

# Proceeds of Crime – Judicial Review

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Fraser Robertson, March 2009

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The vexed question as to the remedies available to a customer when faced by an informal freeze of his assets under the **Proceeds of Crime (Jersey) Law 1999** (“the Law”), has again been considered by the Jersey courts and this time for the first occasion by the Court of Appeal (**Gichuru v. The States of Jersey Police** [2008] JCA 163A). The problem arises where the police do not give consent to the bank or other financial institution to the release of a customer’s funds, due to a suspicion that they may be the proceeds of crime. As a result those funds effectively become subject to an indefinite and informal freeze by virtue of Article 32 of the Law, given that the bank or financial institution is most unlikely to deal with the assets without police consent.

In **Ani v. Barclays Bank** [2004] it was stated that in such circumstances the customer has two alternative remedies:

(i) Bringing a public law action for judicial review of the police refusal to consent to payment; or,

(ii) Bringing a private law action against the financial institution seeking to enforce his contractual or other rights to seek payment.

Issues arose in **Gichuru** as to the inter relationship between these two alternative remedies.

The facts in brief in **Gichuru** were that the claimant originally brought proceedings against the relevant financial institution (a trust company) for the release of funds. The claimant also joined the police into that action. When the court subsequently indicated that the police should not normally be convened to such proceedings and released them the private law action against the trust company was stayed by consent. The claimant then changed tack and made an application for leave for judicial review of the police decision not to consent to the dealing of the funds in circumstances where the funds had effectively been frozen for six years.

## REFUSAL OF CONSENT BY THE POLICE

The Court of Appeal first analysed the nature of a refusal by police and when it may be challenged. The court stated that it was arguable without expressing any view on the merits that the police were under a duty to keep a refusal to consent to payment under regular review and that a refusal, although initially reasonable, might become unreasonable and liable to be quashed through the effluxion of time.

The primary argument of the police was that the judicial review potential remedy was not available to a claimant in circumstances where there was an alternative remedy, namely a private law action against the financial institution.

This was the first occasion the court had to consider this important point. The Court of Appeal indicated that judicial review is indeed conventionally regarded as a remedy of last resort. It was not enough however that merely this should be an alternative remedy. Any potential alternative remedy had to be equally effective to achieve the applicant's ends, in other words the question was "*whether the substitute for judicial review adequately protects the rights and interests of the claimant*".

## QUALITATIVELY DIFFERENT REMEDIES

The Court of Appeal concluded that the two remedies were qualitatively different. Importantly any private law proceedings against the relevant financial institution would not cancel the refusal of the police to consent. That refusal to consent had several important consequences. Firstly, the refusal could be disclosed to regulatory authorities overseas; and secondly the existence of a refusal would need to be disclosed to any bank subsequently invited to take deposit of the monies once released as a result of any private law action against the original financial institution. In those circumstances it was unrealistic to conclude that the continued existence of the police refusal to consent would have no impact at all on the customer's ability to obtain funds and place them elsewhere without any "regulatory taint".

The court added that there was a further reason why the proceedings for judicial review should be allowed to continue, namely that the issue of what constraints if any might be imposed upon the police in making or maintaining a refusal to consent was a matter of general importance. This was particularly so as currently the police could put in place a time-unlimited quasi freezing order thus keeping a person in an indefinite state of financial limbo. The Court of Appeal thus concluded that the previous authorities were correct to determine that a customer had a choice of remedy, but wrong if previous decisions had been to the effect that the remedies were alternative the one to the other. The Court of Appeal indicated that a customer in such circumstances was entitled to pursue both remedies, as they were not strictly speaking 'alternatives' to each other.

**Gichuru** represents helpful further clarification of matters but there is still awaited a definitive decision as to the limits and constraints if any upon police powers to refuse consent in the context of the Law. It is to be hoped that a substantive decision in this area will come before the courts in the near future.

Should you have any questions or requests for further information, please contact:

**Fraser Robertson**  
**Local Group Head – Litigation & Insolvency**  
frobertson@applebyglobal.com  
Tel: +44 (0)1534 818032

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## The Right People. The Right Places.

### **Bermuda**

Canon's Court  
22 Victoria Street  
PO Box HM 1179  
Hamilton HM EX  
Bermuda

Tel +1 441 295 2244  
Fax +1 441 292 8666

### **Jersey**

PO Box 207  
13-14 Esplanade  
St Helier  
Jersey JE1 1BD  
Channel Islands

Tel +44 (0)1534 888 777  
Fax +44 (0)1534 888 778

### **British Virgin Islands**

No 56 Admin Drive  
Wickhams Cay 1  
PO Box 3190  
Road Town  
Tortola VG 1110  
British Virgin Islands

Tel +1 284 494 4742  
Fax +1 284 494 7279

### **London**

2nd Floor  
2 Royal Exchange Bldgs  
London EC3V 3LF  
United Kingdom

Tel +44 (0)20 7283 6061  
Fax +44 (0)20 7469 0540

### **Cayman Islands**

Clifton House  
75 Fort Street  
PO Box 190  
Grand Cayman KY1-1104  
Cayman Islands

Tel +1 345 949 4900  
Fax +1 345 949 4901

### **Mauritius**

8<sup>th</sup> Floor  
Medine Mews  
La Chaussée  
Port Louis  
Mauritius

Tel +230 203 4300  
Fax +230 210 8792

### **Hong Kong**

8<sup>th</sup> Floor  
Bank of America Tower  
12 Harcourt Road  
Central  
Hong Kong

Tel +852 2523 8123  
Fax +852 2524 5548

### **Zurich**

Bahnhofstrasse 52  
CH-8001  
Zurich  
Switzerland

Tel: +41 44 214 6525  
Fax: +41 44 214 6524