

Confiscation under the Proceeds of Crime Law

Overview

A confiscation order is a post-conviction application to seek to remove from a Defendant the benefits that he has accrued from his crime.

Powers to confiscate from convicted defendants their benefit from crime were first introduced following the failure to recover funds in a drug trafficking case in 1978 known as Operation Julie. The House of Lords held that existing powers to forfeit items used in the commission of an offence could not be used "to strip the drug traffickers of the total profits of their unlawful enterprises." In response a confiscation regime was introduced in England & Wales by the Drug Trafficking Offences Act 1986. Although confiscation was initially available only in drug trafficking cases, it was extended by the Criminal Justice Act 1988 to cover non-drug indictable offences and specified summary offences.

The Proceeds of Crime Act 2002 (here after POCA) received Royal Assent on 24th of July 2002. It came into force on the 24th of March 2003, and is the current manifestation of these powers in England and Wales.

The Cayman Islands introduced the Proceeds of Crime Law (here after POCL) on the 30th of June 2008.

R v May [2008] UKHL, [2008] AC 1028, is a guideline authority and provides assistance in how to approach the legislation. Per Lord Bingham in May:

“The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, nor does it operate by way of fine.”

The first matter to bear in mind is this – confiscation is not meant to act as a fine or further punishment. Whilst confiscation proceedings can raise complicated legal or factual issues the majority of cases can be quite straightforward and the initial approach to all cases should be an attempt to answer the questions raised in May.

- (i) Has the Defendant (D) benefitted from the relevant criminal conduct?
- (ii) If so, what is the value of the benefit D has so obtained?
- (iii) What sum is recoverable from D?

Thus the final order will state the benefit figure, the available assets to meet the order, the time frame to pay, and also a period of imprisonment in default.

Postponement and its effects

After proceedings under Section 15 POCL have been initiated the application will, in most cases, be postponed to allow for the timetables of cross service of documents to be completed.

The period of postponement can be extended on application by any party, but must not extend beyond the permitted period of 2 years from the date of conviction, unless there are exceptional circumstances justifying such an extension. Section 23(2) and (3) POCL.

Postponement does not preclude a Defendant from being sentenced but it limits the powers of the Court when doing so. If sentencing prior to confiscation the Court must not impose a fine, nor order payment of compensation, or make any other specified financial order (Section 24(2) POCL). However within 28 days of the postponement period ending the Court can vary the sentence by making any of the financial orders previously prohibited. (Section 24(4) POCL)

Procedure

When the Court postpones a confiscation application to allow for service of documents it will follow the order below.

- (i) **Section 27 POCL notice** – The Prosecuting Authority, post conviction, will serve upon the Defendant the notice containing a list of the information they wish the Defendant to provide. There is no restriction placed upon what kind of information may be specified in the order, but this will usually require the disclosure of all assets and liabilities, and all bank accounts wherever held.

The Court will set a time frame for a Defence response. Failure to comply without a reasonable excuse allows the Court to draw such inference as it believes is appropriate.

There is a limitation as to future use of this information. **Section 27 (9) POCL** “No information given under this section which amounts to an admission by the defendant that he has benefitted from criminal conduct is admissible in evidence in proceedings for an offence.” This safeguard prevents against self-incriminating responses being adduced in a future prosecution as an admission of guilt.

- (ii) **Section 25 POCL Statement of Information** – served by the Prosecuting Authority on the Court and Defence. This is information not evidence, and so the strict rules of evidence will not apply. The Statement will contain the information relevant to deciding whether the Defendant has a criminal lifestyle, whether he has benefitted from his general criminal conduct and what that benefit is. This must include information the Prosecutor believes is relevant to deciding whether or not the statutory assumptions under Section 19 POCL should or should not be made.

If the Prosecution accepts that the Defendant does not have a criminal lifestyle then it must contain all relevant information in deciding whether he had benefitted from his particular criminal conduct and his benefit from such conduct.

