

# Asset Recovery

*Contributing editors*

Jonathan Tickner, Sarah Gabriel and Hannah Laming



2018

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Asset Recovery 2018

*Contributing editors*

Jonathan Tickner, Sarah Gabriel and Hannah Laming  
Peters & Peters Solicitors LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



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

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2017. Be advised that this is a developing area.

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



## CONTENTS

<b>Global overview</b>	<b>5</b>	<b>Kazakhstan</b>	<b>80</b>
Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP		Yerzhan Manasov and Ratmir Abdrashitov Linkage & Mind LLP	
<b>Australia</b>	<b>9</b>	<b>Korea</b>	<b>87</b>
Tobin Meagher, Andrew Moore and Alice Zheng Clayton Utz		Michael S Kim, Robin J Baik and S Nathan Park Kobre & Kim Yoon-Hee Kim and Jae Hwan Lee Shin & Kim	
<b>Bermuda</b>	<b>16</b>	<b>Liechtenstein</b>	<b>93</b>
Kevin Taylor, Nicole Tovey and Kai Musson Taylors (in association with Walkers)		Thomas Nigg and Eva-Maria Rhomberg Gasser Partner Attorneys at Law	
<b>British Virgin Islands</b>	<b>21</b>	<b>Monaco</b>	<b>99</b>
Tim Prudhoe and Alexander Heylin Kobre & Kim		Donald Manasse Donald Manasse Law Offices	
<b>Canada</b>	<b>28</b>	<b>Nigeria</b>	<b>105</b>
Maureen Ward and Nathan Shaheen Bennett Jones LLP		Babajide O Ogundipe and Cyprian Nonso Egbuna Sofunde, Osakwe, Ogundipe & Belgore	
<b>Cayman Islands</b>	<b>35</b>	<b>Qatar</b>	<b>110</b>
Jalil Asif QC, James Corbett QC and Pamela Mitchell Kobre & Kim		Fouad El Haddad Lalive in Qatar	
<b>Cyprus</b>	<b>41</b>	<b>Serbia</b>	<b>114</b>
Andreas Erotocritou and Antreas Koualis AG Erotocritou LLC		Tomislav Šunjka Law Office of Tomislav Šunjka	
<b>Greece</b>	<b>48</b>	<b>Switzerland</b>	<b>121</b>
Ilias G Anagnostopoulos and Alexandros D Tsagkalidis Anagnostopoulos		Marc Henzelin, Sandrine Giroud and Maria Vinogradova Lalive	
<b>Hong Kong</b>	<b>54</b>	<b>United Arab Emirates</b>	<b>129</b>
Nick Gall and Ashima Sood Gall		Ibtissem Lassoued Al Tamimi & Company	
<b>Ireland</b>	<b>60</b>	<b>United Kingdom</b>	<b>134</b>
Gavin Smith and William Greensmyth Walkers		Jonathan Tickner, Sarah Gabriel and Hannah Laming Peters & Peters Solicitors LLP	
<b>Italy</b>	<b>65</b>	<b>United States</b>	<b>144</b>
Roberto Pisano, Valeria Acca and Chiara Cimino Studio Legale Pisano		Carrie A Tendler, Jef Klazen and Michael A Sanfilippo Kobre & Kim	
<b>Jersey</b>	<b>74</b>		
Simon Thomas and William Redgrave Baker & Partners			

# Cayman Islands

Jalil Asif QC, James Corbett QC and Pamela Mitchell

Kobre & Kim

## Civil asset recovery

### 1 Legislation

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

The primary statutory laws in the Cayman Islands to consider in a private investigation to trace assets are:

- the Confidential Information Disclosure Law 2016: this replaced the Confidential Relationships (Preservation) Law (2015 Revision) with effect from 22 July 2016 and has decriminalised the disclosure or use of confidential business information connected to the Cayman Islands. Confidential information is now protected by breach of confidence under common law. Absent consent from the owner of the information, the statute sets out limited circumstances in which disclosure of confidential information can be made without incurring liability, for example:
  - in compliance with criminal or regulatory investigations;
  - treaty obligations;
  - to report wrongdoing; and
  - where there is a serious threat to life and with court permission.

