

# **CONFISCATION WITHOUT CONVICTION**

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Introductory remarks ....

This handout covers some of the areas of confiscation, outside of and before conviction, in this order:

1. The use of Restraint Orders & Receivers
2. The use of Cash Forfeiture
3. Civil Recovery

## **1. The Use of Restraint Orders and Receivers**

Restraint orders preserve specified assets for the purposes of satisfying a confiscation order. A restraint order may be made pre trial, & at any time thereafter until proceedings have been concluded. Property is liable to be restrained under such an order if the defendant is shown to have an interest in it (no matter how small that interest is), as well as property held by the recipient of a “tainted gift”.

Restraint orders are deeply intrusive. They affect defendants & third parties by restricting, or prohibiting any person from dealing with assets without the court’s permission.

Management receivers are appointed after, or at the time an application for a restraint order is made. They can be appointed if the defendant is not competent to manage his own financial affairs or there is evidence that he would do so in a way that is fraudulent, or that is intended to diminish the value of his assets.

The legislation also allows for the appointment of both “Enforcement receivers” & “Directors receivers” – they are only appointed after a confiscation order has been made & are in different circumstances responsible for the enforcement of confiscation orders.

### **Process**

Sections 40 to 47 of POCA cover Restraint Orders – which can be made ex-parte, in writing & supported by a witness statement to a Crown Court Judge.

There are five possible conditions for the making of a Restraint Order:

- (i) s40(2) – a criminal investigation has been started & there is reasonable cause to believe that the alleged offender has benefited ...
- (ii) s40(3) – proceedings for an offence have been started but not concluded & there is reasonable cause to believe that the defendant has benefited ...
- (iii) s40(4) – an application by the prosecutor or the Director has been made under ss 19, 20, 27 or 28 & not concluded or the court believes that such an application is to be made & there is reasonable cause to believe that the defendant has benefited ...
- (iv) s40(5) - an application by the prosecutor or the Director has been made under s21 & not concluded or the court believes that such an application is to be made & there is reasonable cause to believe that the court will decide under that section that the amount found under the new calculation of the defendant’s benefit exceeds the relevant amount (as defined in that section).
- (v) s40(6) - an application by the prosecutor or the Director has been made under s 22 & not concluded or the court believes that such an application is to be made & there is reasonable cause to believe that the court will decide under the new calculation of the available amount

found under the new calculation of the available amount exceeds the relevant amount (as defined in that section).

If any of the conditions are satisfied, a Crown Court Judge may make a Restraint Order.

Section 41(3), most importantly gives the Court the power to provide for “exceptions” to the Restraint Order allowing for reasonable living & legal expenses & for the purpose of enabling a person to carry on any trade, profession or occupation.

### **Exceptions**

#### **(i) Legal Expenses**

Section 41(4), makes it clear that there is no provision under a Restraint Order to allow for legal fees for the underlying offence, or proceedings connected with it, except that the defendant *may be permitted* to bring or resist civil claims. The defendant must rely upon public funding; under the previous legislation this was not the case.

#### **(ii) Reasonable Living Expenses**

There should be standard provision in Restraint Orders for “reasonable living expenses”. Section 120(3)(a), suggests that a Restraint Order “may” only be subject to such a provision. Following *Re Peters [1988] 3All E.R. 46.*, this has been taken to include allowing a defendant to pay his son’s school fees, & according to Lord Glennie in *HM Advocate v WMM [2005] CSOH 130*, should cover the payment of ordinary debts as they fall due.

The onus is therefore on the defendant to inform the prosecution of their regular expenditure & if he feels that something might go beyond that level to apply to the court to vary the order.

### **Management Receivers**

Management Receivers are appointed after, or at the time an application for a Restraint Order is made. They can be appointed if the defendant is not competent to manage his own financial affairs or there is evidence that he would do so in a way that is fraudulent, or that is intended to diminish the value of his assets.

Powers are conferred on a Management Receiver by the Crown Court. Powers are not vested on Management Receivers by statute, & this is important, because the court is charged with deciding which powers a receiver needs.

The powers of Management Receivers can be far reaching: e.g. to take possession of the property (s.49(2)(a)), & to manage or “otherwise deal” with it. This might include selling all or part of that property, or arranging for another person to carry on the business (s.49(10)). The receiver may be authorised by the court to hold property, to sue & be sued, & to take “any other steps the court thinks appropriate” (s.49(4)).

## **2. Cash Forfeiture**

### **Seizure**

The starting point is the initial seizure of cash by either a constable or a customs officer. Cash may be seized if there are reasonable grounds for suspecting that it is “recoverable property” or is intended for use by any person in “unlawful conduct”.

The definition of “recoverable property” does not help, is that it is “property obtained through unlawful conduct”. While “unlawful conduct” is conduct that would be unlawful in the UK or it occurred outside the UK would be unlawful overseas.

Not all property obtained through unlawful conduct is recoverable property for the purposes of ss 304-307. If property, having been obtained through unlawful conduct is disposed of, whether it remains recoverable depends in whose hand it passes.

