

## Confiscation Hearings in the Crown Court – A Short Introduction

As an overall guide to the legislation I have found Blackstone's Guide to the Proceeds of Crime Act (3<sup>rd</sup> ed, 2008) to be invaluable in preparing this guide. Blackstone's Criminal Practice also has a well written section on confiscation orders. This guide is intended to provide a broad overview of the process, rather than a detailed treatise on all aspects of the law.

### Procedure and Evidence

Proceedings can be initiated either by the prosecution's request (s6(3)(a)) or by the Court on its own motion (s6(3)(b)).

The standard of proof throughout POCA, for both prosecution and defence is the balance of probabilities (s6(7)). The ordinary rules of criminal evidence do not apply.

S16-18 concern the provisions of statements of information by each side. Where the prosecution has initiated proceedings s16(1) states they must provide a statement of information within the period the court orders. If the court initiates proceedings then it can order the prosecution to provide a statement (s16(2)). Where a s16 statement has been made s17 provides that the court may order the defendant to make a statement in response indicating what is and is not accepted and what evidence he proposes to rely on. S18 gives the court a more general power to order the defendant such information as may be specified to help the court carry out its functions.

S6(4) provides that, once proceedings start, the "court must proceed as follows-

- a) It must decide whether the defendant has a criminal lifestyle;
- b) If it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
- c) If it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct."

S6(5) goes on to say that if a defendant has benefited "it must-

- a) Decide the recoverable amount, and
- b) Make an order (a confiscation order) requiring him to pay that amount."

### The Four Stages

There are four stages in the confiscation process:

Stage 1: Determining Criminal Lifestyle

Stage 2: Determining Benefit from Criminal Conduct

### Stage 3: Determining the Recoverable Amount

### Stage 4: Determining the Available Amount

### Stage 1: Determining Criminal Lifestyle

This is simply a matter of applying the rules. However, it is extremely important. It is only if the defendant has a criminal lifestyle that the court can go on to apply the assumptions to determine his benefit from his general criminal conduct.

The rules are contained in s75 of the Proceeds of Crime Act 2002 (“the 2002 Act”). The defendant has a criminal lifestyle if he has been convicted of one or more of the qualifying offences. There are three categories:

- Offences specified in schedule 2 to the 2002 Act. (In summary these are offences of drug trafficking; money laundering; directing terrorism; people trafficking; arms trafficking; counterfeiting; intellectual property; prostitution and child sex; and blackmail).
- An offence “forming part of a course of criminal activity” (s75(2)(b)). This is defined in s75(3). The defendant must have been convicted of three or more offences in the current proceedings, each of which was committed after 24<sup>th</sup> March 2003, and which constitutes conduct from which he has benefited; or the defendant must have been convicted of two separate such offences in the 6 years prior to the commission of the current offence.
- An offence committed over a period of 6 months from which there had been not less than £5,000 benefit.

### Stage 2: Determining Benefit from Criminal Conduct

There are two ways in which benefit is assessed. Firstly, if the defendant has been found to have a criminal lifestyle (see stage 1 above) the court must assess his benefit from his general criminal conduct. The assumptions apply. If the defendant does not have a criminal lifestyle then the court must determine his benefit from his particular criminal conduct.

### Stage 2: General Criminal Conduct

S76(2) defines this as all of the defendants criminal conduct regardless of when it occurred.

There are four assumptions (s10):

- Any property transferred to the defendant in the six years before the start of the proceedings was obtained as a result of his general criminal conduct and at the earliest time he appears to have held it.
- Any property held by the defendant after the conviction was obtained as a result of his general criminal conduct and at the earliest time he appears to have held it.
- Any expenditure incurred by the defendant in the six years before the start of the proceedings was met from property obtained as a result of his general criminal conduct.

- For the purposes of valuing any property obtained by the defendant, he obtained it free of any other interests in it.

There are only two ways to rebut the assumptions. Firstly, if the defendant proves on the balance of probabilities it is incorrect (s10(6)(a)). Secondly, where “there would be a serious risk of injustice if the assumption were made” (s10(6)(b)).

### Stage 2: Particular Criminal Conduct

The assumptions do not apply. The inquiry is restricted to the offences in the current proceedings (and any TIC's).

### Stage 2: Determining Benefit

S76(4) states that a person benefits from his criminal conduct “if he obtains property as a result of or in connection with the conduct”. S76(7) states that the benefit to the defendant is “the value of the property obtained”. Whether or not the property obtained has been restored to its original owner is irrelevant for the purposes of determining benefit. Similarly, whether or not the property has been dissipated in some other way is irrelevant: the court is looking for the total value obtained, not the net profit made. In situations of joint benefit there is nothing wrong in principle with all defendants being found to have benefited to the full sum obtained (though each case will, of course, depend on its facts).

### Stage 3: Determining the Recoverable Amount

S7(1) defines the recoverable amount as an amount equal to the defendant's benefit (i.e. the stage 2 figure). However, if the available amount (stage 4) is less than the benefit then the recoverable amount is the available amount or a nominal amount if the available amount is nil (s7(2)).

S79(2) and 80(1) state that the basic rule of valuation is that the value of property is its market value at the time the court makes the order. However, this is qualified somewhat by s80(2) which states that the value is the greater of the following:

- Its market value at the time it was obtained by the defendant (adjusted for inflation; *or*
- If he still holds the property, its current market value; *or*
- If he no longer holds the property the market value of any property that directly or indirectly represents it, or a combination of both if he has converted only part of the property which he originally obtained.

The effect of this is that if the value of property has declined since it was obtained the benefit is the original value plus inflation. The rationale is to find the greatest value the property has had since it was obtained and use that to determine the benefit figure.

If recovery or forfeiture orders (under POCA) are in force for particular property then the value of that property must be ignored in determining the benefit (s7(4)). Any previous confiscation orders must also be deducted (s8(3)). Similarly, if the court is aware that any victim has started proceedings to recover certain property then the court does not have to determine the recoverable amount and make an order and if it does it can make it in whatever amount the court believes just. (s6(6) and s7(3)).

#### Stage 4: Determining the Available Amount

The available amount is the aggregate of the total value of all property held by the defendant (minus the total amount of any priority obligations) and the total value of all tainted gifts (s9(1)).

Priority obligations is defined in s9(2) as being any amounts due in respect of fines or other court orders and anything defined as preferential debt in s386 of the Insolvency Act 1986 (i.e. debts to HMRC, remuneration of employees and occupational pension scheme contributions).

Gift is defined as property transferred for significantly less consideration than its value at the time he obtained it (s78(1)). If a defendant has a criminal lifestyle (see stage 1) then a gift is tainted if was made in the six years preceding the start of the proceedings (s77(2) and (9)). Also, regardless of when it was made, a gift is tainted if the prosecution can prove that, when it was made, it was property obtained by the defendant as a result of, or in connection with, his general criminal conduct or that it was property which representing such property wholly or partly (s77(3)). If a defendant does not have a criminal lifestyle then any gift is tainted if made after the date the offence was committed (s77(5)). The value of any tainted gift is determined in the same way as the value of property forming the recoverable amount (see stage 3 above).

TIM BOSWELL  
13 King's Bench Walk

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