公报文章

Civil Recovery of the Proceeds of Crime and Unlawful Conduct in Bermuda and the Cayman Islands: recent developments

百慕大和开曼群岛犯罪得益和非法行为所得得益的民事追偿：最新发展

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As leading international financial centres, both Bermuda and the Cayman Islands have detailed legislation in place providing methods for the civil recovery by Governmental agencies of the proceeds of crime and unlawful conduct, in the form of Bermuda's Proceeds of Crime Act 1997 and the Cayman Islands' Proceeds of Crime Act (2020 Revision) respectively, and associated procedural rules.

作为领先的国际金融中心，百慕大和开曼群岛均制定了详细的立法，为政府机构对犯罪得益和非法行为所得得益进行民事追偿提供了方法，分别是百慕大的《1997 年犯罪所得法》和开曼群岛的《犯罪所得法》（2020 年修订版），以及相关的程序规则。

The Proceeds of Crime legislation provides the enforcement authorities in Bermuda and the Cayman Islands with an extensive armoury of legal tools by which to freeze, and to recover, property which is, or which represents, the proceeds of crime and unlawful conduct, applying just the civil standard of proof, even in the absence of a criminal prosecution or a criminal conviction.

这些有关犯罪得益的立法为百慕大和开曼群岛的执法机关提供了大量的法律工具，用于冻结和追回属于或代表犯罪、非法行为所得的财产，仅采用民事诉讼的举证标准，即使没有刑事检控或刑事定罪。

These legal tools include, for example, the use of civil recovery orders, property freezing orders, interim receiving orders, and vesting and realisation orders.

这些法律工具包括使用民事追偿令、财产冻结令、临时接收令以及归属和变现令等。

The primary purposes of civil recovery proceedings are to ensure that property derived from criminal conduct is taken out of circulation and use, and to enforce a measure of recovery for the benefit of the state, and society at large.

民事追偿程序的主要目的是确保从犯罪行为中查获的财产不再流通和使用，并为了国家和整个社会的利益执行一定的追偿措施。

As illustrated by the Cayman Islands' Director of Public Prosecution's Policy Guidance Notes dated 24 January 2020, civil recovery proceedings can be considered and pursued in a wide range of circumstances, including in cases where:

正如 2020 年 1 月 24 日的开曼群岛检察长的政策指导说明所说，可以在各种情况下考虑和执行民事追偿程序，包括以下情况：

- the only known criminality has occurred outside of the jurisdiction, and the relevant offence does not attract extra-territorial liability so as to justify a local criminal prosecution;
- there is no identifiable living suspect who is within the jurisdiction, or who is realistically

- 唯一已知的犯罪行为发生在司法管辖区之外，有关罪行不构成域外责任，因而不能成为当地刑事检控的理由；
- 没有可辨认的、活着的嫌疑人在司法管辖区内或实际上能被带到司法管辖区内；

capable of being brought within the jurisdiction;

- proceeds of crime can be identified but cannot be linked to any individual suspect or offence;
- a law enforcement or prosecuting authority considers that there is insufficient evidence to justify a criminal prosecution or criminal conviction to the criminal standard of proof (i.e. beyond reasonable doubt), but sufficient evidence to satisfy the civil standard of proof (i.e. the balance of probabilities);
- a prosecution has been conducted, but has not resulted in a conviction, despite the apparent strength of the evidence;
- there appears to be an urgent need to take action to prevent offending, or secure the proceeds of crime, in advance of a future criminal prosecution;
- it is not practicable to investigate or prosecute all of those with a peripheral involvement in the criminal conduct, and a strategic approach is taken with respect to minor participants;
- the offender is being prosecuted in a foreign jurisdiction, and is expected to receive a sentence that reflects the totality of the offending, so that the public interest does not require a prosecution in the Cayman Islands.

The fact that no criminal convictions have yet been secured anywhere in the world in connection with the property that is the subject of the civil recovery proceedings has been held to be legally irrelevant, given the differing standards of proof between criminal proceedings and civil recovery proceedings: see, for example, *Gale v Serious Organised Crime Agency* [2011] UKSC 49 and *Attorney-General and Minister of Legal Affairs (Enforcement Authority) v Zirkind* [2016] SC Bda 105 Civ[1].