The statute is of extraterritorial effect and impacts any confidential information that is brought within the Cayman Islands. The statute therefore places a significant block on attempts to obtain information on debtors connected with, and assets held through, Cayman entities; and:

- the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978: this gives effect within the Cayman Islands to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970. It allows the Cayman Islands Court, on request from a foreign court:
  - to order examination of witnesses;
  - documentary discovery;
  - inspection, preservation, detention, taking of samples, or testing of any property; and
  - the medical examination of any person, provided that such measures are legally permissible in the requesting country.

Compliance with such requests by foreign courts is one of the specific exemptions to disclosure of confidential information under the Confidential Information Disclosure Law 2016. In addition to the legislation summarised above, recourse can be had to common law and equitable remedies in asset tracing. The criminal jurisdiction in relation to tracing and seizing proceeds of crime may have indirect benefit for individuals seeking to pursue parallel investigations and asset tracing.

### 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?**

Parallel civil and criminal proceedings are permissible in the Cayman Islands Court: *The Matter of Fraser* (2003) CILR 227 confirms that the civil court can make findings concerning property rights notwithstanding ongoing criminal proceedings. The case concerned property that was subject to restraint by the Crown in confiscation proceedings;

nevertheless, the civil court determined the third party's rights in that property.

In *Panton v Financial Institutions Servs Ltd*, PC App No. 95 of 2002 (an appeal from Jamaica, but of persuasive effect in the Cayman Islands), the Privy Council indicated that, in order to obtain a stay of parallel civil proceedings until the conclusion of the criminal process, the defendant would have to show that he or she would suffer unjust prejudice by allowing them to continue. For example, the absence of a right to silence in civil proceedings, and the resulting impact on the criminal proceedings of the defendant having to give evidence, was a factor, but the defendant should not be able to use the stay to obtain a tactical advantage. In *Tasarruf Mevduati Sigorta Fonu v Wisteria Bay Ltd & Ors* (2007) CILR 185, the Cayman Islands Court applied *Panton* and refused to stay a domestic civil claim in which there were parallel criminal proceedings abroad arising out of the same issues.

### 3 Forum

**In which court should proceedings be brought?**

Commercial claims are likely to be commenced in Financial Services Division of the Grand Court of the Cayman Islands owing to the financial jurisdiction thresholds. Certain types of claims are specifically required to be commenced within the Financial Services Division, for example:

- proceedings relating to Cayman-registered investment funds and exempted insurers;
- proceedings under the Companies Law;
- local and foreign bankruptcy proceedings; and
- proceedings for enforcing foreign judgments and arbitral awards.

### 4 Limitation

**What are the time limits for starting civil court proceedings?**

The statutory limitation periods for bringing a civil claim in the Cayman Islands depend on the nature of the cause of action:

- tort: six years from the date of the damage;
- breach of contract: six years from the date of the breach;
- breach of trust (other than fraud): six years;
- fraudulent breach of trust: no limitation period; and
- claims for the recovery of land: 12 years from the date when the right accrued.

In many cases, the starting date of the limitation period can be delayed where the claimant was only able, with reasonable diligence, to discover the facts on which the cause of action is based at some time after the conduct giving rise to the claim occurred.

### 5 Jurisdiction

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

The Grand Court's jurisdiction is based on service of process – provided that the defendant is properly served, the court will have jurisdiction over him or her. Service may take place within the jurisdiction, however fleetingly the defendant is physically present. There is also a discretionary extraterritorial jurisdiction, under which the Court may permit

service on a defendant overseas if certain gateways apply. A defendant served out of the jurisdiction, who has not already submitted, can challenge jurisdiction, and any defendant may raise forum non conveniens arguments.

