

## Reasonable Grounds for Suspecting Under S.303 (2)

1. The test for an Account Freezing Order ('AFO') is relatively low. Though section 303Z1 set out for the test the investigator, it will be a rare occasion when the Financial Investigators ('FI') decision can be challenged. It is more likely that the authority of the FI and whether they are qualified to make the application is more likely to be in issue. As is whether they have received correct approval of a senior or appropriate officer. This should always be checked.
2. Section 303Z3 sets out the test for the court and states that:

*(2) The relevant court may make the order if satisfied that there are reasonable grounds for suspecting that money held in the account (whether all or part of the credit balance of the account)--*

- (a) is recoverable property, or*
- (b) is intended by any person for use in unlawful conduct.*

3. Reasonable ground for suspecting is the key phrase for the court and all parties when considering an AFO. Though there is no guidance as yet on this area some guidance on a similar test "*reasonable grounds to suspect*", can be gained from the case law around the power of arrest. In *Hussein v Chong Fook Kam* [1970] AC 942. Lord Devlin said at paragraph 641A:

*"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end."*

4. In that case the Privy Council was concerned with the power of arrest. Lord Devlin noted that the requirement that any grounds of suspicion should be "reasonable" and said:

*"the protection of the public is safeguarded by th[is] requirement".*

5. Reasonable grounds will only be present if there are objective facts which would enable a reasonable man to conclude that the property in question is recoverable property. This principle is set out in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286. In that case it was held that the mere fact that an arresting officer had been instructed by his superior to effect an arrest was not sufficient.
6. Therefore, on the above basis, the court must find that there are reasonable grounds for suspecting that the money in questions is either recoverable property or that it is intended to be used by any person for use in unlawful conduct. Recoverable property is in essence money which comes from unlawful conduct, though it cannot be received in good faith by the recipient. This will often not be the issue at the initial stage as it is something for the recipient to show. Though it can be grounds for a variation or discharge.

7. The reasonable suspicion must be linked to the money in question. The money must be over £1000 in accordance with section 303Z8 (1). There cannot be a blanket suspicion against the account, the suspicion must be linked to the money or an amount in this account. Therefore, the police will need to show the source or the possible designation of the money, and why that path attracts suspicion.
8. This also raises an issue of tracing. If there has been a questionable transaction into the account, then a number of transactions out of the account which are equal or more to the value of the questionable transaction, but that a sizable balance remains, how do the court approach the money. Is it under suspicion or has it been moved. There have been a number of suggested answers to tracing in this type of environment. First, that it is first in first out. Second, that it is following the intention of the controller of the account. Both have merits, but this is an area which will be tested in relation to AFO's and Forfeiture orders in the coming years.
9. There also has been an issue on how long back can a suspicious activity taint a transfer. So, for instance if there is a suspicion against a company which is 5 years old, can that affect a transfer 2 years later. The answer is there must be a causal link between the suspicious activity and the money.
10. It is of note that the only way a decision to make a freezing order can be appealed is by Judicial Review. This is a substantial barrier to appealing an AFO but it is not impossible. In my view there will be a number of Judicial Reviews in the coming years, which will expand on the earlier case law set out above, and deal with the unique issues which AFO brings.