BVI following the *Gruppo Torres* case mentioned in question 1, although it has not been relied upon to date. Although the specific assistance sought in that case was the recognition of a foreign trustee in bankruptcy, the scope of assistance contemplated in section 122 is wider than that.

Outside of statute, the BVI courts are likely to recognise 'a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up', so long as the information could be obtained in equivalent proceedings in the home jurisdiction: *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36. The BVI courts will also grant *Norwich Pharmacal* relief to foreign litigants in appropriate cases.

15 Causes of action

What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

The main causes of action in civil asset-recovery cases are fraud, fraudulent transfer, breach of trust or fiduciary duty, unjust enrichment, conspiracy (an intentional infliction of harm by unlawful means and unlawful means conspiracy) and breach of contract.

Proprietary claims are a permissible subset of the claims listed above, in which the claimant can show title and interest in the property at issue in the matter. There are certain practical advantages in alleging a proprietary claim as compared to a non-proprietary claim: for example, in the context of seeking injunctive relief, unjustified delay may well ruin a non-proprietary claim. This is not so in respect of a proprietary claim. Further proprietary funds are usually exempt from the defendant's carve-out of permissible expenses in the context of a *Mareva* injunction.

16 Remedies

What remedies are available in a civil recovery action?

Constructive trust

This can arise in the following ways:

- liability in dishonest assistance, where:
 - there is a breach of trust or fiduciary duty;
 - the party assisted in that breach of trust or breach of fiduciary duty; or
 - the target defendant was dishonest;
- liability for knowing receipt:
 - when a third party knowingly receives property impressed with a trust in favour of the claimant;
 - when the assets were disposed of in breach of fiduciary duty and received with such knowledge;
 - when the recipient beneficially received the assets; and
 - when the recipient's state of knowledge at the time of receipt is such that it is unconscionable for him or her to retain the benefit.

Tracing

Rules of tracing are an important equitable tool, whereby a victim of fraud can identify its asset or the proceeds and those persons who have handled or received them and assert a proprietary claim against that property.

They can be traced under the following circumstances:

- there must be a distinct equitable title to the property;
- the claimant can elect to follow the original asset and enforce his or her equitable title or alternatively trace the 'substituted' asset in the hands of the fraudster;
- the claimant can choose whether to enforce an equitable lien for the value of the original asset or claim the entire beneficial ownership of the substituted asset under a constructive trust;
- tracing can take place into a mixed fund to which the fraudster has contributed, although when the fund is mixed, beneficial ownership over the entire substituted asset cannot be asserted;
- when tracing into a mixed fund that includes funds belonging to an innocent volunteer, the court will use different identification rules that provide parity between the parties; and
- when the mixed fund has been used to buy a further asset, the claimant will be able to trace his or her share in the new asset, which may increase or depreciate in value.

Common-law claims

The common-law equivalent of knowing receipt is a personal (ie, not a proprietary) claim.

It is usually used in more-straightforward recovery cases, in which the claimant still retains title at the time of its receipt by another party. In the absence of payment of any consideration or a potential change of position defence, a court can order that monies are paid back.

Restitutionary claims arising from unjust enrichment are, like most other common-law claims, an allegation of wrongdoing on the part of the recipient. However, in respect of restitutionary claims, the recipient must have been one of the wrongdoers. Restitutionary claims are not dependent on tracing into any specific property.

Fraudulent misrepresentation

A fraudulent misrepresentation is a statement of fact made without belief in its truth, knowingly or recklessly made with the intention that it should be acted upon. Bad faith is not a prerequisite to proof of fraudulent misrepresentation. When a contract has been entered into by reason of fraudulent misrepresentation, the person so induced may rescind the contract, claim damages, or do both.

17 Judgment without full trial

Can a victim obtain a judgment without the need for a full trial?

Yes. Summary judgment is an option under Part 15 of the Civil Procedure Rules 2000.

Rule 12.4 of the BVI Civil Procedure Rules provides for an automatic default judgment for failure to file an acknowledgement of service within the prescribed period on a claim for a specified sum of money.

Types of judgment in which declaratory relief is sought (such as declarations of ownership or other legal rights) cannot be obtained on a default basis.

18 Post-judgment relief

What post-judgment relief is available to successful claimants?

Orders for the delivery of information post-judgment are available in a variety of different contexts (eg, oral examination of a judgment debtor or of a former director or officer by a liquidator of a company in liquidation, as well as for such former director or officer to deliver up records of the company in liquidation). In the case of money judgments, the judgment creditor may also serve a financial position notice requiring the judgment debtor to complete a statement of its financial position.

