

## AN OVERVIEW OF THE LAW OF THE UNITED KINGDOM CONCERNING THE PROCEEDS OF CRIME

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### **Introduction**

The proceeds of crime legislation in the United Kingdom is divided into two very distinct regimes; “criminal confiscation”, which in fact confiscates nothing but rather operates like a large fine on the defendant, and “civil recovery”, which operates as a forfeiture regime over specific items of tainted property. The former regime, although in force in one guise or another for over twenty years, has only recently been the focus of detailed judicial scrutiny. The civil recovery regime has only been in force for some six and a half years, and there is little jurisprudence on it. Together, the two regimes may conveniently be called “the confiscation legislation”.

For the international practitioner it is important to understand the nuances in the confiscation legislation in the UK which, although seeking to achieve the same aim as the legislation in other developed jurisdictions, has developed in a way which, for example, a person from the United States would have difficulty recognising. There are a number of former UK colonies and dependent territories, particularly in the Caribbean and the Channel Islands, where the domestic confiscation legislation is modelled closely on that in the UK. However, even here there are differences which can have a significant effect.

It is of course trite that where a confiscation order is enforced abroad, it is enforced by the requested state under its domestic law, thus the nuances and subtle differences in the legislation of each territory can become important, both when an order made by a UK court falls to be enforced in another jurisdiction, and *vice versa*.

The title of our session describes its subject matter as “hitting the suspect where it hurts...” Although probably not intended by Parliament, that can be precisely the effect of the confiscation regime; the imposition of a restraint order on a defendant can and often does have a serious effect on him or her long before, and regardless of whether they are convicted of any offence. As the law currently stands there is also a danger for those who have outstanding financial dealings with those made subject to a restraint order, since the Court of Appeal has ruled that even those who have

secured a judgment for liquidated damages against the defendant cannot seek to enforce that judgment while a restraint order is in place.

## **Criminal confiscation**

### *General principles*

The criminal confiscation regime seeks to give effect to the UK's obligations under a number of international instruments.<sup>1</sup> However, whilst those instruments refer to the ability to confiscate "instrumentalities and proceeds" of crime, the criminal confiscation regime confiscates nothing. Instead it places a personal obligation on a convicted defendant to pay a sum of money to the state, without regard to where that money is to come from.<sup>2</sup> This means that the deprivation of property which was in fact obtained through crime is only incidentally a function of the confiscation regime. Instead, the confiscation legislation focuses on ensuring that a defendant is deprived of "property the value of which corresponds to such proceeds and laundered property".<sup>3</sup> Thus a criminal confiscation order in the UK is the product of an inquiry by the Crown Court into:

- (1) The extent of the "benefit" obtained by a defendant, regardless of his ability to repay that sum, and
- (2) The amount which a defendant has available to pay a confiscation order, regardless of the derivation of that property.

As might be expected, the order is made in the lesser of the two sums.

Confiscation proceedings are complicated by the fact that there are currently three different statutes in operation in the UK, depending on the date on which the index offence was committed.<sup>4</sup> Although it was expected that the problems caused by these concurrent regimes would retreat over time, the new emphasis on, for example, corruption offences means that in fact the question of which statute governs the proceedings remains a live one six and a half years after the Proceeds of Crime Act 2002 (POCA) was brought into force. However, the three main statutes all seek to achieve

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<sup>1</sup> Now to be found in - UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; UN Convention Against Transnational Organised Crime, 2000; Council of Europe Convention on Laundering, Search and Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism, 2005.

<sup>2</sup> *Re Norris* [2001] 1 WLR 1388; *R v May* [2008] UKHL 28

<sup>3</sup> Cf. Council of Europe Convention on Laundering, Search and Seizure of the Confiscation of the Proceeds of Crime and on the Financing of Terrorism, Art. 3.

