

An introduction to Part 5 of the Proceeds of Crime Act 2002 & Civil Recovery Orders

Introduction:

1. Part 5 of the Proceeds of Crime Act (“the Act”) came into force on 25th February 2003¹ and introduced an entirely new cause of action enabling an enforcement authority to recover property which is or represents property obtained through unlawful conduct.
2. The purpose of the regime is to recover the property itself rather than place the respondent under a personal obligation to pay the sum. Therefore the focus is on the derivation of the property and not the conduct of the defendant and it is this which most marks it from criminal confiscation.
3. Due to this non punitive focus the proceedings are characterised as civil and so the standard of proof is the balance of probabilities and the presumption of innocence under Article 6 (2) of the ECHR is not invoked.²

Why is it necessary and when is it used?

4. Asset recovery is considered key in the fight against organised crime for a number of reasons including:
 - a. Disrupting the criminal economy;
 - b. Acting as a deterrent to current and potential criminals and
 - c. Encouraging public confidence in the fight against organised crime.
5. Recovery orders can be made even when no proceedings have been brought in connection with the property.³
6. There are many examples of when recovery proceedings can be brought in circumstances where it would not be possible to obtain a confiscation order in respect of the property:
 - a. Where there has been no prosecution for whatever reason (eg. Death of a witness, defendant absconding, etc);
 - b. Where an indictment has been stayed as an abuse of process;
 - c. Where a defendant has been acquitted;
 - d. Where the person in possession of the property has been convicted abroad;
 - e. Where a conviction has been quashed and no retrial has been ordered and
 - f. Where a confiscation order has been made but later quashed.
7. With its lower standard of proof and its greater reach there have been justified concerns that civil recovery could be used in the place of criminal confiscation. Fortunately this has not been the case because the Act directs that a relevant authority must exercise its functions in the way which it considers is best calculated to contribute to the reduction in crime.⁴ The Act

¹ Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings Order) 2003.

² See *Director of the Assets Recovery Agency v Walsh* [2005] NICA 6 and *Director of the Assets Recover Agency v He & Chen* [2005] EWHC 3021 (Admin).

³ POCA s.240 (2)

⁴ POCA s. 2A (1)

also states that the reduction in crime is in general best secured by criminal investigations and proceedings.⁵

Procedure:

8. Initially only the Director of the Assets Recovery Agency could bring civil recovery proceedings. However on 1st April 2008 the ARA was abolished and its civil recovery powers were transferred to: SOCA; the DPP; the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office.⁶
9. Recovery proceedings are brought in the Administrative Court.⁷
10. The enforcement agency can bring proceedings against any person who the authority thinks holds recoverable property.⁸
11. Proceedings must be brought by the authority within 12 years of the original property being obtained through unlawful conduct.⁹ However it appears the approach of the courts in circumstances where the obtaining through unlawful conduct has been concealed from the enforcement agency is to make an exception and allow the limitation period to run from the point of discovery.¹⁰ It is important to note that although criminal confiscation only applies to conduct after the legislation came into force civil recovery can apply retrospectively.
12. Proceedings are generally conducted under Part 8 of the CPR although if it is a particularly complicated case the court may direct that Part 7 of the CPR apply instead. Details of what must be specified in the Claim Form are set out in the practice direction at paragraph 4.3.¹¹
13. A recovery order must be made if the court is satisfied that the respondent is holding recoverable property.¹²
14. The effect of a recovery order is to vest the property in a trustee for civil recovery.

Recoverable Property:

15. In order to make a civil recovery order the court must be satisfied that the property in question is either recoverable property or associated property.
16. Recoverable property is defined quite simply as 'property obtained through unlawful conduct'.¹³
17. A person 'obtains property through unlawful conduct (whether his own or another's) if he obtains it by or in return for the conduct.¹⁴ It is clear from the reasoning of Tugendhat J in *Director of the Assets Recovery Agency v Lord*¹⁵ that this means a direct causal link must be established between the unlawful conduct and the obtaining of the property.