The appointment of a receiver and freezing orders are also possible.

19 Enforcement

What methods of enforcement are available?

Garnishment

A judgment creditor may obtain payment of a judgment debt from a person who owes money to the judgment debtor, including money in a BVI bank or financial institution.

The court will initially issue a provisional order against the garnishee and debtor and will subsequently consider whether to make a final attachment of debts order at hearing.

Charging orders

A judgment creditor will seek to enforce a judgment against shares in a BVI company held by the debtor by obtaining a charging order over the shares and thereafter making an application for the sale of those shares.

An application is made without notice, but must be supported by affidavit evidence.

Writs of possession or execution

These are available upon court order.

The bailiff is then able to enforce judgment against land or goods as the case may be.

20 Funding and costs

What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

There are no statutory provisions in place governing the funding of litigation in the BVI, and the BVI courts have not had occasion to assess the lawfulness of third-party funding arrangements such as conditional-fee agreements (CFAs) or damages-based agreements. The torts of champerty and maintenance have not been formally abolished as in England and Wales, but it can be expected that BVI courts would give consideration to the global trends towards permitting third-party funding of litigation, and CFAs, at least, would be possible. Note that in *Hugh Brown & Associates (Pty) Ltd v Kermas Limited* (BVIHCV(COM) 2011/13), the Commercial Court was willing to assume, without actually deciding, that there was nothing unlawful about a third-party funding arrangement adopted by the claimant. Although uncommon, it is possible to obtain after-the-event insurance in the BVI.

Reflecting this trend, the litigation-funding market in the BVI is growing.

The courts can manage the costs of litigation through case management orders. Part of the court's case management functions include considering whether the likely benefits of taking a particular step will justify the cost of taking it (Part 25 of the ECSC Civil Procedure Rules). Part 26 of the CPR gives the court a wide spectrum of powers that could be used to manage costs directly or indirectly in the proceedings. These powers supplement the existing costs rules in the BVI, which cap costs in one of three ways: fixed, prescribed or budgeted costs. Costs are usually prescribed, meaning that a successful defendant will receive a percentage of the value of the claim, and a successful claimant would receive a percentage of the sum recovered. This costs regime often results in under-recovery to the prevailing party, and the courts have gone to some lengths to alleviate or circumvent it. Since 2009, updated

rules have applied in large commercial cases (ie, those cases heard in the Commercial Division, which could include asset-recovery cases), to allow greater recovery to the successful party based on an English-style assessment of costs.

Criminal asset recovery

21 Interim measures

Describe the legal framework in relation to interim measures in your jurisdiction.

In 1997, the BVI enacted the Proceeds of Criminal Conduct Act (the 1997 Act), which (with several amendments, including one from 2017) is now the statutory basis for both prosecuting a criminal offence that results in the financial benefit or gain for a defendant, as well as ensuring the preservation of such assets when awaiting the outcome of such prosecutions.

Should there be sufficient evidence and cause, the 1997 Act empowers the court to issue confiscation orders, restrain property and prevent parties from engaging in business with the defendant, among other interim measures. Some of the specific sections are described in greater detail in the answers given below.

22 Proceeds of serious crime

Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

There is no automatic trigger. Investigations can be the result of regulatory action taken by the Financial Investigative Authority, when in the course of conducting its duties it detects some serious crime of a financial nature.

Similarly, the attorney general can employ the enforcement agencies to initiate an investigation if a situation is referred to its office that merits further action, but there is no automatic trigger.

23 Confiscation – legal framework

Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

The 1997 Act is the legal basis for granting the court the ability to issue confiscation orders and determines other powers that can be used to effect the confiscation orders. Under subsection 6(6) of the 1997 Act, the benefit figure is calculated as the value of the property obtained as a result of or in connection with the commission of the offence. Section 9 (as amended) requires the court to make certain assumptions as to what the defendant's benefit includes in the case of 'qualifying offences', which is defined very broadly to include any offence to which the 1997 Act applies and that was committed after it came into force. In broad terms, these are that a defendant's benefit includes property held at or from the time of conviction, that any transfers to the defendant from the six years prior to the bringing of criminal proceedings constitutes benefit from crime, and that any expenditure paid by the defendant in the same time frame was done out of the benefit of his or her crime. The assumptions can be disapplied if shown to be incorrect, to avoid double-counting with a previous confiscation order, or to avoid injustice.

The important amendment in the 2017 legislation (Proceeds of Criminal Conduct (Amendment) Act 2017) is that there only needs to be a requesting (non-BVI) country, rather than that country also to be designated (ie, put on a list by the BVI government of qualified requesting countries). This broadens the scope for confiscation.

