

## Proceeds of Crime - Legal Guidance

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## Chapter 1 - Introduction

### The CPS Asset Recovery Strategy

Confiscation is an essential tool in the prosecutor's toolkit to deprive offenders of the proceeds of their criminal conduct; to deter the commission of further offences; and to reduce the profits available to fund further criminal enterprises. (See *R v Rezvi* [2002] UKHL 1 and *R v Waya* [2012] UKSC 51). Prosecutors should consider asset recovery in every case in which a defendant has benefited from criminal conduct and should instigate confiscation proceedings in appropriate cases. When confiscation is not appropriate and/or cost effective, consideration should be given to alternative asset recovery outcomes.

The CPS has published an *Asset Recovery Strategy* which stresses the importance of asset recovery work. The aim of the Strategy is for the CPS to recover more

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criminal assets, located both in the UK and overseas. The CPS Asset Recovery Strategy is to:

- Prioritise the recovery of assets from serious and organised crime and serious economic crime;
- Pursue the assets of all who profit from crime, when it is proper to do so;
- Assist our international colleagues to enforce assets on our behalf and where necessary assist them in developing their asset recovery capacity and capability; and
- Improve the enforcement of confiscation orders.

By taking away the profits that fund crime, we can help to disrupt the cycle that sustains these organisations and fraudsters. By prioritising the assets of organised and economic crime, the strategy aims to improve further on our asset recovery performance, and to disrupt, deter and reduce organised crime and economic crime. This will help to protect the public from the harm it causes.

The Legal Guidance should be read in conjunction with the DPP's "*Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings*" and prosecutors should apply the principles set out in that document.

All references to legislation are to the Proceeds of Crime Act 2002 ("POCA") unless otherwise stated.

### **The role of the prosecutor**

On 2 December 2002, the DPP signed a Service Level Agreement (SLA) with the Association of Chief Police Officers of England and Wales (ACPO), which is a general guide to co-operation between the parties on issues arising from POCA. The Agreement has been used as a basis for local protocols between Chief Crown Prosecutors and Chief Constables. These clarify roles and responsibilities of those involved at Area/force level and set out effective working arrangements for the Act's objectives.

CPS prosecutors participate in every stage of the confiscation process, in that we:

- Advise on the obtaining of Part 8 investigative orders (see note below);
- Advise upon the need for restraint orders and conduct restraint applications (CPS POC prosecutors);
- Advise on the confiscation investigation;
- Conduct confiscation proceedings in court;
- Obtain receivership orders (CPS POC prosecutors);
- Recover assets to satisfy a confiscation order by way of enforcement action in the UK and overseas (CPS POC prosecutors);

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- Recover assets on behalf of overseas' jurisdictions in response to requests for Mutual Legal Assistance (MLA) or Mutual Recognition requests (MR) (CPS POC prosecutors)

### **Is this a confiscation case?**

Prosecutors should look at the lifestyle and known assets of the suspect or defendant. They will consider relevant information set out on the MG3, MG6 and MG17 forms in police cases and any evidence of a lavish lifestyle, e.g. expensive homes, furnishings, cars, holidays, jewellery and other assets in the witness statements, interviews or custody records.

Prosecutors will not assume that because a financial investigation has not been requested by the officer in the case that confiscation is inappropriate.

Offences are included within *Schedule 2 of POCA* on the basis that they are offences that are typically committed by criminals to acquire wealth. If a defendant is charged with one of these offences, then unless the defendant is committing offences to fund a drug addiction and has no available assets, a referral will generally be made to law enforcement to consider a financial investigation.

When defendants are making a living from crime, it is likely that their offending will be caught by the provisions of s.75 and the lifestyle provisions are likely to apply, but whether the assumptions are triggered or not, such cases will be referred for financial investigation and a confiscation application should follow, unless there are no assets and there is no likelihood of assets being located.

If, on the face of the prosecution file, a suspect/defendant has benefited by more than a minor amount from his particular criminal conduct and is likely to have the means to pay a confiscation order, prosecutors should ask the officer in the case to refer the case for financial investigation.

Generally, it will be appropriate to apply for a confiscation order whenever a defendant has obtained a benefit from or in connection with his criminal conduct and has the means to pay a confiscation order. Prosecutors should ensure that confiscation is proportionate (as discussed in the decision of the Supreme Court in the case of *Waya*) and should apply the principles set out in the DPP's "*Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings*" when deciding whether to apply for confiscation in a particular case.

If a financial investigation has revealed that a suspect has few or no realisable assets, then it may not be a proportionate use of resources to pursue confiscation. In such cases, it may be more efficient to seek compensation, deprivation, forfeiture or restitution orders and costs.

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It may be appropriate to seek confiscation orders in nominal amounts against serious and/or organised criminals, when it has been agreed with law enforcement that the defendant's financial circumstances will be regularly reviewed and a decision made as to whether there should be an application to the court under s.22 to increase the amount of the confiscation order. Nominal orders may also be appropriate when a defendant is expected to be in possession of further assets within a short space of time, e.g. due to an inheritance.

Confiscation may not be appropriate when:

- The defendant has repaid or returned the full extent of his benefit and lifestyle assumptions do not apply ;
- There is a low value of benefit and a compensation or other order would fully or substantially deprive the defendant of his benefit;
- The defendant is before the Youth Court and a compensation or other order would fully or substantially deprive the defendant of his benefit; and/or
- There are no identifiable assets.
- The defendant obtained the benefit jointly with others and recovery of that jointly obtained benefit has been made through the enforcement of orders made against those connected defendants ([hyperlink to Ahmad & Fields para here](#)).

## Early advice

Areas will be expected to provide early advice to the police concerning the investigation, obtaining and enforcement of confiscation orders and confiscation matters generally and will make confiscation applications to the Crown Court on behalf of the police.

Where issues arise regarding the preservation of assets and restraint orders, the case should be referred urgently to the Pre-Enforcement Team of CPS POC for consideration.

## Charging decisions and acceptance of pleas

The number and choice of charges and/or the acceptance of pleas can have a dramatic effect on the value of a confiscation order, prosecutors should consider the impact of such decisions upon the confiscation proceedings particularly where there may be implications upon the application of lifestyle provisions.

Whilst considering the above, all decisions relating to charging and the acceptance of pleas are to be made in accordance with the Code for Crown Prosecutors, relevant charging / legal guidance for the offence(s) and the Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise.

The inclusion on an indictment of offences or the acceptance of pleas of offences committed prior to 24 March 2003 could mean that pre-POCA legislation applies and that notices would need to be served before proceeding to confiscation.

Even within the same proceedings, different legislation can apply to different defendants, depending upon the date of their earliest offence.

## **Part 8 Investigative Orders**

Applications for investigative orders under Part 8 of POCA include Production Orders, Search and Seizure Warrants, Customer Information Orders and Account Monitoring Orders and they are proceedings, which are linked to the investigation of crime. CPS lawyers may provide general advice but should not make the application (see the SLA between CPS and ACPO signed 2 December 2002). If there is a subsequent challenge to any order that is made the CPS may provide advice and assist in the preparation of a brief to counsel, but may not take part in the hearing. Law enforcement should be made aware that they bear the costs of the case including any applications for compensation.

## **Other forms of asset recovery**

If confiscation proceedings are not appropriate it may be that other forms of asset recovery included within POCA may be relevant. Those include civil recovery, cash recovery proceedings and taxation.

The reviewing lawyer should highlight the possibilities to the Financial Investigator or the OIC and if civil recovery is considered a potential avenue contact can be made with CPS POC (note, the NCA conduct their own civil recovery cases) to discuss further.

In respect of cash recovery proceedings, they are a matter for law enforcement agencies however, notwithstanding that they are civil in nature (see the European case of *Butler v UK*) the CPS may act in such proceedings on behalf of the police and HMRC (s.302A). The police may seek early advice from the CPS in relation to contemplated criminal proceedings, where cash has been seized during the course of the investigation.

