

CONFISCATION ORDERS

Matters to bear in mind before the trial - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

When facing a criminal trial it is all too easy to put all your energy into your defence. Some however will have one eye on the bigger picture. What happens to my assets if I do get convicted?

We cannot, in this short article, give a guide to the law on confiscation and the Proceeds of Crime Act 2002 (POCA); all we hope to do is to introduce some of the considerations that may be worth considering before a case comes to trial.

‘CRIMINAL LIFESTYLE’

Confiscation Orders are a sentencing tool. Once a Defendant stands convicted before the Crown Court and the prosecution have asked for a confiscation order then the POCA regime kicks in; the Court must proceed to s6, the confiscation scheme. Section 6(4) defines the depth and scope of the final Order; it provides that the Court must decide whether the convicted Defendant has a ‘criminal lifestyle’ or whether he has just benefited from his ‘particular criminal conduct’.

By s75 a Defendant has a criminal lifestyle if the offence is one specified in Schedule 2 of the Act. This is a list of offences under, e.g. the Drug Trafficking Act, the Terrorism Act the Immigration Act 1971, money laundering, people trafficking, arms trafficking, counterfeiting, intellectual property crimes (copyright infringement), pimping and brothel-keeping and blackmail. If convicted of one of these offences then you are deemed to have a ‘criminal lifestyle’. The other way to have a criminal lifestyle is if the conviction:

- (a) constitutes conduct forming part of a course of criminal activity, or
- (b) it is an offence committed over a period of at least 6 months and the Defendant has benefited from the conduct which constitutes the offence.

Conduct forms part of a course of criminal activity if the Defendant has benefited from the conduct and he was convicted at the trial of 3 or more other offences for which he gained benefit - or - he has in the last 6 years been convicted “on at least two separate occasions of an offence constituting conduct from which he benefited.”

EFFECT OF HAVING A CRIMINAL LIFESTYLE

If the Defendant has a criminal lifestyle then under s6(4) (b) the Court must decide whether he has benefited from his ‘general criminal conduct’ and if so by how much. In doing this the Court will apply the statutory assumptions under s10 to the past 6 years, e.g. any property transferred to the Defendant in that period was obtained through crime and that any expenditure by in the past 6 years was met from the proceeds of crime. This means the Court when trying to determine how much a Defendant has benefited from crime will not be restricted to the crime the accused has just been convicted of but will instead ‘assume’ that the Defendant has a criminal lifestyle and that all monies/property received in the past 6 years derive from his general criminal conduct. The prosecution will attempt to list all the major transactions over the last 6 year period and invite the Court to apply the assumptions.

AVOIDING THE ASSUMPTIONS

The lifestyle finding in itself is not the problem - it is the assumptions that follow that is the worry. There are two ways of avoiding the assumptions under s10(6). Firstly, the Court cannot make the assumption if it “is shown to be incorrect”, so if the Defendant can show that a particular source of income was entirely legitimate then the assumption cannot be made that it wasn’t. Secondly, an assumption can be avoided if “there would be a serious risk of injustice if the assumption were made.” This could include so called ‘double-counting’ - where the Crown’s generous calculations appear to include property considered more than once.

If found to have a criminal lifestyle the prosecution can pursue you for everything you have - and in some cases haven’t got. Otherwise the Crown is stuck with the benefit from the offence that the Defendant has just been convicted of. So what practical steps can be taken to try and protect against a possible lifestyle finding if convicted?

ADMISSIONS

Admissions under s10 of the Criminal Justice Act 1967 can be very helpful to Defendants. For example a Defendant on a money laundering charge may well have a legitimate income - if that fact and some details of income

can be accepted by the prosecution, rather than having to call witnesses, then at least a convicted Defendant can point out to the Judge that it should be beyond dispute that there was some legitimate income in an attempt at avoiding the statutory assumptions. This can of course all be done post conviction but securing a s10 admission during trial will limit the prosecution's assertions in the later confiscation proceedings.

It maybe that there is a plea of guilty in your case. If that is the case then very careful consideration should be given to a Basis of Plea document as this document just might limit the scope of any further confiscation proceedings; see *R v Lunnon* [2005] 1 Cr. App. R (S) 24; *R v Lazarus* [2005] 1 Cr. App. R (S) 98, CA and *R v Bakewell* [2006] EWCA Crim 2.

