

## Freezing Your Assets

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2 May 2012

### Techniques

**The Proceeds of Crime Act 2002 (POCA) is a complex piece of legislation and has been introduced gradually. The confiscation and restraint proceedings provisions were brought into force in March 2003. The authorities are now using their new found tools with increasing regularity. Here we will deal with just one aspect of the Act; Restraint Orders.**

### What is a Restraint Order?

The purpose of a Restraint Order is to freeze property that may subsequently be confiscated. Under POCA the Courts powers to confiscate property is now wider than it was so a Restraint Order can have a dramatic impact on the accused. Previously the Crown could only obtain 'freezing orders' from the High Court and the procedures involved meant that they would rarely bother. Now there is a 'one-stop-shop' for the issue/enforcement of orders; the Crown Court. 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 Mercedes CLK Kompressor convertible it will mean that you cannot sell it or transfer it or dispose of it, or in any way 'realise' it - i.e. turn it into cash. That is because at some stage the Crown intend to take your Mercedes away from you; thus the importance of taking legal advice early. It is not always easy to sort out your financial affairs if you have been remanded - nevertheless a Restraint Order should be addressed at an early stage.

### When and How can a Restraint Order be Made?

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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 you have been charged with an offence and must persuade the Judge that "there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct." But, more alarmingly, you might find yourself the subject of a Restraint Order before you are even arrested! The prosecution can simply go before a Crown Court Judge with their 'reasonable cause for belief' and ask, in effect, for all your cash and all your worldly possessions to be frozen.

The Crown do not have to convince the Judge that your CLK Convertible 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 you have 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.

## **Restraint; not Confiscation**

It must be remembered that Restraint is different to Confiscation. When it comes to having your frozen assets taken away from you for good the Court has some fairly drastic powers available to it but the tests are different (and very complex). At the Restraint stage there needs to be no strict connection between the assets frozen and the actual benefit allegedly obtained from criminal conduct.

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 you; s42(1)(b). The first you will know about it is when you are served with the Order. At that stage you should be taking advice on what you and your family should be doing in preparation for your turn with the Judge when you try and persuade him to relax the Order he made ex parte.

## **Effect of the Order**

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A Restraint Order may apply to all your "realisable" property and any property you receive after the Order has been made. 'Realisable property' really means any property at all as long as it is not directly the subject of an existing Court Order. This can raise all sorts of complications - what for example, of property you hold jointly with someone else? If you are the main bread-winner and have been remanded you may want to sell the Mercedes that you own jointly with the wife in order for her to meet the bills. That will all be a matter for the Judge at a variation/ discharge application (see below).

If your finances are complex the Court may appoint a receiver to receive and manage your property. This would be likely to be an accountant who could have the legal authority to take possession of any of your property and sell your assets. Alternatively, Orders may be quite specific and will often specify certain bank accounts. The Order will also usually include certain exemptions. Principally this includes provision for you to have "reasonable living expenses and reasonable legal expenses", s41(3)(a) or to make provision for the running of your business or trade; s41(3)(b).

## **Legal aid and living expenses**

The legal expenses referred to do not include the expenses in relation to "offences in respect of which the restraint order is made". The reason for this is that wealthy suspects would sometimes spend large amounts defending themselves against criminal charges and related financial orders leaving nothing for the prosecution at the end of the day. Then, if, acquitted, at least he stood a chance of recovering his legal expenses - if not at least the Crown didn't get the cash. Those days are over, changes to the legal aid scheme made under the Access to Justice Act 1999 now provide that you will be granted legal aid to fight your case in the Crown Court even if you have not been charged yet. Ensure your legal advisor is aware that in these circumstances he cannot act for you on a private basis.

## **Application for Variation or Discharge**

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Once you have been served with the Order and have decided you want to fight it then you have to sit down with your legal advisors and figure out what the challenges are; how much money you and your dependents need for reasonable living expenses; what you say about the charges/ proposed charges, the 'reasonable belief' test; and how much of your defence your tactically prepared to give away at this early stage. The Judge will hear your arguments (s42(3)) 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.

We have not mentioned in this Article the Assets Recovery Agency or the statutory effect of having a 'criminal lifestyle'. All this is in the Act and will impact on a great many more people than used to be the case. One thing is for sure; you will be hearing a lot more of the Proceeds of Crime Act now that it is fully enacted and the authorities and the Courts are becoming increasingly confident in using the tolls it provides.

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