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A Briefing Guide to

Confiscation: The Proceeds Of Crime Act 2002

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Confiscation: The Proceeds Of Crime Act 2002

Confiscation in the UK is covered by the Proceeds of Crime Act 2002 (POCA) – a piece of legislation described by many as draconian. It gives the authorities ways of taking assets that they believe have been acquired as the result of criminal activity.

The powers granted to the authorities by POCA appear harsh. While the policy behind confiscation is one of removing the profit from crime, the Home Office incentivisation scheme means that 50% of the proceeds of confiscation are split three ways between the court service, the prosecution and investigators. This can mean confiscation claims being brought because they can be rather than because they should be.

But regardless of this, anyone facing action under POCA has to make sure that they do everything possible to challenge the allegations and assumptions that may be made about them. Much of this will involve taking all necessary steps to prove they have not had any benefit from a “criminal lifestyle”,

What Is Classed As A Criminal Lifestyle?

Criminal lifestyle is defined in Section 75 of POCA. It sets out a number of tests. The first, and by far the most routine, is whether

the offence that the defendant has just been convicted of is a Schedule 2 offence. Schedule 2 of the Act lists numerous offences including virtually all drug trafficking, arms trafficking and counterfeiting offences and brothel keeping. If you are convicted of any Schedule 2 offence then the criminal lifestyle provisions apply automatically.

These provisions apply where the Crown contends that the defendant has profited from crime above and beyond any profits from the crime for which he has just been convicted. This is very significant: if the defendant has a criminal lifestyle then the court enquiry can be an unlimited one.

You can also be considered to have a criminal lifestyle if:

- the offence was committed over a period exceeding six months and there was a profit element or
- in the latest proceedings you were convicted of four or more matters, each having a benefit; or

- you have at least two other separate previous convictions in the last six years for offences from which you benefitted.

General Criminal Conduct

If the defendant is considered to have a criminal lifestyle the court, under Section 6(4)(b) of POCA, must decide whether he has benefited from his 'general criminal conduct' and, if so, by how much. General criminal conduct (GCC), defined under Section 76(2), refers to all the defendant's criminal conduct; no matter when it occurred; although it is usually only the past six years that is considered. That is because in determining the benefit from the defendant's GCC, the court must apply the assumptions to the past six years.

There are 4 statutory assumptions set out in Section 10. These are:

- Any property transferred to the defendant within the last six years was obtained by him as a result of his GCC.
- Any property held by the defendant at any time after the date of conviction was a result of his GCC.
- Any expenditure incurred by the defendant in the last six years was met from property obtained by him as a result of his GCC (therefore the benefit is the value of that property).
- In valuing property obtained by the defendant, the court assumes that he is the only person with an interest in the property.

Challenging Assumptions Of General Criminal Conduct

The burden is on the defendant to rebut any assumption made. There are two ways of doing this under Section 10(6). Firstly, the court cannot make the assumption if it is shown to be incorrect. So for example, if the defendant can show in relation to assumption 1 that a source of income was 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."

If the defendant is convicted of one of the qualifying offences – for example, possession with intent to supply a controlled drug - he has a statutory criminal lifestyle and the court must establish whether he has benefited from his general criminal lifestyle. In establishing this, the court will assume that all his income over the past six years represents the proceeds of crime. The defendant then has to show either that this is not the case or that there would be a serious risk of injustice if the assumption was applied.

Assessing The Benefit That Can Be Recovered

Under Section 6(5) (a), the court must decide 'the recoverable amount'. This involves the court first deciding if the defendant has benefited from crime, using the assumptions to assess if it is a criminal lifestyle case. This is part of finding the recoverable amount which, under Section 7 (1), is an amount equal to the defendant's benefit. But the defendant can reduce the amount of the order if he can prove that the value of his assets (the "available

amount”) is less than the benefit figure – then the lesser amount becomes the recoverable amount. This is subject to the provisions on hidden assets and tainted gifts that are outlined below.

Assessing the benefit is at the heart of the confiscation process and is usually at the centre of most appeals in confiscation cases. Section 76(4) defines benefit as: “a person benefits from conduct if he obtains property as a result of or in connection with the conduct’. This apparently simple contention is the one that causes the most difficulty with defendants and misunderstanding among lawyers; especially if the original conviction is one of conspiracy. It is often suggested that in such cases the benefit for each defendant is the whole benefit from the offence and that it applies equally to all the defendants. This apparent double-counting has survived appeal attempts. But it does not automatically mean that a conspiracy conviction will see the full benefit of the crime attributed to every person involved in the conspiracy.

The Supreme Court has now finally given a defining answer to the issue of sharing out of benefit between co-defendants. In *R v Ahmad and Ahmed & Others* (2014), the Supreme Court held that where co-conspirators jointly acquired the proceeds of a conspiracy to defraud, the question of assessing the ‘benefit obtained’ by each of them would not lead to a splitting up of the benefit figure between the co-defendants. The answer, the Supreme Court found, was that the confiscation order would be made for the

whole value of the benefit - but when it came to enforcement, the order was not to be enforced so that what was recovered from the defendants totalled more than the benefit figure.

POCA'S Lack Of Discretion

The problem with the POCA regime is the apparent lack of judicial discretion it permits. Section 6(5) of POCA provides that the court must make an order for the ‘recoverable amount’; although this does now have to be ‘proportionate’.