## 6 Admissibility of evidence

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

Generally, the Cayman Islands adopts an inclusive approach to the admission of evidence, including hearsay evidence. Evidence of any kind is generally admissible, but the nature and circumstances in which it was obtained may result in evidence having little or no weight. The Evidence Law (2011 Revision) provides in sections 42 to 56 statutory direction as to how admissibility is to be determined. The approach is very similar to pre-1999 English law, and English pre-1999 case law will be persuasive in the Cayman Islands. The UK *Supreme Court Practice* (1999 edition) (White Book) is a useful reference text.

## 7 Publicly available information

### What sources of information about assets are publicly available?

#### Securities

Securities listed on the Cayman Islands Stock Exchange must be registered with the Cayman Islands Monetary Authority (CIMA). The only information publicly available is the registration number and the type of securities fund that is registered. The date of registration may also be available.

#### Court records

Court files can be inspected to obtain copies of the originating process in each case, on payment of the appropriate fee. Only the parties to proceedings have a right to inspect the case documents. A non-party who wishes to inspect a court file must make an application to the court setting out the reason for the application and the portion of the file that he or she wishes to inspect. Such applications may be granted if the applicant demonstrates an interest, financial or otherwise, in the outcome of the proceedings.

#### Exempt companies (ie, not carrying on business within the Cayman Islands)

The certificate of incorporation, confirmation of the company's registered office and copies of the memorandum and articles of association can be obtained from the Registrar of Companies. The registers of members and mortgages and charges, and details of the directors, are not publicly available. Enquiries can be made at the registered office for other information, but will usually be refused unless very good reasons for disclosure are provided.

#### Ordinary resident companies

The register of members (only) is open to inspection.

#### Limited liability companies (ie, not carrying on business within the Cayman Islands)

The location of the registered office and other general information such as the date of incorporation can be obtained from the Registrar of Companies. A company's register of security interests can only be inspected by persons who are permitted under the LLC agreement and by the manager.

#### Exempted limited partnerships

The location of the partnership's registered office, the name and address of the general partner, and the statement containing information such as the general nature of the partnership's business are available for public inspection. The partnership agreement will be available if filed, but filing is not mandatory.

#### Trusts

There is no publically available register or information regarding trusts or trustees domiciled in the Cayman Islands.

#### Land registry

This is open to public inspection.

#### Motor vehicle registry

Information on the ownership of vehicles is available for public inspection.

#### Shipping and aircraft registries

Information on the ownership of Cayman-registered vessels and aircraft is available for public inspection.

In most of the above cases, a fee is payable. Note that land, vehicles and vessels may be owned through a Cayman company, partnership or trust, in which case details regarding the ultimate beneficial ownership will not be publicly available (as discussed above).

## 8 Cooperation with law enforcement agencies

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

The Proceeds of Crime Law (2017 Revision) includes power for the court to order the Financial Reporting Authority to provide information, documents or evidence to third parties. In addition, the Freedom of Information Law (2015 Revision) provides a right of access to information held by public bodies, except when disclosure of those records is exempt under Part III of the law, which includes grounds of national security, legal privilege and personal information.

## 9 Third-party disclosure

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

#### Norwich Pharmacal relief

Pre-action discovery from third parties can be sought under the *Norwich Pharmacal* jurisdiction when the claim could not otherwise be commenced without discovery of the information sought or when the person against whom discovery is sought has become involved, albeit innocently, in the wrongdoing.

#### Bankers Trust orders

Discovery from banks can be obtained following *Bankers Trust v Shapira* (1980) 1 WLR 1274. The court's power can be exercised when:

- there is good reason to believe that property held by the bank is, in fact, the property of the plaintiff (eg, as a result of tracing);
- documents produced by the bank will be used solely for the purpose of tracing money and not for any other purpose;
- the plaintiff gives an undertaking in damages; and
- the plaintiff undertakes to pay any and all expenses to which the bank is put in giving discovery.