As soon as property passes to someone from whom it is not recoverable it ceases to be recoverable property for the purposes of s.304. The obvious category is the bona fide purchaser for value (s.308).

If this is not the case, recoverable property can pass through a series of hands & remain recoverable (s.304(2)).

Property representing the original property is also recoverable, so a person can't thwart the purpose of the Act by exchanging his recoverable property for something else to exclude an application for forfeiture.

To help with the initial seizure, sections 289-291, strengthen the already considerable police & customs powers of search. There is power for them to search property or persons for “cash” (s.289), when there is reasonable suspicion that the cash falls into either of the two categories previously outlined. It is a power that may not be exercised without obtaining approval (unless it is not practicable to do so). “Approval” means approved by a Magistrate or by a senior officer (defined by s.290 (4) (5)).

Cash, must be at least £5,000, & means, under s316(1), s289(6) & (7), when found anywhere in the UK:

- (1) Notes & coins in any currency;
- (2) Personal orders;

- (3) Cheques of any kind including travellers cheques;
- (4) Banker's drafts; &
- (5) Bearer bonds & bearer shares

### **Detention**

Initially the cash can be held for 48 hours provided there are continued reasonable grounds for suspicion (s.295). Further detention may be authorised by a Magistrates' Court, to a maximum of 3 months. Further applications may be granted up to a total period of 2 years.

In granting periods of detention the Court must be satisfied that there are reasonable grounds for the suspicion & that continued detention is justified for the purposes of investigating its origin or intended use. Further continued detention can also be granted if consideration is being given to the bringing of criminal proceedings (*anywhere*).

### **Investigation of Origin or Intended Use**

Proceeds as for criminal cases, the taking of statements, interviews under caution, interrogation of mobile phones & in cases with what must be an intelligence driven suspicion of drugs derivation, an analysis of currency notes using mass spectrometry.

In addition there will often be statements from either police or customs officers, who attempt an expert analysis of the evidence.

### **The Application for Forfeiture Hearing**

When the investigative stage is complete, the relevant body may apply for Forfeiture. On the basis that this is contested, the matter will be set down for hearing in the Magistrates Court. Almost always the defendant will have to pay privately.

Under s301, "Victims & other owners" who lay claim to the cash that has been detained can seek to join the proceedings. These can also include corporate bodies.

These proceedings are civil in nature & the relevant body has the burden of seeking forfeiture on the balance of probabilities. Given the civil nature there will have to be full disclosure of all witness statements, including those that form part of the defence case.

Almost all evidence is admissible. In particular the opinion evidence or supposed expertise of non-independent (often from the officer in the case), customs or police officers should be challenged.

The areas of claimed expertise is legion, but it might include for example that of the suggestion that certain financial institutions are synonymous with money laundering or claimed interpretation of slang on mobile phone text messages.

It is very difficult to challenge Mass Spec evidence (the analysis of currency, mobile phones for unusually high contamination of controlled drugs), though their data bases for mobile phone contamination & Euro note contamination are very small & should be carefully considered.

Necessarily, hearsay & character evidence are admissible. Obviously although the statutory dictated inferences from silence can't be made, the fact that questions weren't answered can be thrown in the pot with everything else, in the way they were before we had the statutory inferences in criminal cases.

### **Determination**

The court may order the forfeiture of the cash or any part of it if satisfied that the cash or part of it is:

- (a). recoverable property, or
- (b). intended by any person for use in unlawful conduct.

As previously indicated there will then follow an application for prosecution costs, which necessarily follow the event.

Any or all of the cash, that the court is not so satisfied will be returned to its owner or owners. The cash will be returned with interest, or if “exceptional circumstances” are found (s.302), additional compensation will be added. Again these being civil proceeding costs will also follow this event, either to be apportioned or to the defence in toto so long as they can be justified.

Appeal is by way of a rehearing to the Crown Court; again the necessary costs implications will have to be borne in mind. Section 101 Serious Organised Crime & Police Act 2005, has amended POCA to allow the applicant/prosecution to also appeal.

### **3. Civil Recovery of Property other than just Cash**

By way of introduction, hitherto the engine for civil recovery has been the Asset Recovery Agency (all references in POCA are to ARA). The Government have recently announced that they have brought forward plans for ARA to merge with the Serious Organised Crime Agency (SOCA), with a planned merger for April 2008.

The Government also plan to extend the power to launch civil recovery proceedings to the three main prosecutors in England and Wales; the Crown Prosecution Service (CPS), the Revenue and Customs Prosecutions Office (RCPO) and the Serious Fraud Office (SFO).

To complicate matters further, the Serious Organised Crime & Police Act 2005, has given the ARA & the other agencies other powers of civil recovery over & above those in POCA.