24 Confiscation procedure

Describe how confiscation works in practice.

Pursuant to section 6 of the 1997 Act, if an offender is convicted of an offence in any proceedings before a court and the court determines that the offender has benefited from any relevant criminal conduct, it shall determine the amount to be recovered in his or her case and make an order directing the offender to pay the amount determined.

A person benefits from the offence if he or she obtains property as a result of, or in connection with, its commission and his or her benefit is the value of the property so obtained.

The sum that an offender is required to pay by virtue of an order shall be equal to:

- the benefit in respect of which it is made; or
- the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the lesser.

25 Agencies

What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

The agencies responsible for tracing and confiscating the proceeds of crime are the Office of the Director of Public Prosecutions for the BVI government and the Financial Investigation Agency (FIA). Section 7 of the 2017 amending legislation allows the Minister of Finance to determine use by the FIA of the monies generated as a result of fines imposed.

26 Secondary proceeds

Is confiscation of secondary proceeds possible?

Yes. The definition of realisable property at section 3(9) of the 1997 Act includes 'property which, in whole or in part, directly or indirectly represent in his hands the property he received [as a result of his criminal conduct]'.

Based on this, any property in which a person has an interest as a result of his or her criminal proceeds would be subject to a confiscation order.

27 Third-party ownership

Is it possible to confiscate property acquired by a third party or close relatives?

No. Section 4 of the 1997 Act catches gifts of the proceeds of crime as it relates to the convicted party, including the value of such gifts in any confiscation order made as against the convicted criminal defendant. The 1997 Act does not provide for a confiscation order to be made against the spouse or cohabitee of that defendant (or other third-party transferee) when such person(s) are not also convicted criminal defendants. It is possible for the confiscation order to be made in respect of the convicted criminal defendant's interest in property in which the spouse or cohabitee holds their own interest.

Instead, recovery as against those transferees would be by way of civil claim (whether on a proprietary or other basis, see above).

Section 11 of the 1997 Act requires the convicted criminal defendant to provide information in the context of any confiscation proceedings, and any failure to cooperate gives rise to adverse inference as to benefit. This adverse inference would not be to the detriment of any third-party transferee.

28 Expenses

Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

The 1997 Act does not address this directly. That said, the 1997 Act does enable the imposition of a fine. There is no statutory or otherwise known direct hypothecation as to the way in which any such fine is applied (eg, there is no equivalent scenario to that of the US Department of Justice participating financially in forfeiture recoveries). In the BVI context, it is possible that the proceeds of a fine (or part thereof) could be applied to defray investigative or prosecutorial costs, but whether this in fact occurs is neither publicly known nor ascertainable.

29 Value-based confiscation

Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. Pursuant to section 18(l) of the 1997 Act, the court may make a charging order on realisable property for securing the payment to the Crown, when a confiscation order has been made for an amount equal to the value of that property.

Update and trends

As the newly imposed registration system of beneficial ownership 'beds down', there are clear issues relating to possible data breaches and use of information obtained through that route. There is no general discretion to exclude evidence unlawfully obtained and restrictions on use, which has been narrowly confined in English proceedings.

30 Burden of proof

On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

The burden of proof is on the prosecuting authorities. The proof of criminal benefit and also the amount of such benefit is subject to the civil standard of proof (ie, the balance of probabilities, see section 6(9) of the 1997 Act). Although the 1997 Act does not explicitly place the burden of disproving the assumptions mentioned in question 23 on the defendant, in practice it would likely be the defendant who would have to disprove them.

31 Using confiscated property to settle claims

May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

No. There is no statutory regime for compensation to the victims of crime, whether from recovered amounts or otherwise.

Note, however, that the information that surfaces from a criminal trial, including a court's determination of guilt, can be used in civil proceedings to make a claim.

32 Confiscation of profits

Is it possible to recover the financial advantage or profit obtained though the commission of criminal offences?

Yes. There is scope for exactly this by the prosecuting authorities: sections 16 to 18 of the 1997 Act provide the basis for restraint or charging orders so as to freeze property when there are pending proceedings.

33 Non-conviction based forfeiture

Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

No. Confiscation of criminal proceeds under the BVI statutory regime requires a criminal conviction (see subsection 6(1) of the 1997 Act), although offences 'taken into consideration' (ie, when there is no conviction) at the time of sentencing can also form 'relevant criminal conduct' that triggers confiscation (subsection 6(5)(b)) at the same time. Additionally, there is legislation subsidiary to the Criminal Justice (International Cooperation) Act 1991, namely the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order 1996 (liaising with designated countries in relation to particular triggers at schedules 1 to 3 thereof) and that creates a regime under which BVI enforcement of non-BVI forfeiture orders is feasible in specific circumstances.

