

**POST CONVICTION CONFISCATION AND THE PROCEEDS OF  
CRIME ACT 2002**  
**By Chris Tehrani**

**INTRODUCTION**

1. The Proceeds of Crime Act 2002 [POCA] is a consolidating Act. Part 2 of the Act replaces the dual schemes provided by the Drug Trafficking Act 1994 and the Criminal Justice Act 1988 for the confiscation of drug trafficking and other crime.
  
2. Part 2 of POCA applies in respect of any offence committed on or after 24<sup>th</sup> March 2003<sup>1</sup>. An offence committed over a period of 2 or more days is to be taken to have been committed on the first day. An order under POCA may be made only in one of the following three circumstances:
  - i. Conviction before the Crown Court;
  - ii. Committal to the Crown Court in pursuance to the PCC (s) Act 2000, sections 3, 4 or 6;
  - iii. Committal (after conviction in the magistrates' Court) to the Crown Court in pursuance of section 70 POCA.
  
3. Where the offender is committed for sentence under 2(iii) above, the judge has the following powers:
  - i. If at the time of the committal the magistrates' court followed the procedure set out in section 70(5) and stated that it would have committed the offender for sentence under section 3 PCC(s) Act 2000 he may deal with the offender as if he had just been convicted of the offence on indictment;

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<sup>1</sup> SI 2003/333, articles 3(1)

- ii. If the magistrates' court did not exercise its power under section 70(5) in relation to an either way offence or the offence is not an either way offence, the judge is limited to dealing with the offender in any way in which the magistrates' court could have dealt with him had he been convicted of the offence before it.
4. The old law applies in respect of offences committed before 24<sup>th</sup> March 2003<sup>2</sup>.
  5. The POCA provisions most likely to be encountered during confiscation proceedings are:
 

S6	Making a confiscation order
S14 and 15	Postponement provisions
S 16	Statement of Information (formerly "prosecutor's statement")
S 17	Defendant's response to the statement of information
S 18	Provision of information by the defendant
S 75	Meaning of criminal lifestyle
S 76	Definition of criminal conduct
S 76(4)-(6)	Definition of benefit
S 10	The four statutory assumptions and the two exceptions
S 9	Definition of "available amount"
S 79 and 80	Valuation of property (and benefit obtained)
S 83	Definition of "realisable property"
S 77, 78, 81	Tainted Gifts
S 11	Time for payment of a confiscation order

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<sup>2</sup> SI 2003/333, article 10.

## **OBLIGATION TO HOLD S6 ENQUIRY**

6. The first condition for a s 6 enquiry is that the offender has been:
  - i. Convicted of an offence in the Crown Court.(see below for the list of qualifying offences);
  - ii. Committed to the Crown Court for sentence;
  - iii. Committed to the Crown Court under section 70 of the Proceeds of Crime Act 1995 for specific consideration of a confiscation order as per section 6(2).
  
7. The second condition is fulfilled and the process becomes mandatory when:
  - i. The prosecutor asks the court to proceed;
  - ii. The Director of the Assets Recovery Agency asks the court to proceed; or
  - iii. The Court itself considers that it is appropriate to do so.
  
8. Once the above conditions are satisfied the court must proceed to hold a section 6 enquiry with a view to making a confiscation order. In the course of the enquiry, the judge must:
  - i. Decide whether the offender has a "criminal lifestyle" as defined in s 75 POCA;
  - ii. If he decides the offender has "criminal lifestyle" decide whether he has "benefited", as defined in s 76 POCA, from his "general criminal lifestyle";
  - iii. If he decides that the offender does not have a criminal lifestyle, decide whether the offender has benefited from his "particular criminal conduct"; and

- iv. If he decides that the offender has benefited from such conduct, decide the "recoverable amount" as defined in s 7 POCA, and make a confiscation order requiring the offender to pay that amount

Unless he believes that a victim of the offender's conduct has brought, or intends to bring civil proceedings in respect of loss, injury or damage done to him in which case the judge has discretion whether to make an order.

