

## CIVIL RECOVERY ORDERS

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The latest way to lose everything - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

By now many readers of this paper will know all too well of the Proceeds of Crime Act 2002 (POCA). An increasing number of you will now be becoming aware of the Assets Recovery Agency and the use by the ARA of High Court Civil Recovery Orders.

### ASSETS RECOVERY AGENCY

The ARA was set up by POCA. It is not a prosecuting authority – the idea is that the body will attempt to take the profitability out of crime. It will confiscate or ‘recover’ the ‘proceeds of crime’. The ARA is staffed not by police officers but with officials whose expertise lies in assessing the benefit a person is said to have made from crime or a criminal lifestyle and in identifying ‘recoverable property’ – i.e. property obtained through unlawful conduct (s304).

Part 5 of POCA enables the Director of the ARA to issue proceedings in the High Court against any person who it ‘thinks’ holds property which is, or represents, property obtained through unlawful conduct, see ss242, 243. For the ARA the advantage of going to the High Court is that it provides a civil procedure. The ARA need not bother with the cumbersome task of obtaining a criminal conviction from a jury who are convinced beyond reasonable doubt that the suspect is indeed a ‘bad ‘un’. In fact there is no need at all for there to be any criminal proceedings and there is nothing in the legislation preventing the ARA from seeking a civil order even if you have been acquitted in the criminal courts. It is important to understand the concept that Civil Recovery is all about the property, not the guilt of the person holding it.

### WHEN CAN THE PROCEEDINGS BE STARTED?

In many cases the ARA will first of all apply for an interim receiving order under s246, or possibly a Freezing Injunction under Pt 25 of the Civil Procedure Rules. The effect is the same – the Director has been to Court without your knowledge and obtained an order which prevents you from dealing with, potentially, any of your assets up to a certain value. The Act provides a 12 year limitation period. In other words the ARA can seek Recovery Orders for property which you obtained as long as 12 years before the proceedings were issued (s27A of the Limitation Act 1980).

### WHAT PROPERTY CAN BE ‘RECOVERED’?

Anything. The Director of the ARA is enabled to seek a Recovery Order for any ‘recoverable property’ – that is any property obtained through unlawful conduct or property which represents property so obtained. It is not limited to drugs money.

### LEGAL AID

At the moment the POCA regime envisages that everyone who is facing a Civil Recovery Order will be entitled to defend the proceedings with the assistance of funding from the Legal Services Commission. This was almost certainly because under the old system those convicted of any offence would happily pay their legal teams privately to defend in the confiscation proceedings on the basis that if successful the cash would be likely to be returned by way of a costs order and if unsuccessful the unlucky villain was happy to see the cash go anywhere except into the coffers of the State. However, the Government seems to have changed its mind again and the s98(1) of the new Serious Organised Crime and Police Act 2005 amends POCA. When enacted the amendment will allow the Court when making Freezing Orders to allow an exclusion for legal expenses – s245C(5)(b). When that comes into force it is expected that Respondents will generally have to fund their own actions – presumably because the Government have realised how expensive these cases will be to defend.

### THE LITIGATION

The burden of proving that property was obtained by criminal conduct lies with the ARA but the standard is the civil standard – the balance of probabilities, and the rules of evidence allow for hearsay. In essence once you have been served with a Freezing or Interim Order you may seek to vary or discharge it. In the likely event that the Order is not discharged then you, the Respondent, will have to defend the application in the High Court. What that involves depends entirely on the case – you may need to instruct forensic accountants or track down witnesses who can testify that your sports car came from winnings at the bookies. The arguments may simply rely on inferences about your criminal conduct and any lack of obvious legitimate income or tax returns which could support the purchase of your two houses and fleet of jet-skis. Early preparation will be vital in the more complex

contested cases.

Civil Recovery Orders are not like Confiscation Orders made in the Crown Court. With the latter the Court determines the Defendant's (as opposed to the 'Respondent') benefit and then decides the recoverable or 'available amount' – i.e. how much the State can in reality get from you; a pounds and pence figure. With Civil Recovery Orders it is the actual property which is the subject of the order – whether it be cash or an oil painting. It will all be listed in the application. If that property was obtained through unlawful conduct, or it represents property obtained through unlawful conduct, then it will be in the ARA's sights.

### **3RD PARTIES**

This approach makes it easier for the ARA to 'trace' property; i.e. if a criminal has given away his ill-gotten gains that may not protect the receiver of those goods. The ARA has a choice. Say a drug dealer uses his proceeds to buy a speed-boat. The boat is brought exclusively with 'drugs money'. The seller knows this. The ARA can go after the cash from the boat seller or the boat itself from the drug dealer (s278). It gets complicated when not all the cash comes from drug dealing or where the boat seller then invests the money in different ways. The Court has a discretion in respect of third parties not to make an order if they have no knowledge that the proceeds of crime were involved.

### **THE FUTURE**

The ARA has so far survived the few legal challenges that have arisen in respect of the Civil Recovery Order regime. No doubt they will be emboldened by this and there will be more and more people who find themselves fighting, not for their liberty before a jury, but for their possessions in front of a High Court judge. The authors of this article are likely to be involved in a challenge involving the use of CROs when a Confiscation Order has already been quashed by the Appeal Court years before and the CRO is being used as a substitute. The issue is likely to be the relevance of the Article 6(1) requirement that civil proceedings should be brought within a 'reasonable time'. The ARA will say, 'we have only just issued, there has been no delay'. The Court may have to decide what the starting point is for delay; the criminal charge which may have been years ago, or the institution of the proceedings by the ARA which may not have happened yet. Whatever happens in that case it does seem that the ARA is likely to become almost as significant as the CPS for those who have an interest in criminal practice. You will hear more of the ARA.

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