## 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?

The Cayman Islands Court has the full range of powers to grant interim relief in appropriate cases. In particular:

- *Mareva* injunctions (freezing orders) to prevent dissipation of assets, with ancillary disclosure requirements;
- *Anton Piller* orders, requiring access to a defendant's property to search for and remove or take copies of documents or property or both; and
- (in insolvency proceedings) an order appointing a provisional liquidator in company winding-up proceedings to prevent:
  - dissipation of the company's assets;
  - oppression of minority shareholders; or
  - mismanagement or misconduct by the company's directors.

**11 Right to silence****Do defendants in civil proceedings have a right to silence?**

Defendants in civil proceedings have a right to silence against incriminating themselves or their spouse in relation only to criminal offences under the laws of the Cayman Islands: section 55 of the Evidence Law (2011 Revision).

**12 Non-compliance with court orders****How do courts punish failure to comply with court orders?**

Failure to comply with court orders is punishable through the contempt jurisdiction. If proved, the party in default could be subject to a fine, sequestration of assets, imprisonment for up to two years or a combination of these. A court may issue an 'unless' or debaring order, which will prevent the party in default from taking other steps or action in the case specified in the order (for example, they may be debarred from relying on documents, adducing factual or expert evidence or from defending the case).

**13 Obtaining evidence from other jurisdictions****How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?**

Application for assistance can be made under The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents and under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

**14 Assisting courts in other jurisdictions****What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?****Assistance with serving proceedings within the Cayman Islands**

The Grand Court Rules permit service of foreign proceedings under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents by a bailiff, attorney or process server.

If service by the bailiff is required, the proceedings (including any necessary translation) should be sent by the relevant authority in the other jurisdiction to the clerk of the Cayman Islands Court with a written request for service to be effected.

**Disclosure and interim remedies**

The Grand Court can, in appropriate circumstances, order the disclosure of documents for use in proceedings in another jurisdiction, subject to compliance (if necessary) with the Confidential Information Disclosure Law 2016.

Pre-action discovery can be sought from the proposed defendant, in an appropriate case, in accordance with the principles set out in *Black v Sumitomo* [2003] 3 All ER 643. However, when the application is made to assist civil asset recovery proceedings elsewhere, the requirements may be difficult to satisfy.

Third-party discovery may be obtained in certain cases, using the *Norwich Pharmacal* and *Bankers Trust* powers.

*Mareva* injunctions (freezing orders) and *Anton Pillar* injunctions (search-and-seizure orders) are available to assist with asset preservation and evidence gathering.

**Taking evidence from a witness within the Cayman Islands**

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 can be used. The foreign court must usually issue a letter of request seeking the assistance of the Grand Court. Application is then made locally to the Grand Court for an order giving effect to the request. The witness is then examined before a judge of the Grand Court and a transcript of the evidence provided to the requesting court.

**Enforcing foreign judgments**

The Cayman Islands will allow enforcement of foreign judgments and orders (including in personam orders) at common law by means of commencing a new proceeding based on the foreign judgment. Details are set out in the publication *Getting the Deal Through: Enforcement of Foreign Judgments*.

The statutory enforcement regime in the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) is currently applicable only to specified Australian judgments and is therefore of limited practical utility.

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

The full range of common law remedies is available. These include contract, tort and equity based claims, such as conversion, unjust enrichment and fraud. Proprietary claims (tracing at law and in equity) are available.

**16 Remedies**

What remedies are available in a civil recovery action?

The court may grant the following remedies in civil recovery actions:

- damages at law: both compensatory and aggravated (if certain limited criteria are met);
- compensation in equity;
- interim and permanent injunctions;
- restitution of property (unjust enrichment cases);
- an account of profits (breach of trust or fiduciary duty cases);
- declarations as to the parties' rights; and
- orders allowing the claimant to follow, trace and recover from trustees or a third-party property that has been applied or transferred in breach of trust.

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

The Grand Court Rules permit default judgment or summary judgment to be obtained when specified criteria are met.

Default judgment can be obtained when the proceedings have been properly served on the defendant but the defendant fails to respond to them.