If the CPS advises that a prosecution should proceed, the CPS will provide advice to the police on the basis that the issue arises from a criminal offence and is ancillary to contemplated, or on-going criminal proceedings. The Court of Appeal has issued guidance in relation to parallel cash recovery and criminal proceedings in the case of *R v Payton* [2006] EWCA Crim 1226.

Conversely, if the CPS advises against prosecution, then either the cash will be returned, or purely civil forfeiture proceedings will continue without CPS involvement.

## **Chapter 2 - Restraint Order**

### **Restraint Order – Introduction**

A restraint application may be made at any time following the commencement of the criminal investigation and at any stage of the criminal proceedings. Prosecutors must monitor the need for restraint throughout the investigation and criminal proceedings. If there is a risk of dissipation of the defendant's assets, they must immediately refer the case to CPS POC for consideration for an application for restraint.

Each case will need to be considered on its merits in accordance with the legal principles detailed above.

A restraint order may make provision for the defendant's reasonable living expenses from their restrained assets and in practice this is likely to make the application for a restraint order unnecessary where a defendant's available assets will be quickly eroded by way of a living expense entitlement. A restraint order should still be considered if there are identified assets that may be required to satisfy a compensation order in circumstances when the compensation order is likely to be paid out of the monies enforced in respect of the confiscation order.

### **Restrain Order - Legal Principles**

A restraint order may be granted under s.41 and may have the effect of freezing property anywhere in the world that may be liable to confiscation following the trial and the making of a confiscation order. It may be made both against a defendant or a person under investigation together with any other person holding realisable property.

An application for a restraint order may be made by the prosecutor or an accredited financial investigator (s.42(2)). An accredited financial investigator is a person accredited by the National Crime Agency (NCA) to exercise Part 2 powers and will usually be an employee of the police force financial units (FIUs) or of HM Revenue and Customs (HMRC).

An application by an accredited financial investigator must be authorised by:

- a police officer not below the rank of Superintendent;
- an HMRC customs officer of similar rank; or
- an accredited financial investigator designated by the Secretary of State.

In all cases, the application will be made by a prosecutor.

Costs generally follow the event in restraint proceedings and prosecutors should only proceed with the application if they are satisfied that they have been made aware of

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all relevant information and that the statement in support of the application properly reflects all of the available evidence both for and against the prosecution case.

The judge may only grant a restraint order pursuant to s.41 if any of the five conditions set out in s.40 are satisfied.

### ***The Five Conditions***

#### *The first condition (s.40(2))*

The first condition is satisfied if a criminal investigation has been started in England and Wales with regard to an offence and there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct (for a fuller summary of 'benefit' and 'criminal conduct' please see Chapter 3 below).

S.88(2) defines a criminal investigation as being an investigation, which police officers or other persons have a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.

Criminal conduct is conduct that either constitutes an offence in England and Wales or would constitute such an offence if it occurred in England and Wales. An alleged offender will be taken to have benefited from his criminal conduct if he obtains property as a result of or in connection with the conduct.

It is important to note that if a restraint order is granted on the basis that the first condition is satisfied the order 'must' contain a requirement that the applicant report to the court on the progress of the investigation 'at such times and in such manner as the order may specify (s.41(7B)).

#### *The second condition (s.40(3))*

The second condition is satisfied if proceedings for an offence have been started in England and Wales and not concluded, and there is reasonable cause to believe that the defendant has benefited from his/her criminal conduct.

Proceedings are started once a warrant or summons in respect of the offence is issued by a justice of the peace under s.1 of the Magistrates' Court Act 1980, or when a person is charged with the offence after being taken into custody without a warrant, or when a bill of indictment is preferred in accordance with section 2(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933.

Proceedings are not concluded for the purposes of POCA until such time as any confiscation order made against the defendant has been satisfied (that is to say that no monies are due under it), discharged or quashed (and there is no further possibility of appealing the decision to quash the order) (s.85(5)).

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By virtue of s.40(7) the second condition will not be satisfied if the court believes that either there has been undue delay in continuing the proceedings or if the prosecutor does not intend to proceed. Plainly, if it is possible that the prosecutor does not intend to commence proceedings against a defendant an application by the prosecutor for a restraint order would be inappropriate.

### *The third condition (s.40(4))*

The third condition is satisfied if the prosecutor has applied (or is likely to apply) to the Crown Court under s.19 (to reconsider making a confiscation order when no such order was made), s.20 (to reconsider making a confiscation when no such order was made and there is new evidence that the defendant benefited from his or her criminal conduct), s.27 (to make a confiscation order where a defendant absconds after conviction or committal) or s.28 (to make a confiscation order where a defendant absconded more than three months previously but was neither acquitted nor convicted in commenced criminal proceedings) AND there is reasonable cause to believe that the defendant has benefited from his criminal conduct.

### *The fourth condition (s.40(5))*

The fourth condition is satisfied if the prosecutor has applied (or is likely to apply) to the Crown Court under s.21 to reconsider the benefit figure in a confiscation order and there is reasonable cause to believe that the Court will decide that the amount found under the new benefit calculation of the defendant's benefit exceeds the relevant amount (as defined in s.21(13)).

### *The fifth condition (s.40(6))*

The fifth condition is satisfied if the Prosecutor has applied (or is likely to apply) under s.22 to reconsider the amount available to satisfy a confiscation order and there is reasonable cause to believe that the court will decide that the amount found under the new calculation of the available amount exceeds the relevant amount (as defined in s.22(8)).

It should be noted that the third, fourth and fifth conditions will not be satisfied if the court believes that either there has been undue delay in continuing the application, or the prosecutor does not intend to proceed (see s.40(8)).

The term "reasonable cause to believe" is not defined in the legislation or relevant case law. It clearly connotes something more than suspicion and the belief must be rational and based on adequate supporting material. It does not require the prosecutor to adduce as much evidence as would be required for a jury to convict.

***Is there a 'real risk' that assets may be dissipated?***

In all cases, regardless of which condition is being relied on, the prosecutor must be able to show there is a real, rather than fanciful, risk that assets will be dissipated if a restraint order is not made.

As LJ Glidewell confirmed in *Re AJ & DJ* (Unreported, December 9, 1992, CA) a restraint order "*should only be made if there is a reasonable apprehension that, without it, realisable property may be dissipated ... if there is no such risk or the risk is merely fanciful, the order ought not to be made since, ex hypothesi, it would not be necessary for the achievement of its only proper purpose.*"

In many cases, particularly those involving charges of dishonesty, the risk of dissipation will speak for itself and will not prove problematic: see *Jennings v CPS* [2005] 4 All ER 391. However, prosecutors must be alive to the necessity to establish that such a risk exists. This is especially so in cases where there has been a delay in applying for the restraint order and there is no evidence to show the defendant has dissipated assets in the meantime.

As the Court of Appeal held in *Re B* [2008] EWCA 1374 in such a case it is incumbent both on the prosecutor and the judge to explain how it can be said there is a real risk of dissipation in the future when the defendant has not dissipated assets in the past despite having every opportunity to have done so.

***The extent of a restraint order***

The amount of realisable property that can be restrained will depend upon the amount in which the confiscation order is likely to be made. The court will permit the prosecutor a degree of latitude in the assessment of the amount of benefit where enquiries into its extent have not yet been completed.

A defendant will be restrained from dealing with all of his assets ("an all-assets restraint order") if the prosecutor is going to ask the court to conclude that the defendant has a criminal lifestyle and has benefited from general criminal conduct.

If the prosecutor is not alleging that the defendant has a criminal lifestyle and the court is going to be asked to decide whether the defendant has benefited from his particular criminal conduct, a defendant will be restrained from dealing with specific assets which, when taken together, which have a lower value than the amount of his benefit from particular criminal conduct ("a specific restraint order").

