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A Briefing Guide to

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# Restraint Orders, Account Freezing Orders And Cash Forfeiture: Defending What Is Yours

RAHMAN RAVELLI

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There is little doubt that the Proceeds of Crime Act 2002 (POCA) gave the authorities significant powers when it came into effect. Subsequent amendments to it have presented enforcement agencies with even greater scope for taking assets from those they investigate.

At Rahman Ravelli, we represent clients in cases involving all aspects of POCA, as you will see from a tour around our website. This particular section is a brief guide to restraint orders, account freezing orders and cash forfeiture.

The important thing for anyone facing a restraint order, account freezing order or cash forfeiture proceedings is to take the right steps to minimise the potential effect.

## What is a Restraint Order?

A restraint order can be made against a suspect or defendant in criminal proceedings to freeze their assets anywhere in the world, if the authorities believe those assets may be liable to confiscation after a trial. Confiscation proceedings are brought following a conviction and enable the authorities to deprive the defendant of the financial benefit of his crime.

## How is a Restraint Order Made?

The application for a restraint order is likely to be made *ex parte*. This means that the applicant sees the Crown Court judge privately in chambers. The intended subject of the order will not have been notified about this. The first they will know about it will be either when they are served with the order or even when they discover that they are not able to withdraw money from their bank account.

The test that the authorities must satisfy in order to obtain a restraint order from the court is contained in Section 40(2) of POCA: they must have reasonable cause to believe that the alleged offender has benefitted from his criminal conduct.

The authority that is applying for the order does 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 that, on the balance of probabilities (which is the civil law standard of proof), there is reasonable cause to believe that the suspect has benefited from criminal conduct. Even hearsay evidence may be used to persuade the judge that there was criminal conduct. Criminal conduct is defined under Section 76 of POCA as any conduct constituting an offence in England and Wales or which (if it took place elsewhere in the United Kingdom or abroad) would constitute an offence there. But there does not need to have been an arrest or charges brought in relation to the criminal conduct.

## Can you remove a Restraint Order?

Once made, a restraint order remains in force until it is lifted by the Crown Court.

This may happen if:

- The order is challenged by the subject of it
- Criminal proceedings are not brought within a reasonable time
- The subject of it is acquitted of criminal charges
- The confiscation order process has been completed after the conviction of the subject

## Can you challenge a Restraint Order?

As applications for restraint orders are civil proceedings, there is no jury and the civil standard of proof – on the balance of probabilities - applies. And with an application being made without the subject of the order being present to voice any objections, it could be argued that the applicant faces few real challenges to their initial attempt to obtain the order.

But challenges to orders can be made against the court, the prosecution or both. There is the possibility of a High Court Judicial Review of the decision to grant the order. But the most likely first step will be an application to vary or discharge the order. This will be a hearing where both sides are represented and will usually take place before the judge that granted the order.

Challenges to an order can be made on a variety of grounds:

## Reasonable Cause

One area of possible challenge is the requirement under Section 40(2) of POCA that the applicant must have reasonable cause to believe that the alleged offender has benefitted from criminal conduct. *Windsor and Hare v CPS* [2011] is an important case in this area. In this case, the Court of Appeal stated there was insufficient evidence for the judge to have granted the order, as suspicions of criminal conduct were not enough to support a reasonable cause to believe, as required by Section 40(2). There may often be

grounds to dispute the claims of criminal conduct that are the basis of an application for an order.

Disclosure: The principal challenge to restraint orders is the lack of full disclosure to the judge that made the order *ex parte*. This challenge will be made at the Crown Court in an application to vary or discharge the order. The *ex parte* procedure imposes a duty on the prosecution to make a balanced application and inform the court of all material facts. Any non-disclosure can be used as a challenge to the order by the defendant.

## Procedural Rules

In our experience there is often little reference by either prosecution or defence to the rules contained in the Criminal Procedure Rules and the Attorney General's Code of Practice, issued under s377 of the Act. Such attention to detail can add weight to any challenge to an order. A number of cases have shown that higher courts are prepared to quash restraint orders (and other orders granted *ex parte*) at an early stage of an investigation if procedures have not been followed to the letter of the law.