- (iii) **Section 26 response to Section 25 statement** – In this a Defendant indicates to what extent he does or does not accept the allegations in the S.25

statement, and what he would wish to rely upon in support of the same. If the Defendant accepts the allegations the Court can take this as conclusive of the matters. If the Defendant fails to respond the court may treat this as acceptance of the allegations, but not in so far as any allegation that he has benefited from his general or particular criminal conduct.

(iv) **Section 25 Statement of Information** – Under S25 (5) The Prosecution are permitted to serve additional statements of information. This will usually be a response to the S.26 Statement, where the Crown now concede the benefit or available asset figure is not as great as they believed, or if new information has come to light as a result of the financial investigation suggesting that one or both figures should be increased, then amending the application accordingly.

Section 15 - Statutory Approach:

If a Prosecutor initiates confiscation proceeding then the Court must address certain questions. Section 15(3) POCL lays out the approach the Court must follow.

(i) The Court must decide whether the Defendant has a criminal lifestyle (S.15(3)(a)).

(ii) If it so decides, then it must decide whether he has benefitted from his general criminal conduct (S.15(3)(b)).

(iii) If it decides he does not have a criminal lifestyle then it must decide whether he had benefitted from his particular criminal conduct (S.15(3)(c)).

These questions will be decided upon the balance of probabilities and will decide to what extent a Defendant can be said to have benefitted, and thus, if he has any available assets, how much he will be ordered to pay.

Criminal Lifestyle:

The first is that a Defendant has been convicted of an offence specified in Schedule 1 POCL (Drug, People, or Arms Trafficking; Money Laundering; Directing Terrorism; Counterfeiting; Intellectual Property; Prostitution and Child Sex; or Blackmail offences). Section 68 (1)(a).

The second is that the conduct constitutes part of a course of criminal activity. This will mean either that the Defendant has been convicted in the current proceedings of 3 or more offences, which constituted conduct from which he has benefitted; or within the 6-year period ending with the day when the current proceedings were started the Defendant had been convicted on at least 2 separate occasions he was convicted of an offence constituting conduct from which he has benefitted. Section 68 (2)(a) and (b).

The third is that the offence before the Court is one committed over a period of at least 6 months, and the defendant has obtained a benefit from the conduct of at least \$5000. Section 68 (1)(c), and (3).

In cases where the allegation is one of conspiracy to commit a substantive criminal offence, it is the duration of the particular defendant's involvement that will be relevant as to whether the offence was committed over a period of at least 6 months, not the period of the conspiracy as a whole (R v Bajwa [2012] 1 Cr. App. R. (S.) 23, CA).

Assumptions to be made in lifestyle cases:

If the Court has decided the Defendant has a criminal lifestyle then it must make the following four assumptions when deciding whether he has benefited from his general criminal conduct, and what his actual benefit is from that conduct (Section 19(1) POCL)

In relation to any property or expenditure an assumption must not be made by the Court if it is shown to be incorrect, or there would be a serious risk of injustice (S.19(6) POCL).

These assumptions shall apply to a period of 6 years ending with the day the proceedings for the offence were started (S.19(8)(a) POCL)

The four assumptions are as follows (Sections 19(2), (3), (4), and (5) respectively):

- (i) Any property transferred to the Defendant after the relevant day was obtained by him as a result of his general criminal conduct, and obtained at the earliest time he appears to have held it.
- (ii) Any property held by the Defendant at any time after the date of conviction was obtained by him as a result of his general criminal conduct, and obtained at the earliest time he appears to have held it.
- (iii) Any expenditure incurred by the Defendant after the relevant day was met from property obtained by him as a result of his general criminal conduct.
- (iv) For the purposes of valuing any property obtained by the Defendant, he obtained it free of any other interest in it.

If the Court does not make one of the assumptions, then it must state its reasons.

It should be noted that the assumptions bite only once the Prosecution have established to the civil standard that property was transferred to a Defendant, that he held property, or incurred expenditure. Section 10 does not mean you merely assume that the property was transferred to the Defendant (R v Whittington [2010] 1 Cr. App. R. (S.) 83, CA).