Where the amount the defendant has benefited from particular criminal conduct exceeds the value of all his assets it will be appropriate to restrain the defendant from dealing with all of his assets.

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Any person who holds assets jointly with the defendant may be specifically restrained from dealing with those jointly held assets. The recipient of a tainted gift may be restrained from dealing with any realisable property they hold up to the current value of the gift.

## Key terms defined

### *Free property*

Property is free property (see s.82) unless it is the subject of:

- a forfeiture order either under the Misuse of Drugs Act 1971 or the Terrorism Act 2000,
- a deprivation order under the Powers of Criminal Courts (Sentencing) Act 2000.
- an interim receiving order, a recovery order or an order for the detention or forfeiture of seized cash under the civil recovery provisions of the Proceeds of Crime Act 2002.

### *Realisable property*

Realisable property is defined in s.83 as any free property held by the defendant and any free property held by the recipient of a tainted gift.

The term "property" is defined in s.84 and covers all property wherever situated and includes money, real or personal property, a thing in action, or other intangible or incorporeal property.

A person "holds" property if he holds an interest in it. A person obtains property if he obtains an interest in it, and one person transfers property to another, if the first one transfers or grants an interest in it to the second. References to an interest, in relation to property other than land, include references to a right (including a right to possession).

If the defendant or the recipient of a tainted gift has any interest in the property, the whole of the property is realisable property and may be restrained.

### *Companies*

Companies enjoy their own legal personality separate and distinct from the defendant. In normal circumstances, therefore, assets of a company do not constitute realisable property of the defendant. However, a long line of authorities have established that where a defendant is the controlling mind of the company and it is a sham and/or has been used to facilitate the criminal conduct complained of, the court may pierce the corporate veil of the company and treat it as the realisable

property of the defendant: see *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19.

The Court will not, however, permit the restraint order to operate at the pre-conviction stage in such a way as to preclude the company engaging in legitimate trading activity. The restraint order will need to make provision for company assets to be released to facilitate such activity. In cases of particular complexity, an application for the appointment of a management receiver may be necessary (see Chapter 5 below).

In all cases where an application to pierce the corporate veil of a company is contemplated, advice from the Pre-Enforcement Team of CPS POC should be sought.

### ***Tainted gifts***

A gift is made if the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer.

There are a number of ways that a gift will be tainted (see s.77):

1. If the court has not made a decision as to whether the defendant has a criminal lifestyle or has determined that the defendant does have a criminal lifestyle a gift will be tainted if it was made after the first day of the period of six years ending with the day the proceedings were commenced against the defendant (or, if there are two or more offences and proceedings for them were started on different days, the earliest of those days); or
2. If the court has determined that the defendant does not have a criminal lifestyle a gift will be tainted if it was made after the date on which the offence was committed (or the earliest date if the particular criminal conduct consists of more than once offence); or
3. If the gift was made at any time and was of property which was obtained by the defendant as a result of, or in connection with, his general criminal conduct or which represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct.

Although a court can apply the wider definition of tainted gifts at the restraint stage (i.e. at point 1 above), if it is clear at that time that the defendant does not have a criminal lifestyle and that therefore the narrower definition will apply at the confiscation hearing, the court will have to take this into account when making the restraint order.

## **Ancillary Orders**

S.41(7) gives the Crown Court jurisdiction to make any such ancillary order as it believes appropriate for the purpose of ensuring the restraint order is effective.

The two orders most commonly made under s.41(7) are disclosure orders and repatriation orders.

### ***Disclosure orders***

A disclosure order requires the defendant to disclose to the prosecutor in a witness statement, verified by a statement of truth, the nature, extent and location of all his realisable property. Such an order may be appropriate if the value of the defendant's known assets do not correlate with the value of the property known to have been obtained by him or her.

A disclosure order may be made against a third party holding the defendant's realisable property: see *Re D (Restraint Order: Non Party)* The Times, 26 January, 1995.

In order to protect the defendant's privilege against self-incrimination, disclosure orders are made subject to a strict condition that the statements may not be relied on in the criminal proceedings. It is of vital importance that this rule is adhered to at all times.

Once a defendant has been convicted, the disclosure statement may be relied on in the confiscation proceedings. Indeed, good practice dictates that such statements should normally be exhibited to the Prosecutor's Statement of information made under s.16.

### ***Repatriation orders***

Repatriation orders are orders requiring a defendant to repatriate to England and Wales assets held overseas. They are most commonly used in relation to funds held in overseas bank accounts which are vulnerable to dissipation before a letter of request can be issued and actioned to secure them.

A repatriation order should only be sought where the realisation of assets held overseas will be necessary to satisfy a confiscation order in the amount of the defendant's benefit. If there are sufficient UK based assets available, a repatriation order should not be sought. For more details on the Court's power to make a repatriation order, see *DPP v Scarlett* [2000] 1 WLR 515.

## **Variation or Discharge of a Restraint Order**

By virtue of s.42(3) the person who applied for the restraint order, or any person affected by it, may apply to vary or discharge it.

In relation to an application to discharge a restraint order the court will take into consideration different factors depending on which condition in s.40 was satisfied when the order was granted.

If the first condition was satisfied the restraint order 'must' be discharged if proceedings for an offence are not brought within a reasonable time. What amounts to "a reasonable time" will depend on the circumstances of individual cases, but it is particularly important that criminal investigations proceed with all due expedition when a restraint order is in force (s.42(7)).

If the second condition was satisfied or the third, fourth or fifth condition was satisfied because an application had been made, the court 'must' discharge the restraint order when the proceedings or the application (whichever is relevant) is concluded (s.42(6)).

If the third, fourth or fifth condition was satisfied because an application was likely to be made the court must discharge the restraint order if within a reasonable time the application is not made (or on the conclusion of the application) (s.42(8)).

The proceedings are concluded when:

1. A defendant is acquitted on all counts (s.85(3)); or
2. The defendant's conviction is quashed on appeal (s.85(4)); or
3. The defendant's confiscation order is satisfied (that is to say no monies are due under it (s.87(1)), discharged or the order is quashed and there is no further possibility of an appeal against the decision to quash the order (s.85(5)); or
4. One of the scenarios relating to an appeal arise as detailed in s.85(6)

An application is concluded when one of the scenarios in s.86(1) or (2) arise.

Prosecutors should not agree to the discharge of a restraint order until such time as the confiscation order has been satisfied. Accordingly it is absolutely imperative that the restraint order is not discharged at the point a confiscation order is made. At that point the proceedings are not yet concluded and any variation to the restraint order which is required to facilitate the sale of the defendant's assets will be managed by the CPS POC prosecutor.

## **Restraint Order – Practical Guidance**

### ***When should an application for a restraint order be made?***

The decision whether or not to apply for a restraint order and if so, the timing of that application are important strategic decisions in the case and should only be taken after careful consideration of the effect on the case both at the investigative or prosecution stage.

A prosecutor should provide the investigator with early advice as to whether in law there is sufficient basis for an application for a restraint order to be made and if there is insufficient evidence, what extra material is required.

Generally, it will be in the public interest to make an application, where the investigation is not likely to be compromised to a significant extent; where there are reasonable grounds to believe that the defendant has benefited from criminal conduct; and there is a real (rather than fanciful) prospect that not insubstantial realisable assets will be dissipated, unless a restraint order is granted.

An application for a restraint order by the prosecutor will be supported by a witness statement from a financial investigator. The responsibility for drafting the restraint order lies with the CPS POC prosecutor. The witness statement and the draft restraint order will be lodged with the court. The majority of Crown Courts will deal with such an application on the papers but there may be circumstances where the courts require a hearing at which the FI and counsel will attend.

In accordance with Part 33.51(2) of the Criminal Procedure Rules 2015 ("CrPR 2015") an application for a restraint order may be made without notice to the defendant if the application is urgent or if there are reasonable grounds to believe that giving notice would cause the dissipation of realisable property that is subject of the application.