<sup>4</sup> For offences committed before 24<sup>th</sup> March 2003 the relevant statutes are the Drug Trafficking Act 1994 (DTA) and the Criminal Justice Act 1988 (CJA), amended in 1993 and 1995, depending on the type of offence. For offences committed after that date, the relevant statute is the Proceeds of Crime Act 2002 (POCA).

the same result, and in almost all respects have been treated as meaning the same thing, despite subtly different wording, lessening the difficulties of statutory construction.

Under each statute the Crown Court is required to answer a sequence of questions. The House of Lords has emphasised that those questions must be answered methodically, and should not be elided.<sup>5</sup> The sequence is as follows:

- (1) Has the defendant “benefited” from crime? The concept of “benefit” can seem highly artificial, and where a defendant is convicted of certain types of offence the court is required to make a number of assumptions against the defendant concerning the derivation of his property.
- (2) If so, what is the value of that benefit? Once again, valuing benefit can seem very artificial, and once again in answering this question the Court may be required to make certain assumptions against the defendant, depending on the type of criminality of which he has been convicted.
- (3) What amount does the defendant have available to meet a confiscation order? In answering this question the derivation of the defendant’s property is irrelevant, as are any outstanding financial obligations which might conflict with the order. This principle has led to the criminal prosecuting arm and the tax collecting arm of the UK Revenue service arguing with each other as to which should be entitled to receive sums from the defendant.

A criminal “benefit” is not the net profit, or even the total gain from a criminal activity. The example given in the leading decision of the Court of Appeal on the subject illustrates the point graphically;

*Suppose that a defendant D inherits £1,000 from his law-abiding grandmother. Suppose further that D spends that whole sum on drugs which he then sells for £1,000, making no profit. Suppose in addition that he repeats that operation on four occasions, on each of them buying drugs for £1,000 and selling them for the same sum. It is on those facts plain that his turnover on the five transactions is £5,000, that being the gross sum received by him by way of payment on the five transactions.*<sup>6</sup>

The “benefit” to D in these circumstances was held to be £5,000, notwithstanding that he was no better off at the end of the enterprise than he was at the beginning.

A person benefits from an offence if they “obtain property as a result of or in connection with” that offence.<sup>7</sup> In order to “obtain” property, it is necessary that the defendant obtain

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<sup>5</sup> *R v May* [2008] UKHL 28

<sup>6</sup> *R v Banks* [1997] 2 Cr. App. R. (S.) 110

<sup>7</sup> POCA s. 76(4), replicating CJA s. 71(4). The wording of the DTA is different but treated as meaning the same thing.

something like “the power of disposition” over it,<sup>8</sup> so that, for example, a mere courier or custodian will not ordinarily be held to have “obtained” anything carried or guarded.<sup>9</sup> It is necessary that the defendant personally obtain the property, regardless of what may have been obtained by others.<sup>10</sup> However, even this has a caveat; if property is obtained jointly by a number of confederates in a criminal enterprise, the “benefit” to each is the whole of that property, whether they obtained a joint interest as a matter of law or were “jointly interested in getting the property out of the crime.”<sup>11</sup> A simple example is illustrative:

*Suppose A, B and C jointly steal £100,000, paid into a joint bank account to which each is a signatory. A withdraws £60,000 and B withdraws £40,000, leaving C with nothing.*

In this example the benefit to each of A, B and C will be £100,000.

Where a defendant obtains illicit goods, for example drugs, the “value” of those illicit goods is their black market value.<sup>12</sup> When ruling that this was so the House of Lords was careful to point out that the judgment applied to items which could only be sold on the black market, and would not affect, for example, the value of stolen property. However, it remains to be seen whether the distinction can be so easily achieved.