Particular Criminal Conduct:

If the Court has decided that a Defendant does not have a criminal lifestyle, it must go on to decide if he has benefitted from his particular criminal conduct. Section 69 POCL tells us how the Court will approach this issue.

A person then benefits from this conduct if he obtains property as a result of, or in connection with the conduct, and his benefit is the value of the property obtained. Section 69 (3) and (4) POCL.

It should be noted that if a person obtains a pecuniary advantage as a result of his conduct then he is deemed to obtain a sum of money equal to the value of the pecuniary advantage obtained (Section 69(5)).

Assessment of Benefit:

R v Allpress [2009] 2 Cr. App. R. (S.) 58, CA, held that were a person acts as a temporary custodian or courier of criminal property he does not obtain the full value of the item, even if charged as part of a conspiracy. If he was paid for his role, or obtained a pecuniary advantage in the form of a reduction in a drug debt, this would fall to be considered as his benefit from the offence.

R v Islam [2009] 1 A.C. 1076, HL: Black market value of illicit goods is used when establishing benefit. This is not to be used though when establishing available or realisable assets, as you cannot sell these items lawfully so no value can be realised from them.

Apportionment of benefit – multiple defendants

R v Kinsella [2011] EWCA Crim 1275:

The judge should ask, firstly, whether the defendant had obtained property from the robbery, and secondly, in what capacity he had received those proceeds, whether for himself, whether jointly for others, or whether on behalf of others. The mere fact that the first question was answered affirmatively was not dispositive of those questions. In the absence of evidence as to how the proceeds of the robbery were disposed of and apportioned, it was a matter of inference on the facts.

If it seems to all parties that multiple defendants in a joint enterprise, or co-conspirators, obtain the property jointly with no evidence how it is to be divided, does this mean court merely divides the benefit equally, or finds in full from each and order payment subject to what may or may not be available individually?

The Supreme Court addressed this issue in the case of R v Ahmed; R v Fields [2014] 3. W.L.R. 23. The Court held that the word “obtains” in Section 76(4) should be given a wide interpretation, including disposition or control, not merely ownership. If a Court could not presume that multiple defendants obtained the property together then it would never be able to make an order as there will rarely be cases where it is clear how proceeds are obtained by each defendant. In joint enterprise cases it will often be appropriate for the Court to presume all defendants obtained the whole of the property, but the Court should be prepared to examine this and make findings if there is evidence that different defendants obtained different property.

In one of these joined appeals the Court found that the correct approach in a joint enterprise carousel fraud was to order that each defendant had obtained the whole amount, and thus each was liable for the full amount. A person who stole property

acquired control of it, not ownership. Thus, the interests of accomplices were not “interests” to be considered under Section 79(3).

The Court though went on to make this important point in relation to enforcement. A payment by one offender of an amount due under the confiscation order should go to reduce the amount payable by the others. To take the same proceeds more than once would not serve the aim of the legislation, would be disproportionate, and would violate Protocol 1 art.1 of the Convention. Where there had been a joint obtaining, confiscation orders had to be made against each defendant for the whole of the benefit obtained. However, each had to provide that it was not to be enforced to the extent that any sum had been recovered in satisfaction of another confiscation order in respect of the same joint benefit

Return or repayment of Benefit – R v Waya its implications and limitations:

There is limited opportunity for argument as to abuse of process in confiscation applications on the grounds that the order or result would be oppressive. Most authorities on this point should now be read in light of the landmark case of R v Waya [2012] UKSC 51; [2013] 1 A.C. 294. This provides the opportunity for judicial discretion that did not exist prior to this judgment. A Court must still make a confiscation order if the statutory conditions are met, but only if it is compliant with article 1 of the First Protocol – the right to peaceful enjoyment of possessions. The deprivation of property as a penalty had to be proportionate to the legitimate aim, which was to remove from criminals the pecuniary proceeds of their crime.

This has primary application to particular benefit cases, as the assumptions in a lifestyle case would not be made if the Court concluded they were “unjust” (Section 19(6) POCL)

In R v Waya the appellant had paid back in full a fraudulently obtained mortgage, by way of a ‘clean’ second mortgage. Where a defendant had restored the proceeds of crime, it would be disproportionate to make a confiscation order as it would not satisfy the statutory purpose and would be an additional financial penalty.