### **STATEMENT OF INFORMATION- S16**

9. As with the DTA and CJA, the prosecutor must set out a statement of information which must contain the information prescribed in CPR. 58.2(2). The statement must be served upon the offender.

### **OFFENDERS'S REPOSNSE TO STATEMENT- S17**

10. A judge may order the defendant to:
  - i. Indicate the extent to which he accepts each allegation in the statement of information; and
  - ii. So far as he does not accept an allegation, to give particulars of any matters he proposes to rely upon.

### **OFFENDER PROVIDING INFORMATION- S18.**

11. Where the court is proceeding under section 6, it may, for the purpose of containing information to help it in carrying out its functions, at any time, order the offender to give it specified information, and such an order may require all, or a specified part, of the information to be given in a specified manner and

before a specified date, provided no information given which amounts to an admission by the offender that he has benefited from criminal conduct is admissible in evidence in proceedings for an offence.

12. Where the offender fails, without reasonable excuse, to comply with an order, the judge, quite apart from any power he may have to deal with him in respect of a failure to comply with an order under this section, may draw such inference as he believes to be appropriate.

### **CRIMINAL LIFESTYLE- S75**

13. An offender has a criminal lifestyle if the offence or offences of which he convicted:
  - i. Is a lifestyle offence specified in schedule 2 of the Act;
  - ii. Constitutes conduct forming part of a course of criminal activity; or
  - iii. Is an offence committed over a period of at least six months and the offender has benefited from the conduct which constitutes the offence.
  
14. Offences specified in Schedule 2 including aiding and abetting, attempts, conspiracy, and incitement to commit any of the offences listed in schedule 2. The offences can be summarised as follows:
  - i. Drug trafficking offences;
  - ii. Section 327 and 328 POCA money laundering offences;
  - iii. Directing terrorism;
  - iv. People trafficking;
  - v. Arms trafficking;

- vi. Counterfeiting;
- vii. Intellectual property offences
- viii. Pimping and brothel keeping.
- ix. Blackmail.

The lifestyle offence must have been committed on or after 24<sup>th</sup> March 2003.

15. An offence which 'constitutes conduct forming part of a course of criminal conduct.' To qualify in this category, an offender must have been convicted of:

- i. Three or more other offences in the current proceedings, each of which constitutes conduct from which he has benefited, or.
- ii. Such an offence on a least 2 separate occasions in the six years before the current proceedings were started, notwithstanding that any of those offences were committed before 24<sup>th</sup> March 2003<sup>3</sup>

And in either case the offender obtained "relevant benefit" of not less than £5000.

16. An offence committed over a period lasting at least six months. In most cases, the period of the offence would be determined by the particulars of the charge. However, there are times when prosecutors are over cautious and draft particulars with a wider period of time than is necessary, the true period of the offence being shorter than that contained in the charge. If this is the case, it will be a question for the judge to answer, if the criminal conduct covered a period of at least 6 months.

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<sup>3</sup> SI 2003/333, art 7(5)

## **BENEFIT FROM “CRIMINAL CONDUCT”**

17. Criminal conduct is defined<sup>4</sup> as conduct which constitutes an offence in England and Wales or would constitute such an offence if it occurred in England and Wales.
18. There are two types of criminal conduct: general criminal conduct; and particular criminal conduct.
19. The general criminal conduct of an offender is all his criminal conduct. It is immaterial whether:
  - i. That conduct occurred before or after the passing of POCA;
  - ii. Property constituting a benefit from that conduct was obtained before or after the passing of the Act; or
  - iii. It formed the subject of criminal proceedings.
20. The particular criminal conduct of the offender is his criminal conduct which constitutes:
  - i. The offences or offences concerned;
  - ii. Offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;
  - iii. Offences which the court will take into consideration in deciding his sentence for the offence(s) concerned,

But conduct which constitutes an offence which was committed before 24<sup>th</sup> March 2003 is not particular criminal conduct under s76(3) or 224(3) POCA<sup>5</sup>.