It may be that a defendant “obtains” nothing, but secures a “pecuniary advantage”. That term is not defined in the statute, and has been held to mean essentially any financial advantage which accrues to the defendant. The classic example is tax evasion; the defendant is held to have “benefited” in the amount of tax evaded, since he has avoided paying that sum to the state.<sup>13</sup>

If a defendant is convicted of certain offences the court is required to assume that everything which has passed through his hands in the six years preceding the institution of proceedings, together with everything he currently owns, was derived from criminal activity unless he can prove the contrary or show that “there would be a serious risk of injustice” if that assumption were made.<sup>14</sup>

Having calculated the “benefit” to the defendant, the court must investigate the extent of the defendant’s current wealth, limiting the confiscation order to either the benefit or the realisable assets of the defendant, whichever is the lower. Thus if in the example above A and B were penniless by the time of the confiscation proceedings, but C owned a house worth £250,000, nominal orders would be made against A and B and a confiscation order for £100,000 would be made against C, notwithstanding that he had in fact yielded nothing from the crime while A and B had received all of the gain. In calculating the available amount, only debts which have priority in the case of the defendant’s bankruptcy may be deducted from his total worth. Thus almost all outstanding debts

<sup>8</sup> *R v May* [2008] UKHL 28

<sup>9</sup> *R v Allpress and others* [2009] EWCA Crim 8

<sup>10</sup> *R v Jennings* [2008] UKHL 29; *R v Saeger, R v Blatch* [2009] EWCA Crim 1303

<sup>11</sup> *R v May* [2008] UKHL 28; *R v Green* [2008] UKHL 30

<sup>12</sup> *R v Islam* [2009] UKHL 30

<sup>13</sup> *R v Smith (David)* [2001] UKHL 68

<sup>14</sup> DTA s. 4, CJA s. 72AA, POCA s. 10.

must be left out of account. The only exception is secured debts; such creditors are accepted to have an interest in the relevant property which must be deducted in calculating the amount available to the defendant.

Where the property belonging to the defendant is the illicit goods obtained, such as controlled drugs, the realisable value is nil.<sup>15</sup> This discrepancy between the calculation of benefit and the amount available to the defendant is open to two objections:

- (1) If a defendant has other assets, the consequence is that he must pay over the black market value of the drugs from legitimately acquired assets, notwithstanding that the drugs themselves have been seized. This is surely far removed from the purpose of confiscating the “proceeds and instrumentalities” of the crime.
- (2) It has the effect that the same property, in the same proceedings, has a different value depending on the stage which those proceedings have reached. The statute contains no warrant for such a discrepancy.

Regrettably, the House of Lords did not confront either of these objections.

The court has no discretion to leave property out of account once the benefit has been calculated.<sup>16</sup> This has led to a sequence of case law investigating whether there are any mechanisms by which the courts can mitigate the harsh consequences of the legislation and prevent obvious injustices such as the position of C in the hypothetical example above.

In a case called *R v Shabir* [2008] EWCA Crim 1809 the defendant was a pharmacist. He over-claimed from the state for the cost of drugs provided to NHS patients by a few hundred pounds, though the total claim to the NHS was of the order of £220,000. The Crown Court held that his “benefit” in these circumstances was the total value of the claims, including those which had been legitimate, and a confiscation order of some £220,000 was made. The Court of Appeal held that this had been the correct application of the statute, but that the imposition of a confiscation order in excess of £220,000 where the actual criminal gain was a few hundred pounds raised real questions about whether the order was proportionate or oppressive. The Court held that in such circumstances it was oppressive and therefore an abuse of process for the Crown to seek a confiscation order of some £220,000, quashed the order and substituted a compensation order in favour of the NHS for the few hundred pounds over-claimed.

Less than a year later the Court of Appeal again considered the issue of whether confiscation proceedings could amount to an abuse of process in three joined appeals.<sup>17</sup> Although appearing to approve of the decision in *Shabir* the Court emphasised that the confiscation legislation is framed in mandatory terms and that the Crown Court is not free to disapply the legislation because it felt that the result would be subjectively oppressive. The Court did however recognise that where either no

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<sup>15</sup> *R v Dore* [1997] 2 Cr. App. R. (S.) 152; *R v Islam* [2009] UKHL 30

<sup>16</sup> *R v Ahmed and Qureshi* [2004] EWCA Crim 2599

<sup>17</sup> *CPS v N, CPS v P, R v D* [2009] EWCA Crim 1573

real benefit was made at all (such as in *Shabir*), or the defendant had repaid all that could properly be described as “benefit” under the statute to his victim, the purposes of the confiscation legislation were not met by the imposition of a confiscation order, so that in such circumstances a Judge may be entitled to hold that confiscation proceedings amount to an abuse of process.