BENEFIT

Even where property is obtained only partly in connection with criminal conduct it is treated as if it were wholly so obtained; s76(6). The amount of benefit is the value of the property obtained. This means that all the property obtained not just the net profit: *R v Banks* [1997] 2 Cr. App. R (S) 110. So where the defendant is a courier taking money out of UK to Ireland to launder it, the value of his benefit is the total amount he carried, not just his pay for taking it: *R v Simpson* [1998] 2 Cr. App. R (S). But in the case of *R v Olubitan* [2004] 2 Cr. App. R (S) 14; the Court of Appeal refused to uphold this stringent interpretation of benefit. In that case the defendant did not obtain any property out of or in connection with his criminal conduct; he had joined in the conspiracy on the day of his arrest and the Court of Appeal found there was no basis for a confiscation order to be made against him.

The issue of benefit has always caused problems and will continue to do so. One aspect which is particularly difficult is the principle of apportionment; i.e. should a benefit be divided between the convicted defendants or should the whole value be attached to each defendant - the legislation seems to provide for the latter and case-law has upheld this apparently unjust result; see e.g. *R. v. Patel*[2000] 2 Cr.App.R.(S.) 10, CA. The House of Lords is considering an appeal at the moment in a case called *R. v. May* [2005] 3 All E.R. 523, CA where guidance on when apportionment between co-defendants can be directed is expected; judgment likely March 2008.

DRUGS CASES

Drug cases are notorious for producing some very Draconian Confiscation Orders. However, it is as well to remember that the general principle in assessing a benefit figure is to assess the value of the property, e.g. your house, at the market value of the property at the time of the confiscation hearing (s79(2)). Drugs however have no legitimate market value so someone caught in possession with a large quantity of drugs would, in theory,

be able to avoid the value of this for confiscation purposes. The Courts get round this problem by applying the logic that the drugs themselves were purchased from the proceeds of previous dealing, therefore the Defendant could be said to have benefited from drug trafficking to the value of the drugs in his possession; see *R v Dore* [1997] 2 Cr. App R (S) 152. However, the Courts cannot just make assumptions about previous dealing, there must be evidence of this; only then do the statutory assumptions apply, see *R v Williams* [2001] 2 Cr. App R (S) 206. *R v Ajibade* 28.2.06 (CA) was a case of a drugs courier caught at Heathrow, there was clearly no evidence that she had purchased the drugs herself - never mind from the proceeds of drugs dealing. In those circumstances there was no finding that the value of the drugs in effect represented their purchase price, see also *R v Hussain* 28.2.06 and now *R v Green Times Law Reps* 15/6/07. Furthermore, where the Crown supply figures to the Court based on street level values the Court of Appeal has reduced final orders on the basis that the appellant must have purchased the dugs wholesale: see *R v Berry* [2000] Cr. App. R (S) 352; value reduced by 20%.

Also, if pre-trial it can be established that your defence includes, for example, an assertion that you have a legitimate income or that your lifestyle can be explained by some other legitimate income stream, say gambling or being an amateur antique seller then those assertions become part of your defence case. That being so the prosecution are under a duty to investigate. If you are confident enough to be able to specifically plead certain transactions in a Defence Statement then the police will have to look into these assertions. Maybe neither party uses the material produced but you would be entitled to disclosure of it and use of it at any later confiscation proceedings. It is sometimes nigh on impossible for the defence to obtain materials such as bank statements etc from third parties which is why it is always worth considering using the resources of the State to tactically assist you if appropriate. If, on the other hand, the police do not diligently investigate your defence then this is so me ammunition for making an application to avoid the statutory assumptions after any conviction.

CONCLUSION

Confiscation proceedings under POCA are quite separate from the trial and sentencing procedures. But sometimes you can start to protect yourself at and before the trial stage; it all depends on the particular facts of the case. Knowing the case inside out and understanding the defence 'theory of the case' is important - then at least the defence team can start thinking about possible tactical admissions, cross-examination points and issues about legitimate income etc. As usual early preparation is the key.

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