Restraint Orders

1 May 2014 Azizur Rahman.

Proceeds Of Crime Act 2002

The purpose of a Restraint Order made under the *Proceeds of Crime Act 2002 (POCA)* is to freeze property that may subsequently be confiscated. Confiscation 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. A Restraint Order does what it says ? the Order will specify what you cannot do; i.e. you cannot 'deal' with the property cited in the Order.

The Order will invariably include a disclosure provision so that the defendant has to declare all he owns to the prosecutor. Sometimes defendants will take a risk. They will withhold information hoping the prosecutors are not aware of it. That is a risk because should the investigators discover the bank account or whatever it is then they can haul the defendant back to Court on an application for committal for contempt of Court. Such allegations are hard to defend – they are civil proceedings in the Crown Court, there is no jury and the civil standard of proof applies.

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When And How Can A Restraint Order Be made?

The Crown's application for a Restraint Order 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. Indeed this may not have been the first time the prosecution has been to see the Judge privately about a specific individual. If the police are conducting a 'money-laundering investigation' (as defined in POCA) they may have applied under s345 for a Production Order so that your bank has to disclose bank statements etc to the police. The test that needs to be satisfied at that stage is just '***reasonable grounds for suspecting***'. However, the fruits of those Production Orders might lead to a second visit to the Judge to ask for a Restraint Order, as the officers now have; 'reasonable cause to believe that the alleged offender has benefitted from his criminal conduct' (s40(2)) – the test for obtaining a Restraint Order.

The Crown 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, 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' – '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.

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Challenges to Restraint Orders

The principal challenge to Restraint Orders is lack of full disclosure to the Judge that made the Order *ex parte*.

Windsor & Hare v CPS [2011] EWCA 143

is an important case in this area. HMRC was investigating an alleged duty diversion fraud involving suspects linked to the Eastenders group of companies dealing in alcohol imports. In December 2010 they obtained ex parte both a restraint and a management receivership orders from a Judge sitting at the Old Bailey. In the subsequent appeal proceedings, the Court of Appeal quashed the orders – though allowed time for the Crown to re-apply to the Old Bailey for new orders. That later application was unsuccessful. The appeal Court took advantage of the case to effectively teach HMRC a lesson – and a lesson to Judges that such orders should not be granted ex parte unless the prosecution can demonstrate that they have done their job properly.

The Court noted that Judges must focus fully on the statutory test. The key ground for the Court of Appeal was the insufficiency of the evidence before the Judge who granted the Order. The witness statements in support of the ex parte application were full of allusions to suspicion – "*it is suspected the goods may have been diverted* " etc. That is suspicion – not evidence, and the Court firmly found it is not good enough (perhaps good enough for a Production Order but not a Restraint Order). Nor was the fact that persons involved in the case had previous convictions for precisely the same offence of assistance; the Court found that that was of little relevance to the test.

But the lessons from the Eastenders case, it seems, have still not been learned. There has been a series of recent cases concerning ex parte applications by prosecutors before Crown Court Judges. The case of

R (Golfrate Property Management Ltd & Dr. Gulam Adam) v Southwark Crown Court & Commissioner for Police for the Metropolis [2014] EWHC 840 (Admin)

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concerned applications under POCA for search warrants. The application was ex parte and so all the principles re-iterated in the Eastenders case applied. The Court expressed dismay at the fact that it is routinely still police officers (not counsel) making these ex parte applications – the Court clearly making the point that officers were not properly disclosing everything to the Judge that should be disclosed, including any possible defence arguments there may be pointing away from the Order being made.

The *ex parte* procedure imposes a duty on the prosecution to make a balanced application and inform the Court of all material facts; Re Stanford [2010] 3 WLR 941. Any non-disclosure should be marked in costs against the prosecution – again a highly under-used defence tool. Non-disclosure which is "appalling" is likely to disqualify the Crown from maintaining a Restraint Order: Jennings v CPS [2006] 1 WLR 182 at [64].

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Also, in our experience, there is often little reference, by either prosecution or defence, to the detailed procedural rules under the ***Criminal Procedure Rules*** and the ***Attorney General's Code of Practice*** issued under s377 of the Act. It is this attention to detail that can add weight to any challenge and it is clear from recent case law that the higher Courts are prepared to quash Restraint Orders, and other Orders granted ***ex parte*** at an early stage of an investigation.

What some officers (and defence lawyers) may have thought of as routine is, in fact, a very complex area of law involving infringement of civil liberties and properly crafted challenges are now more readily entertained.

Disclosure is usually the principal ground of challenge but it can be supported by reference to sloppy procedure where that has been the case. For example notes of the hearing should be supplied to the defence – again something often missed by both sides. Purely criminal practitioners often like to say that they can teach their civil counterparts a thing or two about, e.g. cross-examination and trial craft. But those of us who practice in the civil side of crime as well (e.g. POCA civil recovery etc) know that in fact that in this area there are many lessons to be learned from civil practice where such applications (known as interim relief) are much more common-place and often heard before High Court Judges. For example, in Interoute Telecommunications v Fashion Gossip (1999) TLR 10/11/99 it was established that it is the duty of lawyers making ***ex parte*** injunction applications to ensure a full note of the hearing is provided to the defence. Those civil norms can and should be used in Crown Court POCA Restraint proceedings which are civil in nature, this is partly why the Court in ***Golfrate*** indicated concern at the idea of police officers making these applications on their own rather than instructing counsel. Another basic in civil practice which is sometimes missed in the cross-over to criminal is the duty for the Judge to give reasons; see e.g. R (Glenn & Co (Essex) Ltd & Ors v HM Commissioners for Revenue & Customs & Another [2012] 1 Cr. App. R 22

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Property Held Jointly

Third parties holding an interest in property can be affected by a Restraint Order. This is often an area of real concern as Restraint Orders will often restrain the spouse's interests as well. 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 – again there may well be scope for argument if the prosecution has failed to bring this to the attention to the Judge at the *ex parte* stage.

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Living & Legal Expenses

This is another area which often rankles 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.

However, bearing in mind that Restraint Orders are only designed to protect assets that might be confiscated there are solid arguments to be had where a defendant's entire assets are restrained in a case where the value of any Confiscation Order could not reasonably, on the facts, exceed a given amount. The authors have been involved in cases where e.g. a home has been released from a Restraint Order so that funds can be generated for the instruction of lawyers privately to defend in the case. As time goes on this is bound to happen more and more often given the erosion of legal aid rates in recent years to a rock bottom minimum.

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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

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having to battle with the authorities over your own assets. Anyone affected by 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 experienced lawyers as soon as possible.

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Aziz Rahman is Senior Partner at Rahman Ravelli and its founder. His ability to coordinate national, international and multi-agency defences has led to success in some of the most significant corporate crime cases of this century and top rankings in international legal guides. He is recognised worldwide as one of the most capable legal experts regarding top-level, high-value commercial and financial disputes.