Prosecutors should consider whether the complexity of the case requires that the application be made in person, rather than on the papers and a realistic time estimate should be provided to the court. In complex cases, the court should ensure that a High Court judge or suitably experienced Circuit judge is allocated to the case.

Certain applications for a restraint order at the pre-charge stage (that is, on the basis that the first condition is satisfied) require authorisation from a CPSPOC Legal Manager.

Applications for production and restraint orders should generally be made to the same judge and court and the prosecutor should ask to see the evidence used in support of the production order.

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### ***What must the Court do?***

*Apply the correct burden and standard of proof*

The burden rests on the prosecution on a balance of probabilities.

*Exercise of powers*

By virtue of s.69(2) the power to grant a restraint order under s.41:

- must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;
- must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;
- must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant; and,
- may be exercised in respect of a debt owed by the Crown.

This provision has become known over the years as "the legislative steer" from which it will be seen that, although the judge has a discretion whether or not to grant an application for a restraint order, the exercise of the discretion is far from unfettered.

*Section 69* is much stricter than the equivalent sections in the old legislation and, as the Court of Appeal held in *Serious Fraud Office v Lexi Holdings PLC (In Administration)* [2008] EWCA Crim 1443, "must be taken to represent a deliberate tightening up of the legislation by Parliament." In particular, restrained funds may not be released to enable unsecured third party creditors of the defendant to be paid. The decision to the contrary in *Re X* [2004] 3 WLR 906 is no longer good law.

### ***Undertakings by the prosecutor***

Part 33.52(5) CrPR provides that the Crown Court may require the applicant to give an undertaking to pay the reasonable expenses of any person other than a person restrained from dealing with realisable property, which are incurred as a result of the restraint order. Prosecutors should file a letter giving undertakings as mentioned earlier. The prosecutor cannot, however, be required to give an undertaking in damages: see Part 33.52(4) CrPR.

### ***Cases of unusual complexity***

Occasionally cases arise that are of particular complexity, raising issues far removed from those normally dealt with by a Crown Court judge. They may, for example raise difficult issues regarding trusts, company law, insolvency law, property law or family law. In such cases the principles set out in the judgment of Hughes LJ in *Stanford International Bank v Serious Fraud Office* [2010] EWCA Civ 137 should be followed.

Prosecutors should liaise with the appropriate Courts Administrator with a view to arranging for the hearing to take place before a judge with the necessary expertise. In urgent cases, the judge initially dealing with the application should make the restraint order, but impose a short return date when the matter can be considered by a judge with appropriate expertise.

### ***Restraint Appeals***

The appeal procedure may be found in a combination of POCA, the Criminal Procedure Rules 2015 and in the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003 No. 82). There are resource and other implications for the CPS if unworthy appeals are pursued and prosecutors should refer likely cases to their line manager for consideration.

The prosecutor may appeal in the following circumstances:

- Section 43(1) to the Court of Appeal where the Crown Court has refused to make an order;
- Section 43(2)(a) to the Court of Appeal where the Crown Court has made an order; and
- Section 44(2) to the Supreme Court of the decision of the Court of Appeal.

A notice of appeal must be served on all parties within twenty-eight days and leave to appeal must be obtained from the Court of Appeal or from the Supreme Court.

Appeals to the Court of Appeal regarding restraint will be limited to a review of the decision of the Crown Court unless the Court of Appeal considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

The Court of Appeal will allow an appeal where the decision of the Crown Court was wrong, or unjust because of a serious procedural, or other irregularity in the proceedings in the Crown Court.

Any party to an appeal before the Court of Appeal may appeal with leave to the Supreme Court.

## Chapter 3 - Confiscation

### Confiscation – Legal Principles

The Crown Court can make a confiscation order under s.6. The following legal principles apply in respect of such an application.

The Crown Court must proceed under section 6 POCA if two conditions are met. The first condition is that the defendant:

- is convicted of an offence or offences in proceedings before the Crown Court; or
- is committed to the Crown Court for sentence; or
- is committed to the Crown Court with a view to a confiscation order being made (under s.70).

If the prosecutor asks the magistrates' court to commit the matter to the Crown Court under s.70 the magistrates' court 'must' do so.

If a committal occurs in respect of an either-way offence under s.70 the magistrates' court must, by virtue of s.70(5), state whether it would have committed the defendant for sentence under s.3(2) or s.3B(2) of the Powers of Criminal Courts (Sentencing) Act 2000 in any event. Failure to comply with s.70(5) has the implication of limiting the Crown Court's sentencing powers (s.71).

The second condition is:

- the prosecutor asks the court to proceed; or
- the court considers it appropriate to do so.

In recent case law, in particular, *R v Waya*, courts have considered the impact of Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR) upon the making of a confiscation order. It was held that a confiscation order must be proportionate to the legitimate aim of recovery of the proceeds of crime. *Waya* must be read as a whole, giving due regard to paragraphs 10-35 of the judgment.

### Postponement of the confiscation proceedings

By s.14(1) the court may: "*(a) ... proceed under section 6 before it sentences the defendant for the offence (or any of the offences) concerned, or (b) postpone proceedings under section 6 for a specified period.*"

It is during the postponement period that the relevant statements will be filed (see more below).

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The court may order more than one postponement and the period of postponement may be extended in accordance with s.14(2). The period of postponement must not end after the "permitted period" has finished: see s.14 (3). If the court postpones making a confiscation order it can sentence the defendant for the offence or offences. In the event of postponement, s.15(2), stipulates the court must not impose a fine, or a compensation order under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 or a forfeiture order under the Misuse of Drugs Act 1971, or a deprivation order under the Sentencing Act 2000 or a forfeiture order under the Terrorism Act 2000.

Prosecutors should ensure the court explicitly deals with compensation claims separately from confiscation and gives reasons why a compensation order is not being imposed at the point of sentencing. If the reason is explicitly given that a compensation order is not being made because the application is being adjourned to the confiscation hearing, then the ability to pursue the application for compensation is preserved in the event that confiscation is not ultimately pursued.

### ***What is the permitted period?***

"Permitted period" is defined in s.14(5) as being a period of two years starting with the date of conviction.

### ***Date of conviction***

The defendant's date of conviction is defined in s.14(9) as being the date on which he was convicted of the offence concerned, or where there are two or more offences and the convictions were on different dates, the date of the latest.

### ***Further postponements***

Section 14(8) provides that where proceedings have been postponed already for a period and an application to extend the period further is made before the previous period of postponement ends, the application may be granted, even though the previous period (by the time of the application is heard) may have ended. In effect this means that provided the application is submitted to the court before the postponed period comes to an end, the application may be granted.

### ***Postponement beyond two years***

There is no limit to the period of postponement where the court finds that there are "exceptional circumstances": see s.14 (4). POCA does not define when circumstances are exceptional although some guidance may be found from previous case law in relation to the DTA and CJA. In practice, only in exceptional circumstances should the need for postponement take the final date of making any confiscation order beyond the two year period and the timetabling should reflect this.

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Such circumstances can arise where there are assets abroad which require investigations pursuant to a letter to request.

### ***What amounts to exceptional circumstances?***

In *R v Jagdev* [2002] 1 WLR 3017 the Court of Appeal held that the purpose of the power to postpone confiscation proceedings was to enable the judge to reach a fair conclusion on the confiscation issue: and that where there was a real prospect that the hearing might have been wasted and an unjust order made if the judge had proceeded to hear the case, then the judge was entitled to hold that there were exceptional circumstances.

The Court of Appeal has shown a marked reluctance to interfere with the exercise of the discretion of the sentencing judge to find exceptional circumstances. It is not a question of whether or not the Court of Appeal would find the circumstances in question to be exceptional, but whether the judge was entitled to conclude that they were (see *R v Gadsby* (2002) 1 Cr App R (S) 97).

