

RESTRAINT AND RECEIVERS

Your money or theirs? - An Article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

In this article we give a brief overview on the law relating to Restraint Orders - that is an order made by in the Crown Court which effectively freezes the assets of someone who is either being prosecuted or investigated for alleged criminal offences. It is often the first warning sign that there is trouble ahead. The orders themselves can be very restrictive and we consider here how such orders are made and what steps should be taken if you find yourself on the wrong end of a Restraint Order.

PROCEEDS OF CRIME ACT 2002

The purpose of a Restraint Order is to freeze property that may subsequently be confiscated. Confiscation of course is the power the Crown Court has to make orders depriving convicted offenders of their assets if the offender has benefited from his criminal conduct. That topic in itself is a huge one and not one that can be covered here.

Prosecutors worry that suspects who are under investigation, or have just been interviewed or charged may start hiding their money just in case they are convicted. In such circumstances the prosecution can apply to the Crown Court to restrain those assets - that power is contained in the Proceeds of Crime Act 2002 ("POCA"). A Restraint Order does what it says - the Order will specify what you cannot do; i.e. you cannot 'deal' with the property cited on the Order. If the Order mentions your car for example it will mean that you cannot sell the car or transfer it or dispose of it, or in any way 'realise' it - i.e. turn it into cash.

WHEN AND HOW CAN A RESTRAINT ORDER BE MADE?

Section 40 of POCA creates a number of circumstances in which the Crown Court may issue a Restraint Order. Usually the Crown will apply for an Order after a suspect has been charged with an offence, but the authorities can seek such an order even before there is an arrest - as long as an 'investigation' has started, s40(2)(a). The Crown have to establish at this stage that there is a reasonable cause to believe that the alleged offender has benefited from his criminal conduct (s40(2)(b)).

The Crown do not have to convince the Judge that any named property was purchased directly with ill gotten gains. All they have to do is persuade the Judge, to the civil standard, - i.e. on the balance of probabilities, that

there is reasonable cause to believe that the suspect has benefited from 'criminal conduct' - this 'criminal conduct' is widely defined as any conduct which would constitute an offence (s76) and the Crown may rely on hearsay evidence to persuade the Judge.

The Crown's application to the Court is likely to be made ex parte, that is the prosecution seeing the Judge privately in Chambers without notice to the suspect; s42(1)(b). The first a suspect will know about it is when he or she is served with the Order, or even finds that his or her cash-card for some reason no longer works at the bank's ATM.

However, it is important to bear in mind that the Court does not have to make a Restraint Order and those affected can challenge the making of such an Order. In *Director of Serious Fraud Office v A* (2007) 151 S.J. 1058, CA the Court found that although there was a legitimate public interest in preventing a suspect from dissipating or hiding his assets once he became aware that an investigation was under way it did not necessarily mean that, even if the statutory conditions were satisfied, an order would inevitably be made - s40(1) provides that the Court may grant an Order - not must.

RECEIVERS

If a suspect's finances are complex the Court may appoint a Management Receiver (s48) to receive and manage the property. This will be a sizeable accountancy firm who could have the legal authority to take possession and control of any or all of the suspect's property and sell any assets. This is a major step which has significant implications for those on the receiving end.

Management Receivers do not come cheap. They are officially appointed by the Court but they charge for their services and the first port of call for their fees is the restrained or confiscated assets, see s49(2)(d). One area that is of concern is the Receiver's costs - which are rarely insignificant. This can lead to a gross injustice where the restrained assets have been used to pay the Management Receiver's large bills only for the suspect to then go onto trial and be acquitted - in that scenario the innocent suspect may have to bear the cost; see House of Lords ruling in *Capewell v Commissioners of Custom & Anor* [2005] 1 ALL ER 900.

That possibility of manifest unfairness should be taken

into account at the time the Order is made - or challenged. Defenders can ask for the Court to consider to satisfy itself that the expense of appointing a Management Receiver is proportionate and should remind the Court of the duty of proportionality and the risk of injustice - tailored of course to the individual facts of the case.

PROPERTY HELD JOINTLY

Third parties holding an interest in property can be affected by a Restraint Order. The most obvious example is the spouse of someone who is facing criminal charges, for example the wife of someone facing serious fraud charges where the wife has a joint bank account and holds the matrimonial home in joint names. In law where any person has been, or may be, affected by the actions of a Management Receiver, an application can be made to the Court under s62(3) for directions as to the exercise of the Receiver's powers. The Receiver potentially has the power to sell property to satisfy his bill even before the matter has come to trial - though such a serious step should not be taken without seeking a direction from the Court first; *Re P* [2000] 1 WLR, 473. The case of *Gibson v RCPO* [2008] Times Law Reports, 14/7/08 is instructive in this scenario. In that case a Confiscation Order was made against a convicted drug trafficker. The assets identified had been the 50% equity in the matrimonial home and joint bank account, held by the offender's wife - the home had been purchased in joint names. The Crown Court took the view that the wife must have realised that the mortgage was being paid by the husband's ill-gotten gains and was thus an asset which could be sold to satisfy the Confiscation Order. The Court of Appeal took a different view, it found that there was no legal principle under which a spouse could be deprived of the benefit of illegally obtained property on the grounds of public policy. The wife kept her half of the house and bank account. Applying that principle to start of proceedings, i.e. the Restraint Order stage there is solid argument for limiting the scope of any such Order where there are assets which are held in joint names with a spouse.

LIVING & LEGAL EXPENSES

This is another area which often wrangles with those on the wrong end of a Restraint Order - the amount allowed by the Order for ordinary living expenses. Variation applications made after the initial *ex parte* Order will often challenge the amount allowed. What is required is a careful analysis of expenses together with as much proof as possible - these steps need to be considered at the very earliest opportunity.

An exception cannot be made for legal expenses in relation to the actual offence in respect of which the Restraint Order is made (s41(4)(a)). The State therefore must pay for the defence through Legal Aid.

APPLICATION FOR VARIATION OR DISCHARGE

Once a suspect has been served with a Restraint Order and he has decided he wants to fight it then the first step must be to sit down with the legal advisors and figure out what the challenges are, how much money is needed for reasonable living expenses, what is said about the charges/ proposed charges, the 'reasonable belief' test, and how much of the defence it is tactically wise to give away at that early stage.

The Restraint Order will have been made with no opportunity for the suspect to say anything. By s42(3) he has the power to apply to the Court to discharge or vary the Order. The Judge will hear the arguments which, may, if appropriate also include human rights arguments about the proportionality of the Order. Either party, prosecution or defence, may appeal to the Court of Appeal, s43.

THE FUTURE

The Home Office published guidance last year on how money gathered in from Confiscation Orders is divided up. It is split 3 ways between the Court Service, the prosecution and investigators (i.e. police, customs, SFO, SOCA etc). The split used to be one-third each of 50% of the confiscated assets (i.e. 16.6% each of the total recovered). The shares are now investigators 18.75%, prosecutors 18.75% and courts 12.5%. It will therefore be readily understood why we believe that the Crown will now use their confiscation powers (and thus their restraint powers) more and more in the future.

Having your assets restrained is a serious step. There is not only the worry of impending or actual criminal charges but a protracted period of time when you are having to battle with the authorities over your own assets. Anyone affected by such a Restraint Order needs to get to grips with their own finances as soon as possible, consider the case against them and the terms of the Order and develop a strategy with their lawyers as soon as possible.

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.