Despite the fact that there have been a number of successful civil recovery proceedings to date (both by way of judgment and by way of settlement), there are signs in the recent case law that the Courts of Bermuda and the Cayman Islands are keen to ensure a level playing-field between enforcement authorities and defendants with arguable explanations or meritorious positions, having regard to the Constitutional right in each jurisdiction for every defendant to have a fair trial, in both criminal proceedings and in civil proceedings.

- 犯罪所得可以被识别，但无法与任何嫌疑人或罪行作出联系；
- 执法机关或检察机关认为，在刑事举证标准上（即排除合理怀疑），刑事起诉或刑事定罪的证据不足，但在民事举证标准上（即概率平衡），则证据足够；
- 已进行了起诉，但尚未定罪，尽管有明显有力的证据；
- 在未来的刑事起诉之前，似乎迫切需要采取行动防止犯罪或保全犯罪所得；
- 调查或起诉所有与犯罪行为有间接关联的人是不切实际的，对此要参与者采取战略性的办法；
- 罪犯正在外国司法管辖区受到起诉，预计将受到反映整个犯罪行为的判决，因此，为了公众利益，无需在开曼群岛进行起诉。

即使在世界任何地方尚未对作为民事追偿程序对象的财产作出刑事定罪，此事实被认为在法律上无关紧要，因为考虑到刑事诉讼和民事追偿诉讼的举证标准不同：参见案例 *Gale v Serious Organised Crime Agency*（*Gale 诉重大组织犯罪局*）[2011] UKSC 49 以及 *Attorney-General and Minister of Legal Affairs (Enforcement Authority) v Zirkind*（*总检察长兼法务部长（执法机关）诉 Zirkind*）[2016] SC Bda 105 Civ[1]。

尽管迄今为止已经有一些成功的民事追偿诉讼（通过判决及和解），但最近的判例法中有迹象表明百慕大法院和开曼群岛法院希望确保执法机关和被告之间的公平环境，有可争辩的解释或可能成功的立场，会考虑到每个司法管辖区的宪法赋予每个被告在刑事诉讼和民事诉讼中获得公平审判的权利。

[1] See also, in Bermuda, *Attorney General (Enforcement Authority) v Tito Jermaine Smith* [2018] Bda LR 50 and *Attorney General and Minister of Legal Affairs v Kenith Clifton Bulford* [2021] Bda LR 27.
也请参阅百慕大 *Attorney General (Enforcement Authority) v Tito Jermaine Smith*（*总检察长（执法机关）诉 Tito Jermaine Smith*）[2018] Bda LR 50 以及 *Attorney General and Minister of Legal Affairs v Kenith Clifton Bulford*（*总检察长兼法务部长诉 Kenith Clifton Bulford*）[2021] Bda LR 27。

In its recent judgment dated 5 April 2022 in the case of *Attorney-General and the Minister of Legal Affairs (Enforcement Authority) v Patino* [2022] SC Bda 23 Civ, the Supreme Court of Bermuda has expressly acknowledged that "*Bermuda, as a leading international business jurisdiction, has a compelling interest in ensuring that companies incorporated in this jurisdiction are not used for the purposes of depositing proceeds of unlawful conduct even if the unlawful conduct took place outside the jurisdiction*".

百慕大最高法院在其最近于 2022 年 4 月 5 日就 *Attorney-General and the Minister of Legal Affairs (Enforcement Authority) v Patino*（*总检察长兼法务部长（执法机关）诉 Patino*）[2022] SC Bda 23 Civ 案的判决中明确说明，"*作为领先的国际商业司法管辖区，百慕大确保在辖区注册成立的公司不被用于存放非法行为所得，即使非法行为发生在辖区外*"。

On the particular facts of that case, however, Chief Justice Hargun dismissed an application by the Attorney-General for a Civil Recovery Order under section 36X of Bermuda's Proceeds of Crime Act 1997, relating to an investment account held with Sun Life Financial Investments in Bermuda, valued in the region of US$450,000.