R v Harvey [2013] EWCA Crim 1104; [2014] 1 W.L.R. 124 considered the position in relation to plant hire, and so chattels not real property. Here they were stolen, used, and returned only upon being seized by the police. The Court found this was not a Waya situation. Where a defendant obtained chattels and materially reduced their value prior to them being restored, the Court will not reduce the confiscation order to the extent of the property’s residual value on the basis that that was returned. The correct approach to benefit would be the full value of the items at the time they were obtained.

Forfeiture of items may not be the same thing as recovery of the benefit of the crime. In R v (Cadman) Smith [2001] UKHL 68 cigarette smugglers took their boat past the first customs point at the docks for declaration of their cargo but were stopped further up the river. The contraband tobacco was seized and forfeited. This did not prevent

an order being made. The offence itself made clear that the benefit was the evasion of the duty, not the cigarettes themselves. The benefit had not been recovered.

Available assets

If the Court is satisfied that the Defendant has benefitted from either his general or specific criminal conduct, and has been able to specify his benefit then it must go on to consider what assets are available to the Defendant to meet the order.

The amount a Defendant will be ordered to pay will be the same as the amount of the benefit figure (Section 16(1) and (2)) unless the Defendant shows that the assets available to him are less than this.

R v Summers [2008] EWCA Crim 872, [2008] 2 Crim. App. R (S) 101:

The burden of showing that a defendant's realisable assets were less than the amount of his benefit... rested and remained at all times on the defendant; it was not for the prosecution to establish the existence of undisclosed assets.

If a Defendant chooses to give no acceptable explanation of what happened to the benefits identified or what assets are available to him, so as to not discharge the burden upon him then the Court may well be compelled to conclude the available amount is not less than the benefit figure (R v Whittington [2010] 1 Cr. App. R. (S.) 83, CA).

How are available assets assessed?

Section 18(1)(a) and (b) POCL states that the available amount is the aggregate of all free property held by the Defendant (minus the amount payable under obligations having priority) and the total value of all tainted gifts.

Property is all property, wherever situated and includes money, all forms of real or personal property, and all chose in action or other forms of intangible or incorporeal property (Section 76(2)(a), (b), and (c) POCL). Property is free unless it has been subject to one of the specified orders (Section 75) made upon conviction or has been detained or forfeited in a summary application under POCL.

Tainted gifts:

A person makes a gift if he transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer (Section 71 (1)). This will of course cover the position where title is passed to another merely to create the impression a defendant no longer has any interest in it, but will also apply when a Defendant 'sells' property to another but for a 'peppercorn rent' as a sham. Overly generous Birthday presents may also be subject to judicial scrutiny!

The gift will be tainted if it is made in the 6-year period referred to above in the case of lifestyle offences. Where the Defendant does not have a criminal lifestyle, any gift made after the commission of the offence will be a tainted gift.

If the Court concludes that a Defendant has made a tainted gift the value of such property is still deemed to be available to him, irrespective that another may physically possess the item, or that they have themselves disposed of it in some way. The gift's market value will form part of the total he is ordered to pay.

Time to pay.

If an order is not to be met immediately the Court can extend the period to pay. This can only be for a maximum of 6 months from date of Confiscation order (S.20(2) and (3) POCL), although if a Defendant requires further time, on establishment of exceptional circumstances this can be extended to 12 months. (S.20(5) POCL).

Enforcement:

If an order is not met the Court retains the power to commit the Defendant to prison for some or all of the period of imprisonment set in default. This is punishment for failing to comply with the order of the Court, not as an alternative to making payment. Upon release the Defendant will still owe the amount outstanding, plus any interest accrued.

If a confiscation order is made, not satisfied, and not subject to an appeal, a Prosecutor may apply to the Crown Court for the appointment of a Receiver, who in turn may have the power conferred upon them to take possession of, manage, or realise the property.

Oliver Grimwood

Barton Attorneys