Summary judgment can be obtained when the plaintiff satisfies the court that there is no genuine defence to the claim with a realistic prospect of success and no other reason why the case should go to a full trial.

**18 Post-judgment relief****What post-judgment relief is available to successful claimants?**

The full range of pre-judgment interim relief is similarly available against defendants post-judgment to secure funds or property pending enforcement.

**19 Enforcement****What methods of enforcement are available?**

Available methods of enforcement include:

- seizure and sale of assets;
- garnishee orders (requiring a third party who owes money to the judgment debtor to pay it to the judgment creditor instead);
- charging orders over land or other assets; and
- insolvency proceedings.

**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?**

The Cayman Islands is a 'loser pays' jurisdiction: the general rule is that, subject to the court's overriding power to make a different order, the loser pays the winner's legal costs. The actual amount of the costs to be paid will be subject to the court reviewing their reasonableness, unless the parties reach agreement.

The Cayman Islands does not currently permit contingency fees to be charged within the Cayman Islands. Conditional fees are permitted,

but the court must approve the fee agreement in each case. It is unclear to what extent the Cayman Islands courts will permit litigation funding by third parties; the doctrines of maintenance and champerty still apply in the Cayman Islands. Whether the current limitations on conditional and contingency fees should remain is under review by the Law Reform Commission.

The overriding objective contained in the Grand Court Rules requires the court to deal with every cause or matter in a just, expeditious and economical way. The court has a duty to manage proceedings actively by considering whether the likely benefits of taking a particular step justify the cost of taking it. There are, however, no explicit powers to make costs-management orders or to require case budgets, nor has there been a comprehensive review of costs as in England and Wales under the Civil Procedure Rules.

---

## Criminal asset recovery

### 21 Interim measures

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

The Cayman Islands has enacted legislation addressing seizure and confiscation of criminal assets: Proceeds of Crime Law (2017 Revision). This legislation empowers the court to issue orders to the police or other enforcement agencies to restrain or seize property.

Such orders can prevent a specified person from dealing with realisable property held by him or her, subject to such conditions and exceptions as the court may specify.

---

### 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?**

Investigations to identify and trace assets can be initiated by enforcement authorities when serious crimes are detected.

The powers of the Grand Court under the Proceeds of Crime Law (2017 Revision) to issue orders for the production of information to assist in civil recovery investigations are not automatically applied but are often invoked.

---

### 23 Confiscation – legal framework

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

Confiscation is governed by the Proceeds of Crime Law (2017 Revision). The court can make a confiscation order against a defendant in addition to any other sentence passed upon him or her. The court will decide whether the defendant has a criminal lifestyle, in which case there is a presumption that all of his or her assets are benefits from criminal conduct; otherwise the court can order confiscation only to the extent that it concludes that the defendant has received a benefit from the particular criminal conduct in question. The court determines the amount of the benefit in an adversarial hearing, where the Crown and the defendant are each permitted to put forward their own cases as to the amount of the benefit. The court can then order confiscation of the amount of benefit it determines or a lesser amount.

---

### 24 Confiscation procedure

**Describe how confiscation works in practice.**

The criminal court will consider at the time of sentencing the defendant whether to make a confiscation order (although the decision can be adjourned and the actual order can be made up to two years after sentence).

The procedural stages are as follows:

- the attorney general must file at court a statement of information setting out the Crown's case as to why the defendant has a criminal lifestyle, whether he or she has benefited from the criminal conduct and the extent of the benefit. The statement must include any information relevant to the assumptions that the court can make about the fact of the defendant's criminal lifestyle. When it is not the Crown's case that the defendant has a criminal lifestyle, the

statement must give details of the Crown's case as to the defendant's specific benefit from his or her particular criminal conduct and the amount of such benefit;

- the court may then order the defendant to indicate the extent to which he or she accepts the Crown's statement and, where he or she does not, to set out his or her own case;
- the court then decides whether to make a confiscation order based upon the material in the statements and upon evidence heard in court. The court's decision as to the amount of benefit and amount of the confiscation order is made on the balance of probabilities; and
- once the order is made, enforcement agencies, such as police or customs officers, can seize property belonging to the defendant up to the amount of the confiscation order. Orders can also be applied to third-party holders of the property (ie, banks or funds) provided that the defendant's property can be sufficiently identified and is not mixed with that of third parties.