Further, it is not necessary for the sentencing judge to use the expression "exceptional circumstances" when he orders the postponement (see *R v Chuni* [2002] EWCA Crim 453. Judge LJ summarised the position in these words in *R v Steele and Shevki* [2001] 2 Cr App R (S) 40:

"These decisions involved the Courts discretion, judicially exercised where the statutory conditions are present, taking full account of the preferred statutory sequence ... For example, to take account of illness on one side or the other, or the unavailability of the Judge without depriving a subsequent order for confiscation of its validity."

### ***Postponement for a specified period***

By s.14(1)(b), the period of the postponement must be for a specified period. This does not mean that the judge must specify the very date the substantive hearing is to begin.

In *R v Steele and Shevki* [2001] 2 Cr App R (S) 40 the Court of Appeal held that once the court had postponed a determination on the grounds that there are exceptional circumstances, it is not then necessary for the court to find further exceptional circumstances for subsequent postponements.

### ***Who may apply for an adjournment?***

A postponement or extension may be made upon application by either the defendant or by the prosecutor. Alternatively, the court may order a postponement of its own motion: see s.14(7).

### ***What happens if the judge gets it wrong?***

Section 14(11) provides that a confiscation order must not be quashed on the sole ground that there was a defect or omission in the procedure connected with the application for the granting of a postponement.

### ***Postponement pending appeal***

By s.14(6) a confiscation hearing may be postponed pending the determination of an appeal by the defendant against his conviction for any of the offences concerned. Any such postpone shall not be for a period in excess of three months from the date on which the appeal is determined unless there are exceptional circumstances.

Practical point: the judge may order a postponement without a hearing.

Part 33.13(4)(c) CrPR 2015 provides that the Crown Court may order a postponement without holding a hearing. If agreement can be reached with the defence in this respect the matter can therefore be dealt with by lodging letters with the court to achieve this thus saving costs.

### **Terms of the Confiscation Order**

The purpose of confiscation proceedings is to obtain a confiscation order which seeks to deprive the defendant of the financial benefit that he or she has obtained from criminal conduct.

In determining whether, and in what terms, a confiscation order is appropriate, the Crown Court should adopt a staged approach:

### ***Has the defendant benefitted from criminal conduct?***

By virtue of s.6(4) the court must first decide whether the defendant, has a criminal lifestyle (as defined in s.75).

A person has a criminal lifestyle if the offence satisfies one or more of these tests:

1. it is specified in Schedule 2;
2. it constitutes conduct forming part of a course of criminal activity; and/or
3. it is an offence committed by the defendant over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.

The criminal lifestyle test is not satisfied unless the defendant has obtained benefit of at least £5,000 in the cases of (2) and (3), however, the value of any TIC's in respect of offences started on or after 24 March 2003 will count towards this sum. TIC's in respect of offences committed before 24 March 2003 will only count towards the sum

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of £5,000 in respect of conduct forming a course of criminal activity based on at least two previous convictions on separate occasions over the last six years (section 75(3)(b)).

### *Schedule 2 specified offences*

The following offences are specified in Schedule 2:

- drug trafficking
- psychoactive substance offences
- money laundering offence
- directing terrorism
- modern slavery
- people trafficking
- arms trafficking
- counterfeiting
- intellectual property
- prostitution, pimps and brothels
- blackmail;
- gangmaster offences; or
- an offence of attempting, conspiring, inciting, aiding, abetting, counselling or procuring an offence specified in Schedule 2.

### *A course of criminal activity*

A course of criminal activity (see s.75(3)) is when the defendant:

- has been convicted in the current proceedings of four or more offences on the same occasion, each of those offences having been committed after 23 March 2003 and from which he or she has benefited; or
- has been convicted of one offence committed after 23 March 2003 from which he or she has benefited on this occasion and within six years of the start of the most recent proceedings been convicted on at least two separate occasions of an offence, which may have been committed before or after 23 March 2003 and from which he or she has benefited.

If the Crown Court decides that the defendant does have a criminal lifestyle then it will determine whether they have benefitted from their general criminal conduct.

If it decides that the defendant does not have a criminal lifestyle, the court will determine whether they have benefitted from their particular criminal conduct.

General criminal conduct means any criminal conduct of the defendant's, whenever the conduct occurred (s.76) and whether or not it has ever formed the subject of any criminal prosecution. Particular criminal conduct means the offences of which the

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defendant has been convicted in the current proceedings, together with any taken into consideration by the court in passing sentence (s.76). So general criminal conduct includes particular criminal conduct.

To determine whether a defendant has benefitted from criminal conduct (either general or particular) the court will consider the definitions in s.76(4) & (5). The former confirms that a person benefits from conduct if he obtains property as a result of or in connection with the conduct. The latter confirms that if a person 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.

If the court concludes that the defendant has benefitted from general or particular criminal conduct it is required to calculate the value of the defendant's total criminal benefit.

*How is the value of the defendant's criminal benefit calculated?*

The defendant's criminal benefit is the value of the property obtained by him as a result of or in connection with his criminal conduct (s.76(7)).

The definition of 'obtains' has been subject to much case law. Ordinarily, the word obtains means ownership (whether alone or jointly), which will normally connote a power of disposition or control. Section 84(2)(b) offers some assistance by confirming that a person obtains property if he obtains 'an interest in it'. A mere custodian or courier is therefore unlikely to have obtained the property in his possession.

In May [2008] UKHL 28, the House of Lords held that assessing the value of benefit calls for an essentially factual enquiry: what is the value of the property the defendant obtained.

This was affirmed in *R v Ahmad & Fields* [2014] UKSC 36 where it was stated that:

*"Ordinary common law principles should be applied to whether a person has acquired property or a financial advantage. Thus property is obtained ordinarily where the defendant obtains property so as to dispose of it as if it were his own; a pecuniary advantage is obtained, such as the evasion of a debt, for example a tax liability, only where the person has evaded a debt to which he is personally subject."*

Crucial to the assessment of benefit will be the Courts determination as to whether the defendant has a criminal lifestyle (s.6(4)(a) and s.75). Please refer to the definition of criminal lifestyle given above.

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If the defendant is deemed to have a criminal lifestyle the court is entitled to make the four assumptions in s.10 in relation to the calculation of the value of benefit from the defendant's general criminal conduct.

That is:

1. any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct and at the earliest time he or she appears to have held it; and
2. any property held by the defendant at any time after the date of conviction was obtained by him or her as a result of his or her general criminal conduct or at the earliest time he or she appears to have held it;
3. any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him or her as a result of his or her general criminal conduct, and
4. for the purpose of valuing any property obtained or assumed to have been obtained by the defendant, he or she obtained it free of any other interests in it.

The 'relevant day' is the first day of the period of six years before proceedings were started, or where there are two or more offences and proceedings were started on different dates, the earlier of those dates.

Proceedings are started when

- a summons or warrant is issued in respect of an offence
- a person is charged after being taken into custody without a warrant; or
- a bill of indictment is preferred

The date of conviction is the date on which the defendant was convicted of the offence or where there are two or more offences and conviction was on different dates, the date of the latest.

It should be noted that the court must not make an assumption in relation to particular property of expenditure if the assumption is shown (by the defendant) to be incorrect or there would be a serious risk of injustice if the assumption were made (s.10(6)) but the court must state its reasons for not making one of the required assumptions (s.10(7)).

### *The value of property*

For the purposes of calculating benefit obtained as a result of general or particular criminal conduct,

- the value of any property obtained will be assessed as the greater of the following two values:

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- the market value at the time that the property was obtained adjusted to take account of changes in the value of money between the date that it was obtained and the date of the confiscation hearing; or
- the market value as at the date of the confiscation hearing.

The definition of 'property' is discussed in Chapter 2.

