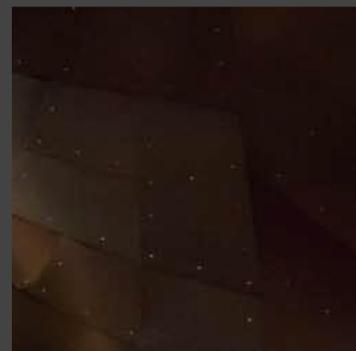


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A Briefing Guide to

Civil Recovery

RAHMAN RAVELLI

Civil Recovery

The challenge posed by enforcement agencies that wish to take the assets of a corporate or high net worth individual (HNWI) is now stronger than ever.

At Rahman Ravelli, we thrive on such cases. Our workload at any given time involves the largest and most involved cases where clients rely on our expertise to prevent enforcement agencies such as the Serious Fraud Office (SFO), National Crime Agency (NCA), Financial Conduct Authority (FCA), Crown Prosecution Service (CPS) and HM Revenue and Customs (HMRC) taking assets without even having to obtain a conviction. They do this by using the civil courts, rather than the criminal courts, to instigate civil recovery proceedings.

Before the Proceeds of Crime Act 2002 (POCA), the authorities could apply for assets to be confiscated of those who had been convicted of an offence. But if a suspect was found not guilty of an offence - even if they were acquitted on a technicality - there was no way that the authorities could confiscate assets that they believed were the proceeds of crime.

But POCA, in particular Part 5 of the Act, made the confiscation of assets far easier for the authorities. It removes the need for there to be a conviction in order for assets to be recovered, as the authorities can now use civil recovery powers to take the assets. All that an enforcement agency has to do

when applying to the High Court is show that on the balance of probabilities – the civil law standard of proof – the assets they are pursuing are the proceeds of crime.

Enforcement Agencies

These pages are designed to explain the details of Part 5 of POCA, the measures that are available to the enforcement agencies and how the civil recovery process works. It also outlines the options available to those who may face such proceedings.

What is Civil Recovery?

For enforcement agencies, civil recovery of assets is an attractive alternative to seeking a conviction.

As an example, if the SFO suspects wrongdoing it can prosecute an individual or corporate and, if it is successful, it can seek to recover assets it believes are the proceeds of crime. Alternatively, it could enter into a deferred prosecution agreement (DPA) with a corporate, where the company admits wrongdoing and agrees to conditions in order to avoid prosecution. But if a prosecution or DPA appears problematic, the SFO (or any

enforcement agency in a similar situation) can go straight for a subject's assets by using civil recovery procedures under POCA.

All the main prosecuting agencies can use civil recovery proceedings, although they may use them for different reasons. The SFO, for example, may use them to tackle global bribery and corruption, disrupt criminal activity that crosses borders and recover proceeds of crime held overseas. Further down, in the Corporate And International Civil Recovery Trends section, we examine some of the notable civil recovery cases and what can be learnt from them.

The NCA is the principal enforcement agency and will take on cases referred to it by the likes of the CPS or HMRC. For parts of this section, we refer to the NCA but what we are saying could apply to any of the enforcement agencies.

Part 5 Of POCA – Specialised High Court Litigation

Part 5 of the Act deals with the civil recovery of the proceeds of crime through proceedings in the civil courts. It includes powers relating to the seizure, detention and forfeiture of cash sums; with cash meaning not only banknotes and coins of any currency but also bank cheques, travellers' cheques and bank drafts. Part 5 applies throughout the UK and enables the NCA to issue proceedings in the High Court against any person that it thinks holds property which is, or represents, property obtained through unlawful conduct. For the NCA, the advantage of

going to the High Court is that it removes the need to obtain a criminal conviction. There is no need for there to be any criminal proceedings and there is nothing preventing the NCA from seeking a civil order - even if a defendant has been acquitted in the criminal courts - if it believes that the property is the proceeds of crime. There only has to be proof to the standard of civil law - which is on the balance of probabilities - that the assets are the proceeds of crime.

It is important to understand the concept that civil recovery is all about the property, not the guilt of the person holding it. As a firm, we have been at the forefront of challenging the universal application of the civil standard of proof and the pursuit of defendants who have been acquitted in criminal trials and have been the first to take such cases to the highest UK and European courts.

Gale v Serious Organised Crime Agency

Civil Recovery And Unexplained Wealth Orders

Part 5 also plays an important role in the effectiveness of the newly-introduced unexplained wealth orders (UWOs).

UWOs, which were introduced by the Criminal Finances Act 2017 (CFA), require the respondent to explain how an asset was acquired. If the respondent does not provide an adequate explanation, or provides unsatisfactory evidence, the asset will be considered "recoverable property" for the purposes of a civil recovery order under POCA.