An alternative to domesticating the non-BVI forfeiture order would be civil proceedings in the BVI on the basis of the non-BVI order.

When, as is very often the case, extremely prompt action is required pre-conviction to safeguard assets pending a criminal trial and anticipated confiscation, a restraint order can be obtained pursuant to section 17 of the 1997 Act, and this can be an application made ex parte (see section 17(2)(4)(b)).

34 Management of assets

After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

The court manages the seizure of assets on a case-by-case basis and subject to its general supervision (as distinct from day-to-day control). The most common approach is the appointment of an experienced accountant or insolvency practitioner as receiver. There is no government agency to do so. As to running costs referable to such assets, these can be defrayed from income (when the assets produce income, such as real estate or a business). The running costs of other types of assets (ie, non-income-producing) will be an expense to the BVI government itself.

When seized assets are 'put to work' by means of commercial use, this would be on an arm's-length (ie, charged-for) basis.

35 Making requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

The framework for making requests for foreign legal assistance is essentially the same as the framework described in question 36. For some countries, bilateral or multilateral treaties are in place to facilitate mutual requests for foreign legal assistance. In other cases, the various UN conventions and treaties assist the BVI in requesting legal assistance as needed. In cases of mutual legal assistance in tax matters, the BVI is signatory to several tax information exchange agreements that comply largely with the Organisation for Economic Co-operation Development's model template.

Procedure

As is also described below, the procedures for requesting foreign legal assistance are very similar to the process of complying with requests for foreign legal assistance.

When a treaty is in place, the process can be streamlined such that courts and law enforcement agencies can work directly together.

When no treaty exists, the court will have the option to submit letters rogatory to other courts for assistance or direct letters to relevant agencies in other countries.

36 Complying with requests for foreign legal assistance

Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

Framework***Mutual Legal Assistance (United States of America) Act 1990***

Implements the bilateral treaty between the United States and the United Kingdom to improve the effectiveness of the law enforcement authorities of both the BVI and the US in relation to the prosecution and suppression of crime through the process of cooperation and mutual legal assistance. It is limited to criminal matters.

Criminal Justice (International Cooperation) Act 1993

Creates a flexible and comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations. It also regulates substances useful for the manufacture of controlled drugs.

Proceeds of Criminal Conduct Act 1997

Represents an all-crimes, anti-money laundering legislation. It provides for the recovery of the proceeds of crime and establishes a regime for the registration and enforcement of external confiscation orders.

Financial Services Commission Act 2001

Establishes the Financial Services Commission as the BVI's autonomous regulatory institution with powers to license, regulate and develop the financial services industry. It empowers the commission

to receive and grant assistance on request from a foreign regulatory authority for the purpose of enabling the foreign authority to discharge its regulatory functions.

Financial Investigation Agency Act 2003

Establishes the FIA, which works with foreign governments and regulatory agencies to prosecute financial crimes and offences. It has the authority to order persons to refrain from completing transactions, freeze bank accounts and produce documents.

Mutual Legal Assistance (Tax Matters) Act 2003

Gives effect to the agreement between the government of the US and the government of the UK (including the government of the BVI) for the exchange of information relating to tax matters, and it extends to any similar agreements the government of the BVI may enter into.

Procedures

The FIA (see above) remains the focal point for conducting investigations. Mutual legal assistance is only provided in respect of valid requests from established government or government-related authorities or agencies. With respect to the current regime, no assistance is provided to individual non-government persons or institutions. Every request for legal assistance must be clear and precise regarding its nature and purpose. It must be written legibly in English.

With respect to requests for legal assistance:

- law enforcement: requests for assistance are sent to the governor and the attorney general. The attorney general will advise the governor on how to respond to the request;

- regulatory breaches or investigations: the managing director or chief executive of the Financial Services Commission will receive the request; and
- tax matters (information exchange): requests of this nature are managed by the financial secretary.

37 Treaties

To which international conventions with provisions on asset recovery is your state a signatory?

The BVI is party to the following international conventions:

- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- UN Convention against Transnational Organized Crime 2000;
- UN Convention for the Suppression of the Financing of Terrorism 1999; and
- UN Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

38 Private prosecutions

Can criminal asset recovery powers be used by private prosecutors?

The present state of the law in the BVI does not provide for this.

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Asset Recovery
ISSN 2051-0489



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