### *Jointly Obtained Particular Benefit*

In *R v Ahmad & Fields*, the Supreme Court held that when property is obtained as a result of a joint criminal exercise, it will often be appropriate for a court to hold that each of the conspirators obtained the whole of that property.

At Para 74 the court then confirmed that:

*"Accordingly, where a finding of joint obtaining is made, whether against a single defendant or more than one, the confiscation order should be made for the whole value of the benefit thus obtained, but should provide that it is not to be enforced to the extent that a sum has been recovered by way of satisfaction of another confiscation order made in relation to the same joint benefit."*

Such a principle avoids the double-recovery of the same joint benefit.

The confiscation order should confirm that a joint benefit has been obtained, the value of the benefit and with whom that benefit is shared.

However, if the evidence discloses separate obtainings, the judge should make that finding.

### ***How is the Recoverable Amount calculated?***

By virtue of s.6(5), if the court concludes that the defendant has benefitted from general or particular criminal conduct it 'must' proceed to determine 'the recoverable amount' and make a confiscation order requiring him or her to pay that amount (subject to such an order not being disproportionate – see *R v Waya* [2012] UKSC 51).

The court is entitled to assume that a defendant's recoverable amount is equal to his or her criminal benefit. However, if the defendant shows that the available amount is less than that benefit accrued, then the recoverable amount will be assessed as the available amount or a nominal amount if the amount available is nil.

The available amount is the aggregate of the total value of all of the defendant's free property (at the time the confiscation order is made) minus the total value of any obligations that have priority; and the total value (at the time the order is made) of

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any tainted gifts. If the court decides to make an order in the sum of the available amount, the court must include a statement of its findings in the confiscation order. Such findings will be incorporated into a Schedule of Assets.

### ***Third Parties***

Since 1 June 2015 the Crown Court has been able to determine the extent of the defendant's interest in jointly-owned property (in cases where confiscation orders have been or are to be made after 1 June 2015). Such a power is provided in s.10A.

Before the court can exercise this power it must afford the third parties who also hold an interest in that property a reasonable opportunity to make representations. This has given third parties standing in confiscation proceedings which they previously did not enjoy.

A determination under s.10A is conclusive in relation to any question as to the extent of the defendant's interest in that property that arises in connection with the realisation of the property (or the transfer of the interest in it) with a view to satisfying the confiscation order or any action or proceedings taken for the purposes of any such realisation or transfer.

It is noted that s.10A determinations cannot be made in relation to 'tainted gifts'.

### **Tainted gifts**

Third parties may also become involved if they are the recipients of 'tainted gifts'. The term 'gift' includes a sale at a significant undervalue as at the date of transfer. The definition of 'tainted gift' depends upon whether or not the defendant has a criminal lifestyle. A gift may be tainted whether it was made before or after the commencement of POCA (section 77(8)).

If the defendant has a criminal lifestyle and has therefore benefited from his general criminal conduct, it will be a gift made by the defendant:

- at any time in the period beginning six years before the date of commencement of proceedings; or
- at any time if it can be shown to be property obtained as a result of or in connection with general criminal conduct or which (wholly or partly and directly or indirectly) represented in the defendant's hands property obtained as a result or in connection with his general criminal conduct.

If the defendant does not have a criminal lifestyle and the court is therefore concerned with calculating his or her particular criminal conduct, it is a gift made by the defendant at any time after the date on which the offence was committed and this will be the earliest date if there are two or more offences. Where there is a continuing offence, it will be any time after the first occasion when it is committed. If

there are TIC's, it will be a gift made at any time after the date on which the earliest TIC was committed.

### **Time to Pay the Confiscation Order**

The amount to be paid under a confiscation order must be paid on the date of the making of the confiscation order (s.11). If the defendant shows that he or she needs time to pay the confiscation order, the court may extend this time for payment for up to three months. This can be extended for a maximum further three months provided an application is lodged with the Crown Court before the expiry of the initial time to pay period. The court must only extend the time to pay period if it is satisfied that 'despite having made all reasonable efforts' the defendant has been unable to satisfy the confiscation order in that period (s.11(4)).

The court can grant different time to pay periods for different assets. For example, it may be appropriate for a defendant to be granted three months in order to sell his house and pay the equity to HMCTS but only 28 days within which to sell his car.

Before granting either an application for an extension of time or an application for a further extension of time, the Court must give the prosecutor an opportunity to make representations. It is important to note that the burden of establishing that time to pay is required rest on the defendant. The Court should be discouraged from allowing time to pay when it is unnecessary or from allowing longer than is reasonably required to realise assets. Further, before determining time to pay, the Judge should wherever possible ascertain the defendant's estimated earliest date of release and set the time to pay accordingly. It is clearly preferable that time to pay should expire well before the EDR so as to enhance the prospect of effective enforcement.

### **The Default Sentence**

Section 35(2) provides that ss.139 and 140 of the Powers of Criminal Courts (Sentencing) Act 2000 applies to the enforcement of confiscation orders in the same way as it applies to fines. The Court must therefore set a default sentence to be served in the event that the defendant does not satisfy the confiscation order within the time allowed for payment.

The maximum term that may be set as a default sentence is dependent on the amount ordered to be paid under the confiscation order. A table of those maximum terms is contained within s.35(2A) and is reproduced below:

<b>Amount</b>	<b>Maximum Term</b>
£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1m	7 years
More than £1m	14 years

## **Compliance Orders**

Prosecutors should consider whether an application for a compliance order is appropriate. Under s.13A the Crown Court can make such an order (a "compliance order") as it believes is appropriate for the purposes of ensuring that the confiscation order is effective.

A prosecutor can make such an application and the procedure is governed by Part 33.14 CrPR 2015.

The court is duty bound, by virtue of s.13A(3), to consider whether to make a compliance order on the making of the confiscation order. Even if the prosecutor has not made such an application, then, the court of its own motion can grant one.

If the court does not make a compliance order on the making of the confiscation order the prosecutor can apply for one 'at any later time'.

By way of example, it may be appropriate for the prosecutor to apply for a compliance order to require a defendant to market his home by a certain date or to advertise his vehicle for sale.

## **Applying for confiscation orders against absconders**

On the application of the prosecutor, the Court may, if it thinks it appropriate, make a confiscation order against a defendant who has absconded (ss.27 & 28).

Under s.27 if a convicted defendant absconds (including if he absconds and is convicted in his absence) the court may proceed to make a confiscation order if the prosecutor asks it to and the court believes it appropriate to do so.

In the case of a non-convicted defendant, the defendant must have absconded, after proceedings had commenced, for a period of at least three months (s.28).

Some provisions, either do not apply (s.10 assumptions, for example), or may be modified in the case of an absconder (see section 27(5) and (6)). It will be necessary to consider what effect this may have on a particular case. When the defendant ceases to be an absconder, s.29 allows the Court to vary any order made by virtue of ss.27 & 28.

## **Appeals**

The prosecution has a right of appeal in respect of a confiscation order, or a failure to make a confiscation order to the Court of Appeal. A notice of appeal must be served within twenty-eight days and leave to appeal is required from the Court of Appeal. The procedure is set out in the Appeal Rules. The prosecutor or the defendant may appeal a decision of the Court of Appeal to the Supreme Court. Any

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decision by the prosecution to appeal a confiscation ruling should be referred to a Level E legal manager with advice sought from a Level E Legal Manager in the CPS POC and the CPS Appeals Unit. These rights of appeal do not apply to:

- applications made to the Crown Court to reconsider the case where no confiscation order was made;
- applications to the Crown Court to reconsider benefit where no confiscation order was made;
- applications to the Crown Court for confiscation orders where the defendant has absconded (s.31).
- applications to the Crown Court for confiscation orders where the defendant has absconded (s.31).