---

### 25 Agencies

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

The following agencies are responsible for tracing and confiscating the proceeds of crime:

- the police and customs officers are the main agencies active in confiscation of criminal proceeds, in conjunction with the attorney general;
- CIMA can initiate its own actions (see question 7), which can include asset tracing; and
- the Financial Reporting Authority.

---

### 26 Secondary proceeds

**Is confiscation of secondary proceeds possible?**

Under section 76 of the Proceeds of Crime Law (2017 Revision), realisable property includes money and all forms of real or personal property, things in action and other tangible or incorporeal property. There is no distinction under the law between primary proceeds and secondary proceeds. Rather, confiscation is possible across all asset classes.

---

### 27 Third-party ownership

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

Property acquired by third parties or relatives can be at risk of confiscation when the property is a 'tainted gift' within the meaning of sections 70 and 71 of the Proceeds of Crime Law (2017 Revision); namely, property directly or indirectly connected with general or specific criminal conduct (as applicable) or transferred by the defendant at a significant undervalue. Property that represents a tainted gift is 'realisable' against a third party in the same way it would be against the individual that gifted it to them.

---

### 28 Expenses

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

While the Proceeds of Crime Law (2017 Revision) allows the imposition of a fine, it does not directly address the recovery of costs by agencies. It is therefore unclear whether such incidental costs are separately recoverable.

---

### 29 Value-based confiscation

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

Confiscation under the Proceedings of Crime Law (2017 Revision) is value-based, but depends on whether the defendant is found by the court to have a 'criminal lifestyle'. If he or she does, then the court can make a number of specified assumptions regarding the defendant's assets (under section 19) before proceeding to fix the amount of the confiscation order. If the defendant does not have a criminal lifestyle then the court is limited to making a confiscation order in the amount

of the defendant's benefit from his or her specific criminal conduct (as determined by the court).

Under Part s18(1) of the Proceeds of Crime Law (2017 Revision):

*For the purposes of deciding the recoverable amount, the available amount is the aggregate of the total of all the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority; and the total of the values (at the time) of all tainted gifts.*

Any property held by the defendant within this definition is potentially available for confiscation.

### 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?**

There are a number of assumptions built into the Proceeds of Crime Law (2017 Revision) that effectively reverse the burden of proof if the court rules that the defendant either has a criminal lifestyle or has benefited from a particular crime, and it is then for the defendant to prove that the property he or she acquired or disposed of in the six years before the proceedings was not obtained through criminal conduct.

### 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?**

There is a separate regime for making compensation orders within criminal proceedings to compensate victims of the crime. The court can order that the compensation payment be satisfied from moneys recovered through the confiscation process.

If the court has information that the victim intends to commence a civil claim for damages, then the court can take that into account in deciding whether to make a confiscation order, but there is no express power to order that funds confiscated can be used in satisfaction of a civil judgment.

### 32 Confiscation of profits

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

Because the confiscation regime is based upon the benefit from a criminal lifestyle or specific gain from criminal behaviour, financial advantage or profit obtained is automatically caught within the confiscation regime. There is no specific reference to a power to confiscate such types of benefit, but this is not necessary given the statutory language in the Proceeds of Crime Law (2017 Revision).

### 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.**

The Proceeds of Crime Law (2017 Revision) permits the confiscation procedure to be commenced before the defendant is formally sentenced. It would be very unusual for the court to do so before conviction, but the attorney general can apply to restrain assets in order to preserve them pending conclusion of the criminal process and associated confiscation proceedings. In certain circumstances, the Cayman authorities may consider a situation serious enough to justify in rem restraint or confiscation or both. For instance, in the *Montesinos-Torres* case, the court made a confiscation order following a judicial request from the Peruvian court, without any conviction occurring within the Cayman Islands.