⁵ POCA s. 2A (5)

⁶ POCA s. 316 (1)

⁷ POCA s. 240

⁸ POCA s. 243 (1)

⁹ POCA s. 28 (1)

¹⁰ See *Director of the Assets Recovery Agency v Szepietowski* [2007] EWCA Civ 766

¹¹ PRACTICE DIRECTION CIVIL RECOVERY PROCEEDINGS

¹² POCA s. 266 (1)

¹³ POCA s. 304 (1)

¹⁴ POCA s. 242 (1)

¹⁵ [2007] EWHC 360 (QB) at 63 ff

18. Property is defined at s. 316 in POCA¹⁶.

Unlawful Conduct:

19. Unlawful conduct is conduct occurring in any part of the UK that is unlawful under the applicable criminal law.

20. Conduct which occurs outside the UK and is:

- a. Unlawful where it occurred and
- b. Would also be unlawful if it occurred in part of the UK

is also unlawful conduct.¹⁷

21. A claim cannot succeed solely on the basis that there was no apparent legitimate explanation for the property.¹⁸ However the Act specifically states that the court does not have to identify any particular type of unlawful conduct in order to be satisfied that the property is recoverable.¹⁹

22. The claim merely has to give a description of the conduct sufficient for the court to conclude it has been unlawful conduct. This can be in quite general terms for example, 'drug trafficking' or 'money laundering' and the specific and individual offences under the criminal law do not have to be identified.

23. So if it is shown that one of a number of possible offences has occurred but not which one the claimant will succeed.²⁰ Also if it is shown that a number of offences were committed at the time the property was obtained, that there were no other means of obtaining the property but without a link between the particular crime and the particular property the claimant will be entitled to succeed.²¹

Associated Property:

24. Associated property is defined in the Act as:

- a. Any interest in the recoverable property;
- b. Any other interest in which the property subsists;
- c. If the recoverable property is a tenancy in common, the tenancy of the other tenant, or
- d. If the recoverable property is part of a larger property, but not a separate part, the remainder of that property.²²

25. So associated property can more tangibly be seen as innocently held property which is in some way legally or physically connected to the recoverable property.

¹⁶ POCA s. 316 "(4) Property is all property wherever situated and includes-(a) money,(b) all forms of property, real or personal, heritable or moveable,(c) things in action and other intangible or incorporeal property. (5) Any reference to a person's property (whether expressed as a reference to the property he holds or otherwise) is to be read as follows. (6) In relation to land, it is a reference to any interest which he holds in the land. (7) In relation to property other than land, it is a reference-(a) to the property (if it belongs to him), or (b) to any other interest which he holds in the property."

¹⁷ POCA s. 241

¹⁸ *Director of the Assets Recovery Agency v Green* [2005] EWHC 3168 (Admin); *Director of the Assets Recovery Agency v Szepietowski* [2007] EWCA Civ 766 and *Olupitan v Director of the Assets Recovery Agency* [2008] EWCA Civ 104

¹⁹ POCA s. 242 (2) (b)

²⁰ *R v Montila* [2004] 1 WLR 3141

²¹ *Director of the Assets Recovery Agency v Warnock* [2005] NIQB 16

²² POCA s. 245 (1)

26. Associated property could be held by the respondent where an asset has been purchased with a mixture of legitimate and recoverable money. Equally associated property may be held by a third party if they have a legitimate interest in an asset connected to the recoverable property.
27. Associated property may be made subject of a civil recovery order and so vest in the trustee for civil recovery provided the court thinks it just and equitable to do so. If such an order is made the court can order the trustee to make a payment to the owner of the associated property (effectively extinguishing their interest) or to create interests or liabilities in relation to it. When considering whether to make an order the court must take into account: the rights of the person holding the associated property; the value to that person of the property, including a value which cannot be measured in money and the interests of the claimant in receiving the proceeds of the recoverable portion of the property.²³
28. It is of significance that the court has to consider the intangible value of associated property as there is a potential for difficulty in assessing what effect if any there may have upon a third party interest. An obvious example is that of a family home where a spouse's interest may be a fairly small proportion but where sentimental value is likely to be high.
29. The owner of associated property can also agree with the claimant to buy out the interest of the holder of the recoverable property.²⁴ There is also provision in the Act to compensate the holder of associated property for any loss suffered as a result of an interim receiving order or a property freezing order.²⁵

Following, tracing and mixing property:

30. Criminal profits are seldom left lying around in cash and typically steps are taken to convert, conceal, disguise, transfer or launder the property. This is envisaged by the Act which confers powers which allow the recoverable property to be followed and traced.
31. Recoverable property that has been disposed of but which retains its original form (eg. a car or a painting) can be followed into the hands of the person obtaining it (and so on) on disposal and so remains recoverable.²⁶
32. Where the original property is used to buy something else the value of the original property can be traced into what it was used to purchase. This property which represents the original property is recoverable. Such property can even be traced into the hands of another.²⁷
33. Any profits accrued from investing the recoverable property is treated as representing the property and so is recoverable.²⁸
34. If a person's recoverable property is mixed with other property then the portion of the mixed property which is attributable to the recoverable property represents the property obtained through unlawful conduct.²⁹
35. A person who has been deprived of property by unlawful conduct may apply to the court for a declaration that the property under consideration in a claim belongs to them.³⁰ In order to make such a declaration the court must be satisfied that: the applicant was deprived of the

²³ POCA s. 272 (1), (2), (3) & (4)

²⁴ POCA s. 271

²⁵ POCA s. 271 (4) & 272 (5)

²⁶ POCA s. 304

²⁷ POCA s. 305

²⁸ POCA s. 307

²⁹ POCA s. 306

³⁰ POCA s. 281

property through unlawful conduct; that it was not recoverable property before they were deprived of it and that it belongs to the applicant.³¹

Instances where the property ceases to be recoverable:

36. Generally no recovery order can be made if the recoverable property has already been subject to some other type of court order, either in the civil or the criminal courts, the effect of which is that the respondent has already been deprived of the property. Examples of this are:
 - a. If the victim of the criminal obtains judgment for the return of the property in a civil claim.
 - b. If the entirety of the original property was cash and it has already been forfeited in proceedings before a magistrates' court.³²
 - c. If the property has been taken into account in calculating a defendant's benefit in criminal confiscation proceedings.³³

Property freezing orders:

37. Where an enforcement authority is considering bringing proceedings for a recovery order it may apply to the court for a property freezing order ("PFO").³⁴ As with criminal proceedings such an application will be made at the investigatory stage.
38. A PFO performs exactly the same function as a restraint order in criminal confiscation and so prevents any person whose property is subject to the order from dealing with the property.³⁵ An PFO may relate to specific property or to all the respondent's assets.
39. An order can be made without notice in circumstances where to give notice would prejudice the enforcement agency's right to recover.³⁶
40. Before making an order the court must be satisfied that there is a good arguable case that the property is or includes recoverable property

Ancillary Orders:

i. Disclosure Orders:

41. Authorise an appropriate officer to give any person written notice requiring them to: answer questions; provide information or to produce documents as specified.³⁷

ii) Search and Seizure Orders:

42. A search and seizure warrant may be issued if any of the following requirements are satisfied. These are:

Where there are reasonable grounds for believing that there is unidentified material on the premises relating to:

- the property specified in the application;
- the question of whether it is recoverable or associated property;
- the question as to who holds any such property, or
- any question as to the extent and whereabouts of the property.³⁸

³¹ POCA ss. 304 - 307

³² POCA ss. 278 (7), (8) & 279 (1)

³³ POCA s. 308 (9)

³⁴ POCA s. 245A (1)

³⁵ POCA s. 245 A (2) (b)

³⁶ POCA s. 245(A) (3)

³⁷ POCA s. 357 (4)

iii) Appointment of a Receiver:

43. The court may appoint an interim receiver and may order, authorise or require the receiver to exercise any of his management powers.³⁹
44. These powers include: selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes; where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business and incurring capital expenditure in respect of the property.⁴⁰

Exceptions:

45. The court has a discretion to allow a respondent sufficient funds from the frozen assets to meet their reasonable living expenses or to carry on any trade, business, profession or occupation.⁴¹

Defences:

46. Once a court has decided that property is recoverable it must make a civil recovery order. However this is subject to two exceptions.

i. Estoppel:

47. It must not make the order if:
 - a. The respondent obtained the property in good faith;
 - b. He took steps after obtaining the property or in anticipation of receiving it which he would not have done otherwise;
 - c. When he took those steps he had no notice that the property was recoverable;
 - d. As a result of those steps taken it would be detrimental to the respondent if an order were made; and
 - e. The court is satisfied that it would not be just and equitable to make a recovery order.

ii) Incompatibility with the ECHR

48. There is no doubt that the making of an order will have an effect upon the respondent's peaceful enjoyment of their possessions as well as, in certain circumstances, their private and family life. So Articles 1 & 8 of ECHR are invoked. However these are not absolute rights and whether or not an order is compatible with the ECHR will depend upon whether the interference:
 - a. Pursues a legitimate aim;
 - b. Is rationally connected to that aim; and
 - c. Goes no further than strictly necessary to achieve that aim.