It is suggested that this leaves the law in an unhappy state; it appears to be recognised that the confiscation legislation is capable of yielding results which are far removed from the purposes for which the legislation was passed,<sup>18</sup> which should be avoided. At the same time, however, the Crown Court is enjoined to apply the mandatory words of the legislation even if the result is properly described as “oppressive”. The difficulty of course stems from the fundamental doctrine that the Crown Court must apply the legislation enacted by Parliament, and if a change is required to the legislation only Parliament can make that change. Thus far, however, the legislature has shown little inclination to revisit this issue.

### *Restraint orders and enforcement*

It must be recognised that a defendant who is aware that his assets are likely to be required to satisfy a confiscation order may well take steps to dissipate or hide those assets. The confiscation legislation therefore empowers the courts to impose freezing orders on defendants which are modelled on *mareva* injunctions in English civil proceedings. Under the CJA and DTA such orders could only be obtained once the laying of a charge was imminent, sometimes leading to long delays in, especially, fraud cases while the allegations against the suspect were investigated. Under POCA, however, a restraint order can be obtained as soon as a criminal investigation is begun,<sup>19</sup> meaning that a defendant who has not even been arrested on suspicion of having committed an offence may nevertheless find himself the subject of an order freezing all of his assets worldwide.

A restraint order can be made in support of criminal proceedings in England and Wales over property “wherever situated”, ie. anywhere in the world.<sup>20</sup> Thus the Crown Court in the UK may exercise world-wide jurisdiction over the defendant in his dealings with his assets. However, before such an order can be effective over the particular assets in question, rather than exclusively as an *in personam* obligation of the defendant, it must be recognised in the country where the assets are located. This replicates the position in ordinary civil *mareva* proceedings. However, one important distinction between civil *mareva* injunctions and criminal restraint orders was highlighted by the House of Lords in *King v Director of the Serious Fraud Office*.<sup>21</sup> By s. 25 of the Civil Jurisdiction and Judgments Act 1982 the High Court in England is empowered to grant *mareva* injunctions over

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<sup>18</sup> Namely: (1) punishing offenders by depriving them of their gains, (2) deterring others by rendering acquisitive crime pointless, and (3) removing criminal assets from circulation so that they cannot be used to fund further crime – see *R v Rezvi, R v Benjafield* [2002] UKHL 1, 2

<sup>19</sup> POCA s. 40(2)

<sup>20</sup> POCA ss. 74, 447

<sup>21</sup> [2009] UKHL 17

property anywhere in the world in support of proceedings in another country, subject to certain conditions. However when faced with a request for assistance by the law enforcement agencies of another country, the Crown Court is governed by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, which by Articles 6 and 8 limit the scope of criminal restraint orders in support of criminal proceedings in another jurisdiction to property situated in England and Wales. Accordingly the device often deployed in, for example, civil fraud actions of coming the UK for a world-wide mareva injunction even though the substantive proceedings are to be heard in, for example, the USA is not available to law enforcement agencies seeking to freeze a suspect's assets.

Under CJA and DTA it was held that a defendant could, at least prior to his conviction, pay bona fide creditors using sums subject to a restraint order.<sup>22</sup> However under POCA the Court of Appeal has held that the regime has been considerably tightened, so that even a victim of a defendant's crime who has secured judgment against him may not seek to have that judgment satisfied out of restrained assets.<sup>23</sup> The only exception is where the claim is proprietary in nature so that rather than seeking recompense for his loss, the victim is able to say that he is seeking the return of his property. The effect of this is to leave the creditors of a suspect completely out in the cold. Since a restraint order can be obtained before the suspect has even been arrested, this is a feature of the legislation which has the ability to hurt not only the suspect but also anyone to whom he owes money. In today's credit-driven society this can be particularly harsh both for the suspect and his creditors.