In October 2018, the High Court upheld the UK's first UWO, which had been obtained by

the NCA in relation to two properties valued at £22M.

The court dismissed a legal challenge to the order, which had been granted against the wife of a former banker imprisoned for fraud and embezzlement in Azerbaijan. The court found that a former chair of a state-owned bank could be classed as a PEP – as could his wife – and that the fairness of his trial was irrelevant because evidence existed to corroborate the allegations against him.

Many more challenges are likely to be made by the targets of UWOs - and ruled on by the courts - as UWOs become more common. The strength of such challenges and the manner in which they are presented will be crucial factors in determining whether they are successful.

The first UWO to be obtained was a notable event. Other UWOs have since followed. The second one was also brought against a PEP while the third one obtained was the first time one had been used against an individual suspected of being involved in serious organised crime in the UK. Many others suspected of such activity may need to know how to respond to a UWO in the future.

But any UWO is likely to be followed by the assets in question being the subject of Part 5 POCA proceedings. Part 5 proceedings are likely to become the crucial area when it comes to challenging an enforcement agency's right to seize a person's assets via a UWO.

Civil Recovery And Account Freezing Orders

While the CFA received particular attention for introducing UWOs, it also brought in account freezing orders (AFROs) and account forfeiture orders (AFOOs). Section 16 of the CFA altered sections of Part 5 of POCA 2002 to create 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.

A senior enforcement officer – an HM Revenue and Customs officer, police officer, Serious Fraud Office (SFO) officer or accredited financial investigator - can apply to a Magistrates Court for an AFRO 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.

The freezing of the account is the first stage of the process. The second is forfeiture. There are two routes that the police 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; resulting in an eventual contested trial.

Freezing a bank account and asking the account holder to explain the source of all its contents and describe the reasons behind some or all of the transactions – many of which may date back months or even years – could be considered to be unrealistic. But challenges can be made to the AFRO itself and it cannot be in force for more than two years. Exceptions can also be made for living expenses and legal expenses.

When Can Civil Recovery Proceedings be Started?

In most cases, the NCA will start by applying for a Property Freezing Order (PFO). That will prevent the person who is the target of it disposing of or reducing the value of the assets named in the order. It will also freeze his bank accounts. Following the Supreme Court case of *Perry v SOCA* [2013], POCA was amended so that PFOs and civil recovery orders can apply to all property, wherever it is in the world.

POCA provides a 20-year limitation period. This means that the NCA can seek an order for property that you obtained up to 20 years before the proceedings were issued. But if the court finds that there has been deliberate concealment of facts relevant to the proceedings then it may extend the 20-year period.

The alleged criminality that is the subject of civil recovery proceedings is not limited to offences committed here in the UK. Proceedings can relate to offences committed overseas, as long as they would have been classed as offences in the UK.

Reasonable Living and Legal Expenses

It is important to note that some money can be excluded from the order. There are POCA provisions that enable an exclusion to be made to allow any monies restrained under the proceedings to be released from the frozen assets in order to pay for both reasonable living expenses and reasonable legal expenses.

If an individual does not have access to any assets other than those covered by the Property Freezing Order, they can request such an exclusion.

What Property can be Recovered using Civil Recovery?

The NCA can seek an order for any recoverable property: any asset obtained through unlawful conduct or property which represents such assets. This will include money in bank accounts and tangible property. Unlawful conduct is defined as conduct that occurred in the UK that is illegal under UK criminal law or conduct that occurred in another country that is illegal under that country's criminal law and would be illegal if it occurred in the UK.

The order can also cover property that is not in the possession of the corporate or individual that is the subject of the order. Associates and

family members can be involved in civil recovery proceedings – as demonstrated by the first unexplained wealth order (and the subsequent Part 5 POCA proceedings) being issued against the wife of a jailed Azerbaijani banker.

Civil Recovery Litigation and Preparation

Once you have been served with a property freezing order the often lengthy litigation process begins. At first, you have a right to apply to discharge or vary the order that has been made. You may challenge the right for the order to be imposed or argue an aspect of it; such as the amount of money that has been allowed to be accessed for living expenses. If the order is not discharged at this stage the court will make directions for the service of evidence and other related matters.

The arguments for trial may simply be factual and rely on inferences about alleged criminal conduct and any lack of obvious legitimate income. But cases have established that although there is no requirement to allege any specific criminal offence, a claim for civil recovery cannot be successful simply on the basis of the person who is the subject of it having no identifiable lawful income. And it is important to remember that there is little in the way of evidence that will not be permitted by the High Court. This can help anyone contesting an order. But it also means that early preparation is vital - especially in the more complex contested cases - as judges will bear in mind any evidence put forward by either side.