## The Risk of Dissipation

When seeking a restraint order, the applicant needs to show that if the order is not made there is a real risk that the assets in question would be dissipated by

the defendant. This means that the defendant would spend, squander or relocate the assets so they could not be recovered. There is no reference in POCA to the risk of dissipation. But case law has made it clear that applications for a restraint order should only be made if there is a reasonable concern that the property may be dissipated if no order is made. This means that if a person has been under investigation for a long time and there has been no evidence of dissipation that person can use this as a strong argument against the making of the restraint order.

## Property Held Jointly

Third parties holding an interest in property can be affected by a restraint order. It can often be the case that a restraint order will affect the interest of a defendant's spouse as well as the defendant. But while this can be a problem for a spouse or third party, it can also be strong grounds for challenging an order.

In the case of *Gibson v RCPO* [2008], a confiscation order made against a convicted drug trafficker identified his assets as including 50% equity in the matrimonial home and joint bank account. The Crown Court took the view that the wife must have realised that the mortgage was being paid for by the husband's illegal gains and could therefore be sold to satisfy the confiscation order. But the Court of Appeal then ruled 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 this principle to the start of proceedings – when a Restraint Order is sought – can limit the scope of an order regarding jointly-owned assets. This can be a particularly strong line of argument if the prosecution failed to bring this to the attention to the judge at the ex parte application for the order.

## Living and Legal Expenses

Applications to vary an order can be made to challenge the amounts allowed to the defendant for living and legal expenses. To maximise the chances of success, a careful analysis of expenses should be carried out as early as possible and all relevant evidence should also be gathered immediately.

## Identifying Relevant Assets

Restraint orders are only used to protect assets that might then be confiscated. As a result, there are very strong arguments that can be made when all of a defendant's entire assets are restrained; especially if the value of those restrained assets appears to exceed the likely value of any confiscation order that would be imposed. It is certainly possible, therefore, to argue that certain assets should be removed from the restraint order.

## Account Freezing Orders

The amendments to POCA introduced under the Criminal Finances Act 2017 (CFA) arguably made it even more significant.

Among these amendments was the introduction of account freezing orders (AFROs) and account forfeiture orders (AFOOs). This amendment created powers to freeze the contents of bank and building society accounts so that, just as with cash, they could be forfeited in the same way – with a forfeiture order.

## Freezing

Section 303Z1 of POCA makes it possible for a senior enforcement officer – an HM Revenue and Customs officer, police officer, Serious Fraud Office (SFO) officer or accredited financial investigator - to apply to a Magistrates Court for an AFRO.

They can do this if they have reasonable grounds to suspect that monies held in an account are either recoverable property (defined in Section 304 of POCA as property obtained through unlawful conduct) or intended by any person for use in unlawful conduct. The minimum balance in the account is £1,000 and the application will usually be made without notice.

## Forfeiture

The freezing of the account is the first stage of the process. The second stage is forfeiture.

There are two routes that an enforcement agency can follow to pursue forfeiture. The first route involves an account forfeiture notice being given by the police to the person affected. This will explain that the money is set to be forfeited and will specify a period of time for any objection to that process. If there is no objection then the AFOO application will be

made to the Magistrates Court, with forfeiture being the inevitable result. The second route is where it is known that there will be a challenge or where objection is made under the notice. Then the court will issue directions in the same way that the court does already for cash forfeiture proceedings.

It could be argued that Section 16 of CFA is simply the law catching up with the modern world. Those suspected of criminality do not always deal in cash and are as likely to keep their assets in bank and building society accounts as anybody else. Freezing a bank account and asking the account holder to explain the source of all its contents and the reasons behind the transactions – many of which may date back months or even years – could be considered to be unrealistic.

But the principle established in *Angus V UK Border Agency* (2011) was that the authorities will have to explain what background offending led to the subject possessing the cash in question. That principle is as valid for the account freezing order process as it is for the more conventional cash forfeiture proceedings – and so the authorities do not have it all their own way.

There are also potential challenges to the AFRO itself: applying principles from the higher courts and the stringent demands they put on applicants in *ex parte* applications to tell the court everything that they would expect the defence to say if they were present. A failure to do this may provide grounds for challenging the validity of the application.

## Cash Forfeiture

POCA makes it possible for an enforcement agency to carry out the search for, the seizure and the forfeiture of cash if there are reasonable grounds for suspecting that it is recoverable property or is intended by any person to be used in unlawful conduct. The cash may be seized even if the agency conducting the search only has reasonable grounds for suspecting that part of it is recoverable property or intended for use in unlawful conduct, provided that it is not reasonably practicable to seize only part of it.