Under the CJA and DTA a defendant was able to draw on restrained assets to fund legal representation, exactly as is the case under a mareva injunction. Under POCA there is an express prohibition on variations being made for such purposes. That this is an absolute prohibition has been confirmed by the Court of Appeal on a number of occasions.<sup>24</sup> So committed is the UK government to the principle that restrained assets should not be used to fund legal representation in criminal cases that it presented an argument to the Court of Appeal, which met with the Court's approval, that it would be preferable to have criminal proceedings stayed altogether if legal aid proves inadequate to provide a proper defence to the defendant than to permit restrained funds to be used to secure representation.<sup>25</sup>

Once a confiscation order has been made it can be enforced by two complementary methods; first a defendant who refuses to pay can be committed to prison for a period of up to 10 years for that default. Second, a receiver may be appointed to get in and realise the defendant's assets. Where such a receiver is appointed he is only entitled to realise the defendant's share of any

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<sup>22</sup> *Re X (Restraint Order: Variation)* [2004] EWHC 861 (Admin)

<sup>23</sup> *Serious Fraud Office v Lexi Holdings* [2008] EWCA Crim 1443

<sup>24</sup> *Re S (Restraint Order: Release of assets for legal representation)* [2004] EWCA Crim 2374; *AP and U Ltd. v Crown Prosecution Service and Revenue and Customs Prosecution Office* [2007] EWCA Crim 3128; *Irwin Mitchell v Revenue and Customs Prosecution Office* [2008] EWCA Crim 1741; *Crown Prosecution Service v Campbell and others* [2009] EWCA Crim 997

<sup>25</sup> *AP and U Ltd. v Crown Prosecution Service and Revenue and Customs Prosecution Office* [2007] EWCA Crim 3128

property in satisfaction of a confiscation order, but he is entitled to draw his costs from any assets which come within the ambit of the receivership order.<sup>26</sup>

### *Confiscation and anti-money laundering*

There is sometimes a confluence in the minds of, particularly, financial institutions between the provisions of the legislation concerned with confiscating criminal benefit and those provisions concerned with anti-money laundering. Whilst both areas may be loosely described as concerning “the proceeds of crime”, the discussion above highlights that a defendant may be ordered to pay a substantial amount in “confiscation” to the state even where he has in fact received no tainted property which could be laundered.

The anti-money laundering provisions in the United Kingdom will be discussed by other members of the panel, but for present purposes it is important to emphasise that “confiscation” is concerned with stripping a defendant of the “benefit” which has accrued to him, regardless of whether he has retained that benefit, or even, in some cases, whether he received any tangible or intangible property at all, while the anti-money laundering legislation has a two-fold aim:

- (1) Ensuring that those engaged in acquisitive criminal activity are not able to evade detection by concealing the origin of their assets, and
- (2) Ensuring that those engaged in businesses often used by criminals to launder their proceeds have procedures in place which ensure that they are not unwittingly used by those criminals for those purposes.

## **Civil Recovery**

### *Background*

Property law in the United Kingdom has for centuries been built on the maxim that “an Englishman’s home is his castle”, and that citizens could not be deprived of their property by the state without express legislative provision. This principle was tested to extremes and survived in *Costello v Chief Constable of Derbyshire*,<sup>27</sup> in which it was held that the possessory title of a thief, although delicate, is better than that of anyone except a person with a better claim. In that case the police seized a car believed to have been stolen from Mr. Costello. Although no charges were

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<sup>26</sup> *Sinclair v Glatt and others* [2009] EWCA Civ 176

<sup>27</sup> [2001] 1 WLR 1437



brought against him the police retained the car, refusing to return it to him on the grounds of its stolen status. The Court of Appeal held that the powers of the police to seize property as evidence vested no title to that property in them, and accordingly the car must be returned to Mr. Costello. Although the Court recognised that there were powerful public policy arguments in favour of vesting a power to seize and forfeit, for example, stolen property, such a power had to be provided for by express legislation. This case followed two earlier decisions of the Court of Appeal.<sup>28</sup>

In answer to this series of cases Parliament enacted Part 5 of the Proceeds of Crime Act 2002. Accordingly, the statute talks of the claimant agency's "right to recover" property said to have been derived from crime,<sup>29</sup> despite the fact that that agency never lost it.