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<sup>4</sup> S76 POCA

<sup>5</sup> SI 2003/333

21. A person benefits<sup>6</sup> from conduct if he obtains property as a result of or in connection the conduct. If he obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
22. Property<sup>7</sup> is all property wherever situated and includes:
  - i. Money;
  - ii. All forms of real and personal property; and
  - iii. Things in action and other intangible or incorporeal property.

## **GENERAL CRIMINAL CONDUCT**

23. An offender deemed to have a criminal lifestyle will have his criminal conduct considered.
24. The purpose of s76(2) is to require the court to investigate the offender's financial history and to recover all benefit obtained no matter whether the criminal conduct occurred before or after the commencement of the act and for this purpose the court must invoke the statutory assumptions set out in s10 in deciding whether the offender has benefited from his general criminal conduct and deciding his benefit from the conduct.

### *The assumptions.*

25. Assumption 1<sup>8</sup>. All Property transferred to the defendant within the 6 year period that proceedings for the index

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<sup>6</sup> S 76 POCA

<sup>7</sup> S 150 POCA

<sup>8</sup> S10(2) POCA

offences(s) was obtained by him: as a result of his general criminal conduct; and at the earliest time he appears to have held it.

26. Assumption 2<sup>9</sup>. Any property held by the offender at any time after the date of conviction was obtained by him as a result of his criminal conduct and at the earliest time he appears to have held it.
27. Assumption 3<sup>10</sup>. Any expenditure incurred by the defendant at any time after the start of the 6 year period was met from property obtained by him as a result of his general criminal conduct.
28. Assumption 4<sup>11</sup>. For the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.

#### *Defeating the assumptions*

29. First exception: assumption(s) shown to be incorrect<sup>12</sup>. If there is evidence/information that shows that the assumption cannot stand, it will be disapplied. In *Regina –v- Dickens [1990] 2 ALL ER 626*, Lord Lane LJ held:

“If after the matter has been fully heard the defendant shows on the balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied on

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<sup>9</sup> S10(3) POCA

<sup>10</sup> S10(4) POCA

<sup>11</sup> S10(5) POCA

<sup>12</sup> S10(6) POCA

as evidence that that item of property..... was part of the defendant's proceeds...." [at p629j].

30. Second exception: serious risk of injustice<sup>13</sup>. The court's obligation is to stand back and make an independent assessment of the risk of injustice<sup>14</sup>. This exception does not exist to avoid personal or domestic hardship<sup>15</sup>.

### **VALUE OF THE BENEFIT**

31. As with previous legislation, it is not the offender's profit but the literal value of what he obtains that constitutes benefit.

### **DETERMINING THE AVAILABLE AMOUNT**

32. Having decided the offender has benefited from general or particular criminal conduct, the Court must make a confiscation order in that amount<sup>16</sup> unless<sup>17</sup>:
- i. The offender shows that the "available amount" is less than that assessed benefit; in which case the amount subject to confiscation is the "available amount" or a nominal amount, if the available amount is nil, but
  - ii. A victim of the offender's conduct has started or intends to start civil proceedings in which case the amount subject to confiscation is such amount as the judge believe is just and which does not exceed the assessed benefit, as the case may be.

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<sup>13</sup> S10(6) POCA

<sup>14</sup> *Regina –v- Benjafield* [2001] 3 WLR 75

<sup>15</sup> *Regina –v- Jones and others* [2006] EWCA Crim 2061, *Regina –v- Dore* [1997] 2 Cr.App.R(s) 152, *Regina –v- Ahmed* [2005] 1 WLR 122.