When a civil recovery application is successfully defended there is no provision in place to pay damages, as there is when an ordinary freezing order is made. But what must be remembered is that there is the possibility of compensation if property to which a property freezing order has applied is not eventually considered to be recoverable property.

Negotiations with the Enforcement Agency

It is possible to enter into a dialogue with the NCA. If managed correctly and conducted by those with the relevant expertise and experience, negotiations can obtain a satisfactory outcome. Which is why it is best to exercise caution and let an appropriate legal representative manage any negotiations.

The NCA will have their specific settlement policies to consider in relation to civil recovery. It must always be remembered that the NCA will be open to discussions regarding any possible way of settling the issue, as bringing civil recovery proceedings to court can be costly for it.

Corporate And International Civil Recovery Trends

The circumstances surrounding each civil recovery case may differ greatly. Different enforcement agencies will bring proceedings against a wide variety of subjects for many different reasons. But certain cases have set precedents – precedents that could be of importance to any potential subject of such proceedings.

Innospec

R v Innospec Limited [2010] emphasised the principle that a prosecution should be the first option rather than civil recovery, although civil recovery can be an alternative if the case is not suitable for prosecution.

Innospec had pleaded guilty to bribing officials at an Indonesian refinery. The Crown and Innospec had agreed, subject to approval by the Crown Court, a criminal confiscation order of \$6.7M and that – subject to High Court approval - Innospec would be the subject of a civil recovery order for a further \$6M

But Lord Justice Thomas said in the Crown Court that a prosecutor should not agree a specific penalty in this way and should never again enter into such an agreement. He added that companies guilty of corruption should be treated like any other criminal defendant and that it was rarely appropriate for a company's criminal conduct to be dealt with by a civil recovery order.

Joint guidance on this issue was given by the Home Secretary and the Attorney General in November 2009. The guidance states that criminal prosecution must be considered first but if the case does not meet the criteria for prosecution then civil recovery can be considered. It adds that the prosecuting authorities are entitled to take the view that the public interest is better served by civil recovery proceedings.

MWKL

This 2011 case showed that even if a corporate or individual had no direct involvement in the wrongdoing, it can still be subject to civil recovery proceedings if it benefits from that wrongdoing.

The SFO brought Part 5 POCA proceedings against M.W. Kellogg Limited (MWKL) for £7M because of the money the company was due to receive as a result of the criminal activity of third parties. The SFO accepted that MWKL took no part in the criminal activity. But the money going to MWKL was share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption undertaken by MWKL's parent company and others.

Contracts relating to a natural gas project in Nigeria that had been obtained using bribery had been awarded to a company partly owned by MWKL on behalf of its US parent company. MWKL reported concerns to the SFO and cooperated with the subsequent investigation. The SFO, working in partnership with the US Department of Justice, decided that the most appropriate approach was to remove the funds that were due to the company through the unlawful conduct.

Chad Oil

This March 2018 case emphasised the global nature of asset tracing. It also showed that civil recovery proceedings can be brought by UK authorities in relation to suspected criminal activity anywhere in the world, provided that the assets in question are under UK jurisdiction.

The case, which became known as the Chad Oil Case, saw the SFO recover millions that had been lost to corruption.

Canadian company Griffiths Energy had bribed Chadian diplomats in the United States and Canada to secure exclusive contracts. A front company named Chad Oil was set up as a vehicle to enable a diplomat's wife to purchase 800,000 Griffiths Energy shares at a hugely-discounted price, which she then sold for a £4.4M profit.

Griffiths Energy later self-reported this and pleaded guilty to corruption charges brought by the Canadian authorities. When Griffiths Energy was taken over by a UK corporation, the corrupt proceeds entered the UK's jurisdiction - enabling the SFO to begin civil recovery proceedings to secure the £4.4M share sale profits.

The recovered money was to be transferred to the Department for International Development (DFID) to be used in projects in Chad.

Making The Right Choice

There is little doubt that civil recovery is being used increasingly by the authorities. They may view it as a simpler alternative to seeking a conviction and then looking to recover assets.

Civil recovery is a weapon that the authorities can use anywhere in the world. It is also a very specialised area of the law. These two reasons alone make it vital that any individual or organisation facing such proceedings seeks expert legal advice as soon as they are aware of what is happening.

Making the right choice of legal representation can make a huge difference when it comes to civil recovery cases. Anyone looking to defend their assets must seek the services of those with both experience and expertise in this specialist area of law: experts who can mount the most robust challenge possible to the authorities' attempts to take those assets.

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