### *"Recoverable property"*

The civil recovery regime does not target "the proceeds of crime" expressly, but rather refers to "recoverable property". "Recoverable property" is property which was obtained "by or in return for" essentially criminal activity, or which "represents" such property. The target of proceedings for a civil recovery order is either:

- Property directly derived from crime – for example £100,000 is stolen in a bank robbery, that £100,000 is "recoverable property", even if it is found in the hands of someone who had nothing to do with the robbery, or
- Property which "represents" the property derived from crime – for example if a house is bought with £100,000 stolen from a bank, the house is the recoverable property.<sup>30</sup>

However, the civil recovery regime does not recognise the concept of "representative property" in the sense of, for example the US RICO legislation – if the property derived from crime cannot be followed into the hands of the respondent, or traced into the property the subject of the claim, there can be no recovery order. This is of course in sharp contrast to the position in criminal confiscation, and can be said to ensure that civil recovery proceedings genuinely target the profits from crime in the sense that any property which is properly the subject of such a claim will either itself be or have been acquired with the net profit achieved by the criminal enterprise.

In order to succeed on a claim for civil recovery, it is necessary for the claimant to establish either that specific property was obtained in return for a specific criminal offence, or that the property was obtained through one or more of a number of activities, each of which was criminal in nature.<sup>31</sup> This provision has caused some difficulty in application. In *Director of the Assets Recovery*

<sup>28</sup> *Malone v Metropolitan Police Commissioner* [1980] QB 49, *Webb v Chief Constable of Merseyside Police* [2000] QB 427

<sup>29</sup> Eg. POCA s. 278, placing limits on the scope of the civil recovery regime.

<sup>30</sup> POCA s. 304

<sup>31</sup> POCA s. 242

*Agency v Green*<sup>32</sup> it was held that it was not sufficient for the claimant to establish that a respondent had an unexplained income, from which fact alone it could be inferred that the property in question was derived from unspecified criminal activity. Sullivan J held that it is necessary for the claimant to set out with sufficient particularity the type of types of criminality relied on to enable the court to adjudicate on it. Quite what was meant by this judgment has been the subject of most of the litigation conducted under this legislation. A sequence of Court of Appeal and first instance decisions have led to the conclusion that, although it is not necessary for the claimant to prove that a specific offence was committed on a specific date by a particular individual, it is necessary for the claimant to establish that criminal conduct of a particular kind or kinds has been committed, and that the property in question can be traced back to the commission of that activity.<sup>33</sup>

### *The burden and standard of proof*

Although the burden of proving that criminal conduct has occurred and that the property can be traced back to that conduct, the standard of proof to be applied in civil recovery proceedings is the ordinary civil standard of the balance of probabilities. This might seem to enable a court to find a person guilty of criminal conduct on a mere balance of probabilities and thereby violate Article 6.2 of the European Convention on Human Rights, enshrining the presumption of innocence, as well as provisions of most constitutions around the world, but the Courts of the UK have highlighted that the subject matter of a claim for a civil recovery order is the derivation of the property in question, not, directly at least, the conduct of the defendant, so that the making of a civil recovery order does not constitute a statement of guilt, nor does it amount to the imposition of a penalty.<sup>34</sup>

However, UK law protects defendants in civil proceedings where serious allegations of wrong-doing are in issue by requiring that, although the claimant may succeed by proving only that those allegations are more likely than not to be true, the evidence on which the claim is based must be the stronger the more serious the allegations or the more serious the consequences of it being proved.<sup>35</sup>