<sup>16</sup> S6(5) POCA

<sup>17</sup> S7 POCA

33. The burden is on the defendant to prove that the available amount is less than the value of the benefit<sup>18</sup>.
34. The available amount is the aggregate of:
- i. The total of the values (at the time of the confiscation order is made) of all the free property then held by the offender;
  - ii. Deducting the total amount payable in pursuance of obligations which then have priority; and
  - iii. Adding the total of the values (at that time) of all "tainted gifts".
35. A gift includes gifts as generally understood [i.e. where no consideration had been given by the recipient for the property in question]. POCA gives an extended meaning to the concept of the "gift", namely the transfer of property for a consideration "significantly" less than the value of the property at the time of transfer. It is for the court to decide whether the consideration is "significantly" less. It is not clear whether the intention of the offender on this issue makes a difference, i.e. he did not intend to gift the proportion of the property which was transferred for less than its true value.
36. Whether a gift is tainted depends on whether the offender has a "criminal lifestyle" within the meaning of s75 POCA. If the offender does have such a lifestyle, a gift will be tainted if it was made by the defendant after the relevant date i.e. within the period relevant to the making of the statutory assumptions under s10 POCA. Gifts made at any time will be tainted if the property constituting the gift was obtained as a result of, or in connection with, the offender's "general

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<sup>18</sup> *Regina -v- Barwick [2001] CLR 52*

criminal conduct" or which directly or indirectly represents such property<sup>19</sup>. If the defendant does not have a criminal lifestyle a gift is tainted only if it is made by the defendant after the offence (before the court) was committed<sup>20</sup>.

37. It will often be necessary to quantify and value the extent of an offender's beneficial interest in the property. Where property is held in joint names, the court should start with the prima facie position as to where the beneficial interests lie and then to go on to find whether there are tainted gifts which ought then to increase the value of the available amount<sup>21</sup>. Where a person contributes only part of the monies to the purchase price of property held in the name of another (or jointly) with the offender), a resulting trust will be presumed in his favour to the value of the an equivalent proportion of the equitable interest<sup>22</sup>. Contributions to mortgage payments have been treated as contributions to the purchase price<sup>23</sup>.

38. Once it is shown that the defendant has an interest in property, the court will proceed on the basis that he holds the entire interest in it. The court is not duty-bound to investigate whether third-party interests exist in property, but it will usually do so. Frequently, an offender pleads the existence of a 3<sup>rd</sup> party interest in his response to a statement of interest but says nothing further about them during the course of the confiscation proceedings. This course usually results in the court treating the property as belonging to the defendant

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<sup>19</sup> S77 POCA

<sup>20</sup> S77(4)-(7) POCA

<sup>21</sup> See e.g. *Regina –v- Buckman* [1997] 1 Cr.App.R.(s) 325, *Regina –v- Robson* 92 Cr.App.R. 2.

<sup>22</sup> *Midland Bank –v- Cooke* [1995] 4 ALL ER 562, *Pettitt –v- Pettitt* [1970] AC 777, *Gissing –v- Gissing* [1971] AC 886, *Tinssley –v- Milligan* [1993] 3 ALL ER 65

<sup>23</sup> *Cowcher –v- Cowcher* [1972] 1 WLR 425

alone. Even if the court is aware of the existence of third-party interests, it will often have insufficient information to quantify the respective shares of the parties.

39. Some practitioners have expressed the firm view that it is wise not to call a third party during the course of confiscation proceedings but to do so at the enforcement stage. The divergence of views on this issue has become wider as a result of the decision of Latham J in *Re N (Norris) March 31 1999*. In that case, N's husband was convicted of a drug trafficking offence. The judge sought to determine the value of his realisable property including a house in which N was living. The property was in N's name but the judge concluded that the property was her husband's realisable property. N gave evidence at her husband's DTA enquiry before the judge who rejected her evidence. A receiver was appointed and N again asserted her claim that she had an interest in the property. At the hearing in the High Court, regarding the appointment of a receiver, objection was taken to N raising the issue again. Latham J upheld the complaint and his judgement was upheld by the court of appeal. The House of Lords reversed the decision and held that the interests of the third party are not identical to those of the defendant and that therefore there may be circumstances in which a 3<sup>rd</sup> party can be heard twice.
40. Section 79 could be constructed as referring to the gross value of property because it says nothing about deducting expenses in the event that the property is sold or otherwise disposed of. In practice the courts make some reduction for such expenses.