然而，就该案的具体事实而言，Hargun 首席大法官驳回了总检察长根据百慕大的《1997 年犯罪所得法》第 36X 条规定的民事追偿令申请，该申请涉及在百慕大的永明金融投资公司（Sun Life Financial Investments）持有的投资账户，价值在 450,000 美元左右。

Applying the civil standard of proof (i.e. the balance of probabilities), the Supreme Court of Bermuda held that it was unable to be satisfied, on the available evidence, and having regard to the defendant's explanations, that the relevant assets represented the proceeds of unlawful conduct or money laundering.

采用民事举证标准（即相对可能性）的百慕大最高法院认为，根据现有证据并考虑到被告的解释，无法确信相关资产是非法行为所得或洗钱所得。

In a separate recent judgment dated 21 September 2021, in the case of *Director of Public Prosecutions v Arani et al*, POCA No 3 of 2020, the Grand Court of the Cayman Islands has sought to clarify an important point of statutory interpretation under sections 84 and 92 of the Cayman Islands' Proceeds of Crime Act (2020 Revision) regarding the potential use by defendants of frozen monies that are the subject of a Property Freezing Order for payment of reasonable legal expenses in their defence of the civil recovery proceedings, subject to the permission of the Court.

另一项近期判决发生于 2021 年 9 月 21 日，案件是 *Director of Public Prosecutions v Arani et al*（*检察长诉 Arani 等人*），POCA No 3 of 2020，开曼群岛大法院试图根据开曼群岛的《犯罪所得法》（2020 年修订版）第 84条和第92条来澄清法定解释的一个重要点，涉及被告可能使用财产冻结令的对象来支付因民事追偿诉讼辩护产生的合理法律费用（但须经法院许可）。

The Grand Court made clear in that case, that, in enabling the payment of reasonable legal expenses, the Court should adopt a restrictive or cautious approach, "*so as to preserve property pending the making of any final recovery orders*"

大法院在该案中明确指出，为了支付合理的法律费用，法院应采取限制性或谨慎的态度，"*以便在作出任何最终追偿令之前保全财产*"。

In doing so, the Grand Court has endorsed the approach taken by the English Court of Appeal in the case of *Serious Organised Crime Agency (SOCA) v Azam & Ors* [2013] EWCA Civ 970 to the effect that it is incumbent on a defendant to persuade the Court to permit the use of frozen monies for payment of that defendant's reasonable legal expenses, having regard to the defendant's disclosure of any other available assets from which to do so, and the interests of justice.

在此过程中，大法院认可了英国上诉法院在 *Serious Organised Crime Agency (SOCA) v Azam & Ors*（*重大组织犯罪局诉 Azam 和 Ors*）[2013] EWCA Civ 970 案中采取的方法，即被告有义务说服法院允许其使用被冻结的款项来支付其合理的法律费用，但也考虑到被告已披露了用于支付此等费用的其他可用资产，并且还考虑到公正利益。

As the enforcement authorities in both Bermuda and the Cayman Islands become increasingly proactive in the commencement of civil recovery proceedings, it is likely that there will be an increasing number of assets located in Bermuda and the Cayman Islands that will become the subject of Property Freezing Orders, and, in turn, variation applications to enable the payment of

随着百慕大和开曼群岛的执法机关在启动民事追偿程序方面变得越来越积极，很可能会有越来越多位于百慕大和开曼群岛的资产成为财产冻结令的对象，与此相应的变异申请也会出现，寻求以此支付辩护费用。大法院最近的判决为被告及其律师提供了适度的安慰，在没有其他可用资产或资金来源的适宜案件中，他们将有足够的资源争取赢得

defence costs. The Grand Court's recent judgment should provide defendants, and their lawyers, with an appropriate degree of comfort that they will have sufficient resources to contest the making of such orders, and civil recovery proceedings more generally, in appropriate cases, where there are no other available assets or sources of funding.

此类命令和更普遍的民事追偿程序。

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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