49. There has yet to be any litigation on these points but it is clear that whilst crime enforcement etc is a legitimate aim there will be circumstances where the effect of an order will be disproportionate. Certainly in the context of criminal confiscation it has been noted by Schieman LJ in *HM Commissioners of Customs and Excise v A* [2003] EWCA Civ 1039 that a public policy justification might not succeed if the effect of an order were to force a spouse who was ignorant of the crime to sell their home and then become dependent on the state. Each case will depend on its facts.

³⁸ POCA ss. 352 & 3

³⁹ POCA 245 (E)

⁴⁰ POCA Schedule 6 para 5

⁴¹ POCA 245 (C)

Abuse of Process:

50. There have been a number of cases in which it has been argued that it is an abuse of the courts' process to allow civil recovery proceedings in instances where criminal proceedings have failed.
51. The response of the courts is clear in that none of these has yet succeeded.
52. In *The Director of Assets Recovery Agency v Singh* [2005] EWCA Civ 580 the respondent had pleaded guilty to a charge of conspiracy to cheat the revenue and a confiscation order had been made against him in the sum of £400 000 for the benefit and £300 000 for the available amount. This confiscation order was quashed on appeal due to procedural irregularity and civil recovery proceedings were brought. The Court of Appeal found that as the original confiscation order was void this was not a situation where there would be double recovery and so there was no reason or justification to preclude this second pursuit of recovery.
53. In *Serious Organised Crime Agency v Olden* [2009] EWHC 610 (QB) the respondent had been convicted of 22 counts of obtaining money, services and property by deception. His conviction was quashed because his arrest was found to have been unlawful. SOCA issued proceedings against him for recovery and the court concluded that the legislation clearly contemplated that recovery could be sought even when the respondent either had not been prosecuted or had been prosecuted and acquitted; or convicted and had the conviction quashed.

Appeals:

54. Are governed by Part 52 of the Civil Procedure Rules. Accordingly, permission of the trial judge or Court of Appeal is required. Permission will only be granted if the court thinks there is a real prospect of success or that there is some other compelling reason why the appeal should be heard.

Enforcement:

55. The trustee for civil recovery is appointed to the court to give effect to the recovery order. The trustee must exercise his powers and pursue the remedies available to him in a way calculated to maximise the sums paid to the claimant. Accordingly the claimant has the power to order the trustee to exercise his functions.
56. The Trustee's functions are:
 - a. To receive sums ordered to be paid and property ordered to be transferred by a civil recovery order;
 - b. To secure the preservation and ultimately the possession of property vested in them by the order;
 - c. To realise the value of property other than money vested in them by the order.⁴²
57. The powers of the Trustee are:
 - a. to sell or manage the property;
 - b. to start, carry on, defend and settle legal proceedings in relation to the property; and
 - c. To incur expenditure for the purposes of acquiring any part of the property not vested in the trustee or to discharge liabilities.⁴³
58. Civil recovery orders do no more than provide the trustee with a cause of action for claims for possession of the property and so the full range of civil remedies is available. Whilst the

⁴² POCA s. 267

⁴³ POCA Schedule 7 paras 1 - 4

substantive proceedings take place in the high court most of the enforcement will be via the county court.

Draft Civil Recovery Order

IN THE HIGH COURT OF JUSTICE Claim No: xxxxxxxx
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

THE HONORABLE MR (S) JUSTICE

[Date]

IN THE MATTER OF A CLAIM FOR A CIVIL RECOVERY ORDER UNDER
SECTIONS 266 AND 243 OF THE PROCEEDS OF CRIME ACT 2002

BETWEEN:

THE DIRECTOR-GENERAL OF THE SERIOUS ORGANISED CRIME AGENCY
Claimant

-and-

(1) RONNIE BIGGS
(2) REGGIE KRAY

Respondents

ORDER

UPON THE APPLICATION of the Director-General of the Serious Organised Crime Agency
made by a claim form issued on [date].

AND upon hearing from counsel for the Claimant and the Respondents:

IT IS ORDERED THAT:

1. [name] of the Serious Organised Crime Agency (the 'Agency') is hereby appointed as the Trustee for Civil Recovery.
2. A recovery order is made in respect of the property listed in the Schedule to this Order (the 'Recoverable Property').
3. The Recoverable Property shall vest in the Trustee for Civil Recovery forthwith upon the making of this Order.
4. *Upon the Trustee taking possession of the Recoverable Property, the Property Freezing Order dated [xxx] shall be discharged.*

Dated