The Supreme Court has ruled in an important case which addressed this apparent lack of judicial discretion; *R v Waya* (2012). The case concerned a mortgage fraud where the fraudulently-obtained loan had actually been repaid. The Court of Appeal found that the appropriate confiscation order was 60% of the value of the house at the time of the order, as the fraudulently-obtained mortgage was for 60% of the value at the time of purchase, with the rest coming from lawful income. As a result, the amount of the order was £1,110,000. But the Supreme Court settled on a different formula – 60% of the equity in the property at the time of the order, minus the repayments. This was a very significant difference; as the final order was for £392,400.

Yet this case is more important because the Supreme Court considered the effect of the Human Rights Act 1998, specifically Article 1 of the 1st Protocol to the European Convention on Human Rights - the right to peaceful enjoyment of property. The court found that, in applying Convention principles, a confiscation order had to be ‘proportionate’

and “that in order to be proportionate a confiscation order had to bear a proportionate relationship to the 2002 Act’s purpose, which was to remove from criminals the pecuniary proceeds of their crime rather than deterrence...”.

POCA did not alter the basic method of enforcing confiscation orders, which is by ordering a period of imprisonment if an order is not complied with. But it did introduce a scheme where a defendant who serves a period of imprisonment in default of an order does not extinguish the confiscation order; Section 38(5). The Court may appoint enforcement receivers to deal with the defendant’s property. Third parties holding interests in realisable property may be ordered to pay the receiver “in respect of a beneficial interest held by the defendant or the recipient of a tainted gift”, under Section 51(6).

Third Parties And POCA

A third party could not be involved in confiscation litigation until the Serious Crime Act 2015 (SCA) amended POCA. A third party can now get involved in the confiscation litigation before the confiscation order is made. Prosecution and the defence are now under a duty to bring to the court’s attention details of any interest that any third party may have in the property claimed as realisable by the Crown. This will make the initial confiscation process more lengthy and complicated but may speed up the enforcement process.

Restraint Orders

Restraint orders can also present opportunities. There is an absolute right for the third party under a restraint order to be heard before the confiscation order is made. Arguments can then be put forward that, for example, the third party’s interest in property can and should be severed from the restraint order. This can be an early argument for, in effect, a reduction of the benefit figure claim, as well as the available amount. Read more about: Restraint Orders.

Tainted Gifts

Section 9 of the Act provides that the available amount is the value of all of the defendant’s free property - minus some of his prior obligations, such as earlier fines - plus the value of all tainted gifts made by the defendant. The notion of tainted gifts, covered by Section 77 of POCA, is designed to catch those who give property to others.

Section 81, however, is also very important as it demonstrates that before determining the value of a tainted gift, it is necessary to establish what the recipient of the tainted gift has done with it.

If the property remains in the recipient’s hands, the value of the tainted gift is either its value at the time the gift was made (which can be adjusted for inflation) or its current value; whichever is the greater.

But if the property is no longer wholly in the recipient’s hands, the value that the court will put on that item must be the greater of:

- Its value at the time of the gift (adjusted for inflation).
- The current value of the retained part plus the current value of anything held by the recipient that represents the part disposed of by the recipient.
- Financial investigators can and should be challenged on their valuations of tainted gifts, as a Section 81 valuation argument can bring them to the negotiating table.

Hidden Assets

There was a general understanding that if the court concludes that a defendant has hidden assets then the confiscation order must be in the full amount of the benefit. This followed the case of *Telli v Revenue and Customs Prosecution Office* (2008), where the judge said that the court must make a confiscation order for the full value of the benefit and had no discretion to order confiscation of a lesser sum.

But the Court of Appeal in the case of *R v Ahmad* found that: "The court may conclude that a defendant's realisable assets are less than the full value of the benefit on the basis of the facts as a whole. A defendant who is found not to have told the truth or who has declined to give truthful disclosure will inevitably find it difficult to discharge the burden imposed upon him. But it may not be impossible for him to do so." The Court in this case added that other sources of evidence apart from the defendant himself may persuade a court that the assets available to the defendant are less than the full value of the benefit – meaning a confiscation order

does not have to be for the full amount of the benefit of the assets that are available plus those that have allegedly been hidden.

The Serious Crime Act 2015

As well as having an effect on third parties and confiscation, as mentioned earlier, the SCA 2015 has introduced other changes to the confiscation regime. It introduced compliance orders, which can be made by the court "for the purpose of ensuring that the confiscation order is effective". For example, a compliance order might prevent a defendant travelling abroad.

Time to pay has also been cut by the SCA. Six months was usually the time given to pay an order and this could be extended to up to 12 months. But the SCA 2015 made the order payable immediately, with extra time only permitted if an asset has to be sold to pay the order. That extra time is limited to up to three months, which can be extended up to a maximum of six months.

Following changes introduced by the SCA, money can now be seized directly from bank accounts to meet a confiscation order. The prosecution can even seize money from bank accounts of third parties where the realisable amount is said to include this. Once a confiscation order is in place, therefore, the Crown can immediately get its hands on the liquid assets even if there is no restraint order in place.

Sentences for defaulting on a confiscation order were increased by SCA. The maximum sentence for non-payment of a confiscation order for more than £1M rose from 10 to 14

years and there is now no automatic half-time release for default sentences.

The Challenges Of Confiscation

The confiscation process can be the most demanding, intrusive and complex part of a case. But by approaching each stage of the process methodically and by seeking the services of an experienced litigator, the effects can be minimised and the most appropriate outcome achieved.

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