41. There is nothing in POCA that prevents the family home from forming part of an offender's "free property"<sup>24</sup> with a view to satisfying a confiscation order.
42. What is referred to as "hidden assets" is in fact a description for two different situations:
- i. Where the existence of assets are inferred- e.g. see *Regina –v- Carroll* 13 Cr.App.R. (s) 99;
  - ii. Where an offender fails to discharge the burden on him to show that the value of his assets is less than the value of his benefit- see e.g. *R –v- Barwick* [2001] 1 Cr.App.R.(s) 445
43. The English courts have held to date that the making of a confiscation order in circumstances where the defendant has failed to discharge the burden on him to show that the value of the "available amount" is less than the value of his benefit from criminal conduct does not violate the ECHR. In *Phillips – v- UK* (5 July 2001), the ECHR held, when considering article 6(1):
- "Whilst the court considers that an issue relating to the fairness of the procedure might arise in circumstances where the amount of the confiscation order was based on the value of assumed hidden assets, this was far from being the case as regards the present applicant."
44. In *Regina –v- Barnham* [2005] EWCA Crim 1049, the Court of Appeal held that the burden on the defendant to show that the value of his assets is less than the benefit figure under the DTA 1994 is convention compliant.

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<sup>24</sup> "Free property" includes property legitimately obtained [e.g. under a will]

## ENFORCING A CONFISCATION ORDER

45. There are three routes by which a confiscation order may be enforced:

- A. The usual method is to treat the value of the confiscation order as a fine. If the order is not paid, the defaulter is liable to be imprisoned, but only as a last resort and only in the circumstances prescribed by s139(3) Powers of the Criminal Courts (sentencing) Act 2000. When a confiscation order is made, the court must make an order fixing a term of imprisonment in default under section 139(2)<sup>25</sup>. Section 11 POCA gives the court limited power to allow the offender time to apply a confiscation order. The maximum period is 6 months. The offender can apply within this period for further time to pay but he must show exceptional circumstances and the extended period must be no more than 12 months from the date the confiscation order was made. Serving a term of imprisonment in default of payment will not extinguish the debt.
- B. The second route of enforcement is through the offices of the Director of the Asset Recovery Agency but only where the court appoints the Director as the "enforcement authority" - see s 36 POCA.
- C. The third route is by way of the appointment of an "enforcement receiver". See S50 and 51 POCA. Where a confiscation order is made but not satisfied and which is not the subject of an appeal, the prosecutor may apply

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<sup>25</sup> A failure to do so does not invalidate the confiscation order- see *Regina –v- Ellis [1996] 2 Cr.App.R. (s) 403*

to the Crown Court for a receiver to be appointed in respect of “realisable property”. The powers of the receiver are set out in section 51 POCA.

## **ABSCONDERS AND DCEASED OFFENDERS**

46. POCA makes no provision for making a confiscation order in respect of a convicted offender who dies before confiscation proceedings have been commenced. In an appropriate case, the civil recovery scheme under part 5 of POCA may be invoked.
  
47. Section 28 POCA empowers the Crown Court to make a confiscation order in the case of an offender who, having been charged with an offence, has absconded for a period of at least two years. Proceedings may be initiated only on the application of the prosecutor or the Director of the Asset Recovery Agency and if the court believes it appropriate to do so. Any person the court believes is likely to be affected by an order under section 6 POCA in these circumstances is entitled to appear before the court and make representations. If the offender is subsequently tried and acquitted he may apply to the Crown Court for the confiscation order to be discharged<sup>26</sup>. If the offender ceases to be an absconder but is not tried [e.g. because the indictment is stayed due to abuse of process], the offender may apply for the confiscation order to be discharged: in this instance the court has discretion to do so if it finds that there has been undue delay in continuing the proceedings or the prosecutor does not intend to continue the prosecution<sup>27</sup>.

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<sup>26</sup> S 30 POCA

<sup>27</sup> S 30(3)-(4) POCA

48. Where an offender is convicted, but absconds, it is not open to the prosecutor, The Director or the court to initial confiscation proceedings save under section 27 POCA. Determinations must not be made using any of the statutory assumptions listed in section 10 POCA.

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