### *The effect of a civil recovery order*

The making of a civil recovery order has the effect of vesting ownership of the property in question in the hands of the Trustee for Civil Recovery, usually a member of staff of the agency

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<sup>32</sup> [2005] EWHC 3168 (Admin)

<sup>33</sup> Cf. *Director of Assets Recovery Agency v Szepietowski & Ors* [2007] EWCA Civ 766, *Olupitan v Director of Assets Recovery Agency* [2008] EWCA Civ 104, *Director of Assets Recovery Agency v Jackson* [2007] EWHC 2553, *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB)

<sup>34</sup> *Director of the Assets Recovery Agency v He and Chen* [2005] EWHC 3168

<sup>35</sup> *Re D* [2008] 1 WLR 1499

which sought the order.<sup>36</sup> This means that “enforcement” of the order is purely a question of ensuring that the Trustee acquires *de facto* and *de jure* possession. It is now clear that a civil recovery order may contain provisions for the surrendering of possession and directions as to realisation of the property, so that it is not necessary, in the UK at least, for the Trustee to take separate proceedings to enforce the order.<sup>37</sup>

There is provision in UK law for the enforcement of “civil recovery orders” obtained in other jurisdictions. However, like criminal confiscation orders such orders can only be enforced by the state which secured the order requesting assistance from the UK, and the order being enforced as if and under effectively the same provisions as a civil recovery order made under Part 5 of POCA.<sup>38</sup> There is as yet no decided case on the issue, but it appears that the decision of the House of Lords in *King v Director of Serious Fraud Office* considered above is of equal application to the obtaining of property freezing orders to enforce an external civil recovery order.<sup>39</sup> Accordingly a law enforcement agency from a country outside the UK may not ask the UK authorities to obtain what amounts to a world-wide *mareva* in support of civil recovery proceedings taking place and in relation to property situated outside the UK.

Part 5 of POCA does however purport to confer extra-territorial jurisdiction on the UK courts when making a civil recovery order. To this author’s knowledge there are as yet no decided cases on the extent to which civil recovery orders obtained under Part 5 of POCA may be enforceable abroad in the absence of an express bi-lateral treaty. However one difficulty which might be thought immediately apparent, in the EU at least, is that civil recovery orders are made *in rem* and could therefore be said to constitute judgments concerned with ownership of the relevant property. Where that is real property, the usual rule is that proceedings concerning the ownership of land should be brought in the jurisdiction in which the land is located.<sup>40</sup> Although there is a strong argument that the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and the Financing of Terrorism might assist,<sup>41</sup> that provision requires that the order be made “in relation to a criminal offence”. Since civil recovery orders can be obtained without proof that any specific offence has been committed, there must be a real question-mark over whether this Convention can be relied on to over-ride the well-established principles of EU law.

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<sup>36</sup> POCA s. 266(2)

<sup>37</sup> *Serious Organised Crime Agency v Olden* [2009] EWHC 822 (QB)

<sup>38</sup> Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, part 5

<sup>39</sup> The foundation for the decision of the House of Lords in *King* was that the regulations did not state, in contrast to the primary legislation, that they were applicable to property “wherever situated” so that they could not be said to have extra-territorial effect. There is a similar omission in the regulations concerning the enforcement of external civil recovery orders.

<sup>40</sup> *Webb v Webb (Case C-294/92)* [1994] QB 696

<sup>41</sup> Article 23(5) of that Convention provides: “The parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, providing that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.”

## Conclusion

The confiscation legislation of the United Kingdom is complex and difficult to construe. This was perhaps inevitable in legislation which seeks to balance the need to ensure that sophisticated professional criminals are deprived of what are likely to be the well concealed profits of their crimes against the rights of individuals to retain peaceful enjoyment of their possessions. In many respects the law remains in a state of development, and it is important that international practitioners remain conversant with the developments and nuances of the law relating to the recovery of criminal assets, both when coming to the UK to enforce orders obtained in other jurisdictions and when asked by the UK to enforce orders made here.