### **“Property”**

“Property” means property of all types including “money” (s.316(4)) irrespective as to whether it is situated in the UK or abroad. The property must have been “obtained through unlawful conduct” (see s.242 & s.241). Property will be obtained “through unlawful conduct” if the respondent acquires it as a fruit of that conduct (e.g. stealing a painting) or “in return for the conduct” (e.g. X was given cash to drive a lorry loaded with cannabis from Spain to the UK). It is immaterial that the person who obtained the property did not perform the “unlawful conduct”, (e.g. a painting obtained by X was stolen on his behalf).

### **Power of the Director to investigate the origin of Property**

The Director of ARA has the power to carry out a “civil recovery investigation” (s.341(2)), which means he may ascertain whether property is recoverable, who holds it, the whereabouts of that property, & the extent of that property.

### **Initiating a Civil Recovery Action**

The Director of ARA may initiate civil recovery proceedings in the High Court against any person whom the Director “thinks” holds “recoverable property”. The claim is made to the Administrative Court.

To recap “recoverable property” is defined by section 304 to mean property obtained by a person “through unlawful conduct” i.e. “by or in return for unlawful conduct” – unlawful conduct is that which is lawful here or overseas.

The Director may take steps to recover property in two ways: either by serving a Claim Form for a “recovery order” under s.243, or by applying for an “interim receiving order” under s.246.

### **“Interim Receiving Orders”**

The effect of this order is to preserve, or take, the property, which an interim receiver then manages.

An application may be made “without notice” (s.246(3)). If the Director considers that he must act swiftly to avoid recoverable property being moved out of the jurisdiction or concealed. The Director may apply for an interim receiving order before, or after, serving a Claim Form on the respondent, & on other persons who hold “associated property” (s.243).

Section 245 defines “associated property”, into 5 categories. There are helpful examples of the 5 categories in the Explanatory Notes to the Act:

245(1)(a) – “interest in recoverable property” maybe associated property, such as a tenancy in a recoverable freehold.

245(1)(b) – “other interest in the property in which the recoverable property exists”, where for example a lease in a freehold block of flats had been purchased with recoverable property, another lease in the same block bought with legitimate money would be associated property.

245(1)(c)(d) – “if the recoverable property is a tenancy in common, the tenancy of the other tenant”, where two people buy a car or obtain a tenancy together, one with recoverable cash & one with legitimate cash, the share of the person who bought with legitimate cash is the associated cash.

245(1)(e) – “if the recoverable property is part of a large property, but not a separate part, the remainder of that property”, where a painting is recoverable property & it has then be framed using legitimate money, the frame would be associated property.

The test for the court to apply in granting an interim receiving order is whether there is a “good arguable case” that the property concerned is all either recoverable or associated property (s.246(5)). When it is granted an interim receiving order must prohibit any person to whose property it applies from dealing with that property.

### **“Property Freezing Order”**

Section 98 of SOCPA introduced new sections 245A-D to POCA. They create an alternative method of prohibiting somebody dealing with their property, a “property freezing order”. Again it can be made ex-parte to the High Court, but it has the added advantage in that it avoids the payment of interim receiver’s expenses.

A property freezing order can be created when under section 245A:

- (4) The court may make a property freezing order on an application if it is satisfied that the condition in subsection (5) is met and, where applicable, that the condition in subsection (6) is met.
- (5) The first condition is that there is a good arguable case-
  - (a) that the property to which the application for the order relates is or includes recoverable property, and
  - (b) that, if any of it is not recoverable property, it is associated property.
- (6) The second condition is that, if –
  - (a) the property to which the application for the order relates is or includes recoverable property, and
  - (b) the enforcement authority has not established the identity of the person who holds it,  
the authority has taken all reasonable steps to do so.

It remains open to the enforcement authority to apply for an interim receiving order if it wishes to do so. In practise, an application for a freezing order under s.245A is likely to be the first step. It is also open to the authority to apply for a freezing order in

respect of part of the property sought to be recovered, & to apply for an interim receiving order in respect of other property.

However, there cannot be a freezing order & an interim receiving order in respect of same property. (see s.245B(2) & (3)).

Finally, s.245C(5) & (6), importantly allows the court to release property to met legal expenses incurred.

### **“Civil Recovery Order”**

If the Director wishes to initiate proceedings for a civil recovery order then he must do so using the Pt 8 CPR procedure. The object being to persuade the court to make a recovery order under section 266 in respect of “recoverable property”. If the court is satisfied that property is recoverable, it must make a “recovery order” (s.266(1)).

The making of a recovery order will be straightforward if all that has to be recovered is “original property” (according s.305(1) property obtained from unlawful conduct - e.g. a stolen painting found in the hands of a thief).

If the recoverable property is swapped or changed it can be followed because it “represents the original property” (s.305(2)). If for example a thief swaps a valuable stolen painting for a car & the car is then swapped for a boat, the boat becomes recoverable property. A break in the chain occurs when property is purchased in good faith without notice of its illicit origin & therefore cease to be recoverable property.

In essence the Director is only permitted to recover either the original property (if it still exists & he can recover it), or as much of the representative as equates to the value of the original property (s.278).