## Reconsideration of a Confiscation Order

Whether or not a confiscation order has been made, the prosecutor (or in the case of a reconsideration of the available amount, the receiver) may apply within six years of the date of conviction for the Court to reconsider a decision not to make an order, or to reassess the defendant's benefit (see ss.19 to 21). The prosecutor (or the receiver) may also apply under s.22 to reconsider the defendant's available amount and there is no statutory time limit on bringing this particular application (as there is with applications under ss.19-21).

For applications under ss.19 to 21 there must now be evidence which was not originally available to the prosecutor. Prosecutors should refer to POCA for the different bases upon which assessments are made on a reconsideration. Section 22 does not require there to be 'new evidence' before such an application can be lodged.

Parts 33.15 and 33.16 CrPR 2015 set out the procedure which needs to be followed in respect of an application to reconsider a confiscation order.

## Draw up the Confiscation Order

The Confiscation Order is drawn up by the Court and should include the following:

- The amount of benefit found by the court
- The amount of the Confiscation Order in sterling;
- The date that the Confiscation Order is made;
- The default sentence for non-payment of the Confiscation Order and that the service of a term of imprisonment in default will not expunge the debt and notice that that the enforcing magistrates court has no power to remit all or part of the order;
- If the defendant has been found to have jointly obtained some or all of the particular benefit with others against whom confiscation orders have also

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been made, an Ahmad proviso (as above) should be inserted and the related confiscation orders identified to ensure that the enforcement authority is aware.

The time to pay should be specified on the Confiscation Order. To be deleted as appropriate:

- Payment is required forthwith
- Payment is to be made in full by .....
- Payments are to be made as follows .....
- Interest is payable on the outstanding balance of the Confiscation Order from the date upon which the Confiscation Order is due to be paid. The rate of interest is the same rate as that for the time being specified in section 17 of the Judgments Act 1838. The rate is currently 8% per annum.

A schedule or schedules representing the Judge's Ruling(s) as to the benefit obtained, the realisable assets and their location is to be attached to the confiscation order. This schedule should be drawn up and agreed by both counsel.

The default sentence should be specified on the Confiscation Order.

### **Ask the defendant to sign authorities**

Where the defendant holds assets that can be realised easily such as money in bank accounts, motor vehicles etc. the prosecutor should invite him at the confiscation hearing to sign authorities to permit their realisation in satisfaction of the order. It is important that prosecuting counsel is in possession of draft authorities and appropriately instructed to seek the defendant's signature. The financial investigator can also assist in this process.

## **Confiscation Proceedings Process**

### ***The Statement of Information (Prosecutor's Statement)***

By s.16 (1), the prosecutor must provide the court with a statement of information within "any period" that the court orders.

#### *The purpose of section 16 Statements of Information*

The s.16 Statement of Information serves a number of purposes. Firstly, it enables the defendant and the court to be put on notice of the Prosecution's case and prevents them being taken by surprise. Secondly, it identifies the real issues that fall to be determined, thereby saving court time in relation to matters not really in dispute. In *R v Benjafield* [2001] 2 Cr App R (S) 47 the Court of Appeal observed that: "*A statement serves the useful purpose of forewarning the defendant of the case of the prosecution which he will have to meet as to his assets. It should assist*

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*the defendant by making clear the matters with which he has to be prepared to deal. It is right that, as the rules require, the prosecution should identify any information which would assist the defendant."*

In many ways section a s.16 Statement of Information serves a similar purpose to pleadings in civil proceedings.

### *The contents of s. 16 statements*

Under s.16, the prosecutor should give to the court a statement with as much detail as possible relating to the defendant's benefit from criminal conduct. The actual content of the statement will depend on whether the prosecutor alleges the defendant has had a criminal lifestyle. Under s.16(4), the statement should include information relevant to the making of the assumptions if the prosecutor believes that the defendant has had a criminal lifestyle.

If the prosecutor does not believe the defendant has had a criminal lifestyle, the statement of information becomes a statement of matters the prosecutor believes are relevant to deciding whether or not the defendant has benefited from his particular criminal conduct and, if so, his benefit from that conduct: see s.16(5).

By Part 33.13 CrPR 2015, when the prosecutor is required under Section 16 to give a statement to the Crown Court, the prosecutor must also, as soon as practicable, serve a copy of the statement on the defendant. Any statement given to the Crown Court by the prosecutor under section 16 must, in addition to the information required by the Act, include the following information in compliance with Part 33.13(5) CrPR 2015:

- a) identify the maker of the statement and show its date;
- b) identify the defendant in respect of whom it is served;
- c) specify the conviction which gives the court power to make the confiscation order, or each conviction if more than one;
- d) if the prosecutor believes the defendant to have a criminal lifestyle, include such matters as the prosecutor believes to be relevant in connection with deciding—
  - (i) whether the defendant has such a lifestyle,
  - (ii) whether the defendant has benefited from his or her general criminal conduct,
  - (iii) the defendant's benefit from that conduct, and
  - (iv) whether the court should or should not make such assumptions about the defendant's property as legislation permits;
- e) (e) if the prosecutor does not believe the defendant to have a criminal lifestyle, include such matters as the prosecutor believes to be relevant in connection with deciding—
  - (i) whether the defendant has benefited from his or her particular criminal conduct, and

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- (ii) the defendant's benefit from that conduct;
- f) (f) in any case, include such matters as the prosecutor believes to be relevant in connection with deciding—
  - (i) whether to make a determination about the extent of the defendant's interest in property in which another person holds, or may hold, an interest, and
  - (ii) what determination to make, if the court decides to make one.

If any witness statement is included as part of the Statement of Information, by Part 33.7 CrPR 2015, the witness statement should be verified by a statement of truth.

In practice, the Statement of Information will normally include:

- i. An outline of the nature of the offences that the defendant has been convicted of, together with references to the indictment, the factual background, the date of conviction, any sentence that has been passed, and the timetable for confiscation;
- ii. A portrait of the defendant himself, including age, address, marital status and dependants. This will also include reference to previous occupations, income derived from the same and any relevant previous convictions;
- iii. The history of any restraint order proceedings including whether a receiver has been appointed;
- iv. The extent of the benefit alleged, and whether the case is one of general or particular criminal conduct. This will often include references to admissions made at trial or the evidence given. It may also extend to relevant sentencing remarks and the basis of plea;
- v. If a general criminal conduct matter, or a lifestyle offence, reference to the assumptions that the court is being invited to draw;
- vi. The nature of the assets the prosecutor maintains are realisable. Whilst there is no duty on the Crown to prove the available amount, it is clearly helpful if it refers to what is known in terms of the defendant's property and wealth;
- vii. The extent of any allegation of hidden assets and the basis for such a belief;
- viii. The amount of the confiscation order the prosecutor is seeking;
- ix. Occasionally a Statement of Information will make reference to decided case law or the statute itself but, normally, issues of law on which the prosecutor seeks to rely should be addressed in a skeleton argument rather than a Statement of Information.

Documentation on which the prosecutor wishes to rely should be exhibited to the statement in the usual way and should normally include the restraint order, any variation orders, the defendant's disclosure statement and, where relevant reports from any management receiver appointed by the court.

The s.16 statement should confirm whether any third party holds an interest in an asset that the defendant holds so that the court can consider its obligation to afford a reasonable opportunity to that third party to make representations to it in respect of

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the extent of the defendant's interest in that asset. If such an opportunity is given to the third party the court can proceed to make a determination of the extent of the defendant's interest in the asset by virtue of s.10A. Accordingly where it appears that a person other than the defendant may hold an interest in an asset, the details of any such interest must be fully set out in the s16 statement. This should include any information that might be relevant to the Court in deciding whether to make a determination and if the Court decides to make a determination information which would assist in determining the value of the defendant's interest in this property. It should be noted that the Court can order the interested party to provide information (s.18A) and can order a separate s.16 statement dealing solely with third party issues once it has decided to make a determination.

