International and Sensitive Evidence in Account Freezing and Forfeiture Orders (AFFO's)

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A regular factor in Account Freezing and Forfeiture Orders (AFFO's) is international or sensitive evidence. Barnaby Hone examines how this evidence raises a number of issues of admissibility and fairness. AFFO's, like Cash Seizures, operate outside set procedure rules but follow general civil procedure. Which rules and laws apply is a particular web which can be discussed in another article in itself.

International Evidence

As has been seen in some of the most high profile AFFO's, such as the NCA's co-ordinated move on multiple Chinese bank accounts, a large amount of the evidence relied upon will concern foreign jurisdictions or be gained from different jurisdictions. This raises two key questions:

First, if evidence is gathered from another jurisdiction is it admissible? The broad answer is yes, as long as it complies with the relevant Hearsay rules, if they apply. In practice, this will mean that the weight the court can put on the evidence will depend on the context that it was gathered in, and how relevant it is to the issue in dispute.

Second, will be the Applicant relying upon foreign laws. This will usually be in the context to prove that criminality took place. If they are presented by an expert in that legal area, then they should be admissible. But if the evidence is presented by a non-expert witness then it will be more difficult to deal with. Indeed, this might be a key ground on which an application can be 'defended' upon.

Sensitive Evidence

Public Interest Immunity applications do not apply in these cases as they would apply in criminal applications, but there is still the privilege to withhold grounds on public interest grounds. The document would need to be withheld on the grounds that it would be 'injurious to the public interest'. But this is a very high test, as the Respondent has a right to a fair trial, in accordance with Article 6. The Applicant also has a duty of full and frank disclosure.

This means that the Applicant will need to draw a very fine line in what evidence they disclose and rely upon. They cannot, for example, rely upon a bland assertion without explaining it, and need to full disclose any evidence which might undermine the application.

The focus needs to be on what is relevant. It should be remembered that the aim of the application is to find out if the money is recoverable or to be used in unlawful conduct. Therefore some evidence might not be relevant, such as why it was initially seized, and on what basis. This was discussed in Hoverspeed v Customs and Excise Commissioners [2002] EWCA Civ 1804, in a similar context. But this does not mean that the reasons will not be relevant. In cases where AFFO's originated from a SAR, it might be relevant what the reasons were for originally seizing the money, and if it was the same in the final case for the Forfeiture.

Conclusion

Each case will of course rely on its own facts. It will be important that the key principles of a right to a fair trial and full and frank disclosure are upheld. On the other hand, it is important to bear in mind what is relevant to the forfeiture test. Although the burden of proof might be lower, those principles will remain paramount.

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