

Protecting Third Party interests in both Account Freezing and Forfeiture Orders.

1. One of the key issues which has been raised by the rise of Account Freezing and Forfeiture Orders (AFFO), is how to protect and withdraw third party's money which is frozen in a subject account.
2. Money can end up in a frozen account for a variety of reasons. There will be plenty of cases when the owner of the money is not aware of the illicit activity, either because they are a victim or because they are not aware of the future purpose or indeed the origin of the money. There will also be plenty of cases of legitimate money ending up in frozen accounts, while the authorities investigate a suspect account and try to determine the origins of the money.
3. Third parties can also be involved if it is their account which is frozen, due to a suspicious transaction which they are either victim of or not connected to. This can be a particular issue with commercial accounts. Though most of these parties will transfer the money into a separate account before it is frozen.
4. The difficulty is made worse as AFFO's do not have any provisions to allow money to be released as compensation once the money has been forfeited. Once forfeited the money is then sent to the Home Office, to be split as set out in the Asset Recovery Incentivisation Scheme.
5. This is a lacuna in the legislation which is being fulfilled by the common sense of the officers and the courts, but should be addressed in future and could lead to a number of injustices. If this does happen it will be interesting to see how the Higher Courts deal with these matters.
6. As there are no powers to recover the money during the forfeiture process it is important to get the money released during the freezing order stage. The relevant statutory provision is section 303Z4 of the POCA.

(1) The relevant court may at any time vary or set aside an account freezing order on an application made by--

- (a) an enforcement officer, or*
- (b) any person affected by the order.*

(2) But an enforcement officer may not make an application under subsection (1) unless the officer is a senior officer or is authorised to do so by a senior officer.

(3) Before varying or setting aside an account freezing order the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to any person who may be affected by its decision.

7. This provision was drafted, purposefully to be very wide. When a third party is applying for their money to be returned they can use them, and the court needs to consider if it is just to do this. This provision can also be used to change accounts, which can be useful when a third party owns the frozen account and it has been frozen, potentially affecting the party's business or other interest.
8. The rules governing an application to vary an order are set at rule 4, of the Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017. The provisions required the court being sent a copy of the application. They will then set a date and send a copy of the application to other parties.
9. The first stage for an interested party who is a potential victim or who can show that the money is legitimate, is to inform the court and the police that they are an interested party. Often this will already have been done, as the prosecuting authority will have interviewed the party as part of the investigation. Making an application to vary does add the party to the proceedings as an interested party, but it is worth doing it before the application so that the party can be aware of any other applications that arise while the application to vary is being prepared.
10. The second stage is to prepare the case. It is important that the party sets out a clear case as to why the money is theirs and why it is legitimate. This should be as detailed as possible. There must be a clear link between the money in the account and the money owned by the party. If the money which has been transferred to the account has subsequently been removed, it cannot be subject to an application.
11. If the application is well evidenced it will often be agreed by the prosecuting authority and the other parties. This will be in the form of a heads of an agreement which can be agreed by the court. If not, then the matter will have to go for a full hearing will have to take place where the third party will have to argue why the money should be released to them.
12. If the application reaches the forfeiture stage then, section 303Z4 no longer applies. In a forfeiture application the court is looking at whether the money is recoverable property or due to be used in unlawful conduct. The legitimacy of the money before it went into the account is not a question for the court. Though an interested party could make a case to the judge at this stage, it would require the court to consider the origins of the money and the justice in releasing it to the party, rather than the core legal test.
13. Therefore, in my view any third-party applications should be made early and with plenty of warning. If the matters go as far as forfeiture we enter difficult legal territory. The appeal rights for these applications are limited. For freezing orders, Judicial Reviews, are the only forum. When it comes to a forfeiture order, this can be appealed to the crown court for a re hearing. Both of these are not an attractive option, and highlighted the need to try and deal with these matters early, and if possible by consent.