### Update and trends

On 1 July 2017, the Cayman Islands enacted legislation requiring certain categories of companies to maintain registers of beneficial ownership at their registered offices. Access to the main register containing beneficial ownership information is limited to certain Cayman Islands or UK law enforcement authorities in circumstances where they have submitted a lawful request. The register is not open to public inspection.

### 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?**

Under the Proceeds of Crime Law (2017 Revision), the attorney general may order a management receivership in respect of any realisable property to which a restraint order applies, or an enforcement receivership. The court can empower the official or management receiver to realise so much of the defendant's property as is necessary to meet the receiver's remuneration and expenses.

Once the relevant expenses have been paid, excess sums are usually returned to the defendant or other owners of the property. (If any monies were to be remaining they would be paid to the Accountant General of the Cayman Islands and treated as being a fine imposed by the court.)

### 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.**

As a signatory to various international treaties regarding asset tracing in criminal matters, the Cayman Islands can implement many of the legal tools generally available including letters of request to procure evidence, freezing orders, etc. The procedural framework for implementing these tools is dependent on the terms of the particular international treaty and can vary substantially. In particular, there is a mutual legal assistance treaty (MLAT) with the United States.

### 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.**

#### Legal framework

The Criminal Justice (International Cooperation) Law (CJICL) (2015 Revision) allows for mutual legal assistance in the context of all serious offences under Cayman Islands law if requested by a country listed in the annex to the CJICL (identical to signatories of the Vienna Convention).

The Proceeds of Crime Law (2017 Revision) and the Misuse of Drugs Law (2017 Revision) govern the registration or enforcement of confiscation orders made by courts of other jurisdictions. Requests for the enforcement of such orders may be made only by countries listed in the annex (Vienna Convention).

The Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order enables the Grand Court to provide assistance to foreign courts in obtaining evidence in criminal and civil cases. Requests are made through formal letters of request and requests may be made by any other country.

#### Procedure

The attorney general is the central authority for all requests made pursuant to the CJICL (2015 Revision), the Misuse of Drugs Law (2017 Revision) or the Proceeds of Crime Law (2017 Revision).

The Grand Court is the central authority for all requests for assistance in the form of formal letters of request. The attorney general will formally handle any application made to the Grand Court for letters of

request. If granted, the evidence will be transmitted to the requesting court by the clerk of the Grand Court.

The Chief Justice is the central authority to receive mutual legal assistance requests based on the bilateral MLAT with the United States (the only MLAT currently ratified by the Cayman Islands).

### 37 Treaties

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

The Cayman Islands is a signatory to the following conventions:

- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- the United Nations Treaty on Organized Crime;
- the United Nations Convention against Corruption; and
- the Organisation for Economic Co-operation and Development Anti-Bribery Convention.

### 38 Private prosecutions

#### Can criminal asset recovery powers be used by private prosecutors?

The Director of Public Prosecutions is the only person formally entitled to bring criminal asset recovery proceedings. It is possible that a private individual might commence a prosecution, but the attorney general would generally intervene to take over conduct of the prosecution; this would seem also to cover the question of ancillary criminal asset recovery powers.

## KOBRE & KIM | DISPUTES AND INVESTIGATIONS

Jalil Asif QC  
James Corbett QC  
Pamella Mitchell

jalil.asif@kobrekim.com  
james.corbett@kobrekim.ky  
pamella.mitchell@kobrekim.ky

9 Forum Lane, Suite 3207  
Camana Bay  
Grand Cayman KY1-9006  
Cayman Islands

Tel: +1 345 749 4000  
Fax: +1 345 749 4020  
www.kobrekim.com

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Commercial Contracts  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation

Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans

Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Renewable Energy  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Asset Recovery  
ISSN 2051-0489



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law