The cash can only be seized in whole or in part if it exceeds the minimum amount, which is currently set at £1,000. When cash is seized, the agency that seized it has 48 hours in which to either return it, seek an order from a magistrates' court so it can be kept longer (initially by no more than three months up to a maximum of two years), serve a forfeiture notice or issue forfeiture proceedings.

The magistrates' court can make an order in relation to the cash providing two conditions if:

There are reasonable grounds for suspecting the cash is recoverable property, its continued detention is justified while the source of it is investigated, consideration is being given to bringing proceedings against a person for an offence which the cash is connected to or such proceedings have been started.

There are reasonable grounds for suspecting the cash is intended to be used in unlawful conduct, its continued detention is justified while its intended use is further investigated, consideration is being given to bringing

proceedings against a person for an offence which the cash is connected or such proceedings have been started.

If cash is detained for more than 48 hours it must be paid into an interest-bearing account and the interest that accrues should be added to it on its forfeiture or release.

The person who had the cash seized can apply to the magistrates' court for an order that the cash detained should be released in whole or in part. The court must be satisfied before releasing the cash that the conditions for its detention are no longer met.

## Forfeiture of cash

Seized cash can be forfeited in two ways under POCA. The cash can be the subject of administrative forfeiture under Section 297A (forfeiture without court order) or the court can order the forfeiture of cash or part of it under Section 298 (forfeiture by court order).

A senior officer may give a forfeiture notice to any person in relation to cash which has been detained under POCA. This allows law enforcement agencies to forfeit detained cash without a court order in uncontested cases. When a notice is served, the cash is detained until either the cash is forfeited, the notice lapses or the cash is released. If no objection is made to the notice, the cash is automatically forfeited after the expiry of the period set by the notice.

The court may order the forfeiture of the cash or any part of it if it is satisfied that it is recoverable property or is intended for use in unlawful conduct. The court has to distinguish between clean and dirty money: for example, if the cash being targeted is in a joint bank account along with money legitimately earned by someone not suspected of criminal behaviour the order cannot take the money that has no criminal connection. An appeal to a forfeiture can be made to the Crown Court within 30 days of the order being made.

## Applying for Cash to be Released

The person or persons from whom the cash was seized - or any other interested party - can make an application to the court for the release of the cash and any interest that has accrued on it.

If the court is satisfied that all or part of the cash is not recoverable property and it is lawfully claimed by the person then the cash can be released. This can cover situations where the cash was seized from someone who had stolen it from its rightful owner. Release of the cash can also occur at a continued detention hearing if the court is not satisfied that there are grounds to detain the cash.

## Whats is recoverable property?

Recoverable property is defined by sections 304 – 310 of POCA. It is the proceeds of crime - property obtained through unlawful conduct - and property representing the proceeds of crime.

As an example, if a person steals jewellery that jewellery is then recoverable property. If the person then sells the jewellery, the money he obtains for selling it is then recoverable property. In such situations, the enforcement authority will attempt to follow the property along the chain of transactions.

## Using Expertise in Cash Forfeiture

Cash forfeiture under POCA is overlooked by many criminal lawyers as a civil after-thought. But at Rahman Ravelli our policy is to use our expertise in POCA to the full. Whether the cash in question is part of a bigger criminal case or whether it is a stand-alone seizure without any criminal proceedings there are tactical considerations that should apply early on.

Many defendants are not made aware of the rule that even if they are successful they may not recover their costs because of the rule in *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010]. But there are certain early measures that can be taken to avoid that outcome and ensure you recover your full costs.

The case of *Angus v UK Border Agency* (2011) meant that the authorities have to now indicate what background offending is said to have led to the subject possessing the cash that is the subject of the proceedings. This gives an experienced POCA lawyer the opportunity to submit there is no proof and that the application for cash forfeiture should not have been made.

Such issues are just two examples of the scope that exists for taking on the authorities. We have been challenging the whole range of POCA cases since its inception. We know how to respond to each and every application made under POCA by the authorities.

## Managing Proceedings Effectively

Restraint, freezing and forfeiture place an obligation on the subject of the proceedings to account for and defend what is theirs. At first, this may not seem easy or straightforward.

But, as we have outlined, challenges can be made and the authorities can also be asked to account for their course of action.

At Rahman Ravelli, we put our deep knowledge of each and every aspect of this area of law to work for our clients to help them retain what they possess.



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