

## CIVIL RECOVERY ORDERS

---

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

Many readers of this article will know all too well about the provisions of the Proceeds of Crime Act 2002 (POCA), either because of restraint or confiscation proceedings in the Crown Court. However, more and more people are painfully learning all about another aspect of this draconian legislation, namely civil recovery

### ARA/SOCA

POCA created an agency called the Assets Recovery Agency (ARA). The ARA was not a prosecuting body - its main role was to issue proceedings in the High Court in civil proceedings seeking 'recovery' of property which was said to be or 'represent' the proceeds of crime - or as the Act puts it property obtained through unlawful conduct (s304). The ARA's function was to take the profitability out of crime. In practice it gave the authorities a second bite of the cherry where they could not prosecute a case. The defendants in such civil actions would not of course go to jail but they stood to lose everything they had.

However, the ARA was not a success. It spent more than it 'recovered'. The ARA was abolished and on 1st April 2008 and its functions were taken over by the Serious and Organised Crime Agency (SOCA). Further, all the main prosecuting agencies now have the ability to issue civil recovery proceedings, e.g. Serious Fraud Office, Customs, CPS, etc. For the purposes of this article we will refer to SOCA, but what is said here applies equally to the other agencies.

### ISSUE OF PROCEEDINGS

Part 5 of POCA enables SOCA 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 SOCA the advantage of going to the High Court is that it provides a civil procedure. SOCA 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 preventing SOCA from seeking a civil order even if a defendant has 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. That said the authors are presently involved in an appeal case where we challenge the universal application of the civil standard of proof (balance of probabilities) and the pursuit of defendants who have been acquitted in criminal trials - case of SOCA v Gale and Others. In that case we have been defending the two main defendants who were acquitted of offences of drug dealing and money laundering in criminal trials in Portugal years ago, only to be pursued in the English High Court in a case relying on the very same allegations that were considered by the Portuguese. The challenge is partly based on the human rights of the defendants (Article 6 - right to be presumed innocent), and some recent helpful authority on confiscation cases.

### WHEN CAN THE PROCEEDINGS BE STARTED?

In many cases SOCA will first of all apply for an Interim Receiving Order under s246, or possibly a Property Freezing Order. It depends whether an Interim Receiver has been appointed or not. The effect is the same - SOCA 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. Breach of that Order is a Contempt of Court. If an Interim Receiving Order has been made then the Interim Receiver will become a large part of your life over the months of the litigation. The Interim Receiver is an individual, usually from an expensive large firm of accountants whose role it is to trace the assets and produce a report for the Court. This is often the backbone of any litigation. The Interim Receiver is regarded as an officer of the Court and has significant powers to compel disclosure of documents and so on.

POCA provides a 12 year limitation period. In other words SOCA 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). If however the Court finds that there has been deliberate 'concealment' of facts relevant to the issue of proceedings then it may extend the 12 years period (s32 of the Limitation Act 1980). We are currently challenging the precise method of applying the limitation period in ongoing appeal proceedings, though it is worthwhile noting that the Government is set on extending the 12 year period to 20 years under the Policing and Crime Bill currently going through Parliament.

The alleged criminality is not limited to offences committed here in the UK. They can have been committed overseas as long as the offences would have been offences here too (s241). The authors are advising in a case involving a contract to ship certain hardware to post war Iraq. The Iraqi government did not receive the goods but millions of dollars had been paid out. Those are the sorts of circumstances where it is at least possible that SOCA or the SFO might start proceedings in the civil Courts recognising the difficulties of a criminal prosecution.

## **WHAT PROPERTY CAN BE 'RECOVERED'?**

Anything. SOCA 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. This will include money in bank accounts, cars, houses, anything. It is also not limited to property in the defendant's possession. In many cases 3rd parties, especially family members are roped into the litigation as the money is traced through to properties that have passed to others. In such cases there is a defence of innocent possession (s308) but it can be seen that the legislation is punitive and is aimed at the property rather than the person.

## **FUNDING**

When civil recovery was first instituted many cases simply did not get off the ground as the Legal Services Commission either refused to grant legal aid or made it impossibly difficult to secure proper funding. Therefore, Parliament acted to change the POCA provisions so as to allow any monies restrained under the proceedings to be released in order to pay for both reasonable living expenses and reasonable legal expenses - see s245C(5)(b).

This creates a tension between the parties as the more money the defence lawyers charge the less money will be left for SOCA if they are successful after trial - and thus the more pressure there is on them to settle. Of course if the defendants win they can expect to get their costs back. SOCA have reacted to this problem by seeking Orders for a losing defendant to pay the costs of the Interim Receiver - this can be many many thousands of pounds. This is grossly unfair as the defendant has no control over those costs; again, we are involved in litigation challenging that approach by SOCA.

## **THE LITIGATION**

In essence once you have been served with an Order (Freezing or Interim Receivership) then the often lengthy litigation process begins. First, though you have a right to apply to discharge or vary the Order that has been made - i.e. a challenge to the case right at the outset, or at least a challenge to part of it or the level of allowed living expenses. Assuming the Order is not discharged then the

Court will make directions for service of evidence and other ancillary matters.

The arguments for trial may simply be factual and rely on inferences about alleged criminal conduct and any lack of obvious legitimate income or tax returns which could support the purchase of the two houses and so on. However, the case of R (ARA & Ors) v Green & Ors, The Times, Feb 27th 2006 should be borne in mind - in that case Sullivan J. said that though there is no requirement to allege any specific criminal offence, a claim for civil recovery cannot be sustained purely on the basis of there being no identifiable lawful income. But remember, everything is 'in' - from hearsay to raw intelligence, there is little in the way of evidence that will not be permitted by the High Court because there is no jury.

## **THE FUTURE**

The fact that all the major prosecuting agencies now have the power to take civil recovery proceedings means we are likely to see more and more use of this as the various agencies get used to the idea of using the High Court rather than the Crown Court. A powerful example is the Serious Fraud Office who after only 6 months of having the power to instigate civil recovery proceedings obtained, by consent, an order from the High Court for the payment of £2.25 million plus costs against the firm Balfour Beatty following an investigation into corruption allegations. In that case the amount concerned reflected the fact that Balfour Beatty had co-operated in the investigation and had indeed brought the issues to the SFO's attention. This was no doubt less voluntary than it might at first seem given the increasingly strict money laundering reporting conditions that companies have to comply with today (Money Laundering Regulations 2007). Given that, and the possibility of reduced financial penalties by co-operation, it is surely inevitable that SOCA and all the other prosecution agencies will find themselves more and more used to trips to the High Court than they currently have been up to now.

## **AUTHORS**

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence case at 23 Essex Street Chambers in London. He is a contributing author to Covert Human Intelligence Sources, (2008 Waterside Press) and has extensive experience in all aspects of the Proceeds of Crime Act 2002.

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.