The s.16 statement should also include a notice that if the Court makes a confiscation order which relates to property in a member State of the European Union other than the United Kingdom, the Prosecutor reserves the right to make an application for a certificate pursuant to Article 11 of the 2014 Regulations.

The s.16 statement should also include a notice of the terms proposed for any compliance order that will or is likely to be sought under s.13A.

### *When should the s.16 statement be served?*

By s.16(1) & (2), the prosecutor must give the statement of information to the court "within the period the court orders". General practice is to ask the Court to set a timetable for confiscation at sentencing. This normally includes the service by the defence of a disclosure statement (S18), service by the prosecution of a Statement of Information (S16), service of a defence response (S17) and the service by the prosecution of a reply (Supplementary S16). Consideration should be given before the sentencing hearing to the setting of a realistic timetable, taking account of both prosecution and defence requirements.

### *On whom should the prosecutor's statement be served?*

By s.16(1), the statement of information must be given to the court. However Part 33.13 CrPR states that the Statement of Information must be served on both the court and the defence.

### *Cross Service*

There is no requirement, either in POCA or the CrPR that a Statement of Information should be served on solicitors acting for a co-accused. This is because statements frequently disclose personal matters relating to the defendant's financial affairs and exhibit financial material including bank statements and disclosure statements sworn in compliance with a restraint order.

### ***The Defendant's Statement***

By s.17(1):

*"If the prosecutor gives the Court a statement of information and a copy is served on the defendant, the Court may order the defendant: to indicate (within the period the court orders) the extent to which he accepts each allegation in the statement, and so far as he does not accept such an allegation to give particulars of any matters he proposes to rely on."*

The purpose of s.17 is to identify areas of dispute between the parties, so that evidence may be adduced only in relation to the disputed points, thus narrowing the issues. It is also intended to prevent the Crown being taken by surprise at the confiscation hearing and effectively being "ambushed" by issues being raised for the first time and without prior notice.

#### *Defendant's acceptance conclusive*

By s.17(2), if the defendant accepts to any extent an allegation in the statement of information, the court may treat his acceptance as conclusive of the matter to which it relates for the purpose of deciding issues as to the defendant's general or particular criminal conduct, as the case may be.

#### *What happens if the defendant fails to respond?*

If the defendant fails in any respect to comply with an order under s.17(1) he may be treated, under s.17(3), as having accepted every allegation in the statement of information apart from:

- a) Any allegation in respect of which he has complied with the requirement;
- b) Any allegation that he has benefited from his general or particular criminal conduct.

Thus, if the defendant fails to respond to a statement of fact in relation to his assets or the available amount, that fact may be deemed by the court to be true. It should be noted that this is a matter for the discretion of the court – it is not bound to treat every allegation as having been accepted simply because the defendant has failed to respond to it.

The defendant who fails to respond to the prosecutor's statement in compliance with an order under s.17 runs the very real risk of having a confiscation order made in the full amount of the benefit figure alleged by the prosecutor.

In *R v Comiskey* (1991) 93 Cr App R 227 the Court of Appeal held that once the prosecution have proved benefit, the burden then passes to the defendant to show, on a balance of probabilities, the value of his realisable property was less than this

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sum. If he fails to discharge that burden, the court must make a confiscation order in the full amount by which it has certified he has benefited.

The Court of Appeal has showed a marked reluctance to interfere with confiscation orders made in circumstances where the defendant has failed to respond to the prosecutor's statement and has failed to give evidence at the confiscation hearing. In *R v Layode* (Unreported, 12 March, 1993) by way of example, in dismissing the defendant's appeal, Macpherson J said:

*"If the judge was wrong about the realisable assets and the bank accounts the Appellant has nobody but himself to blame in this regard."*

He added that the case underlined the importance of a defendant submitting evidence.

### *The issue of self-incrimination*

By s.17(6):

"No acceptance under section 17 (the defendant's response to the prosecutor's statement) that the defendant has benefited from criminal conduct is admissible in evidence in proceedings for an offence."

One of the purposes of s.17(6) is to prevent invoking his privilege against self-incrimination as a justification for failing to respond to the prosecutor's statement. This provision is analogous to the condition subject to which disclosure orders are made in restraint orders and which are designed to protect the defendant's privilege against self-incrimination.

Section 17(6) is also intended to encourage the defendant to be more forthcoming in his disclosure because, if the protection provided by s.17(6) did not exist, the defendant may be reluctant to admit benefit from criminal conduct that had not been the subject of a prosecution.

### *Provision of further information by the defendant*

Section 18 makes the obligations on the defendant even more onerous. It applies where the court is proceeding under POCA either because the prosecutor has asked it to do so, or the court has decided to proceed of its own motion.

Section 18 empowers the court to require the defendant to provide information "at any time" for the purpose of assisting the court to carry out its confiscatory functions under the Act.

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By Part 33.13(2) CrPR, the defendant must provide the information in such a manner as the court directs and serve a copy of it on the prosecutor. The information must be supported by a statement of truth: see Part 33.7 CrPR.

The primary purpose of s.18 is to allow the court to make an order where the defendant is relying, or has relied, on certain matters and the court considers it requires more information to assist it in determining the point in question.

### *What are the consequences of a defendant failing to comply with a Section 18 Order?*

If the defendant fails to comply with the court's order without reasonable excuse, s.18(4) allows the Court to draw any inference it believes appropriate.

What information can the defendant be required to provide under s.18?

This will depend largely on the facts of individual cases but typical examples of the information that may be sought would include:

- a) Particulars of any sources of income, including bequests;
- b) Identification of all bank and building society accounts, whether jointly or solely held;
- c) Particulars of any real property in which the defendant holds an interest;
- d) Details of any unit trusts, books shares or debentures the defendant holds an interest in;
- e) Details of any cash held and from where it was sourced;
- f) Particulars of any motor vehicles, boats works of art, livestock or jewellery owned;
- g) Details of any safe deposit boxes held;
- h) Details of all charge and credit cards held;
- i) Details of any other transfers made to or from the defendant in the previous six years.

### *Protection from self-incrimination*

Section 18(5) contains a similar provision to that in s.17(6) protecting the defendant from incriminating himself and others in the making of any admission or reply under s.18. However, if the information disclosed leads the prosecutor to other new information or evidence, section 18 does not appear to prevent the authorities from using that other evidence.

### *Prosecutor's acceptance conclusive*

By s.18(6), any acceptance by the prosecutor of any assertion contained in a defendant's statement may be treated by the court as being conclusive for the purposes of the confiscation hearing.

### ***Further statements by the prosecutor***

Section 16(6) provides:

*"If the prosecutor gives the Court a statement of information –*

- *he may at any time give the Court a further statement of information;*
- *he must give the Court a further statement of information if it orders him to do so and he must give it within the period the Court orders."*

Under pre-POCA legislation, a practice developed of the prosecutor submitting a further statement if there were matters in the defendant's statement with which he disagreed or which called for further comment. Section 16(6) puts this practice on a statutory footing and provides for a further statement to be tendered by the prosecutor either acting of his own volition or in compliance with an order of the court.

### **Securing the attendance of witnesses**

Once *s. 16 and 17 statements* have been served, the parties should advise each other of the witnesses they require to attend the hearing. It should be borne in mind that certain witnesses, in particular those employed by financial institutions, may not be prepared to attend the court voluntarily. In such cases witness summonses should be sought from the appropriate officer of the Crown Court.

## **Chapter 4 - Enforcement**

### **Introduction**

The purpose of a confiscation order, namely to deprive the defendant of the proceeds of his or her crime, is only fulfilled once the order is paid. A confiscation order is a debt owed by the defendant to the Crown. The defendant can choose to pay the order voluntarily, but if he or she fails to pay the order, compulsory enforcement action can be taken.

All domestic confiscation order payments, however enforced, go to HM Treasury after liquidators and receivers have been paid their fees and compensation has been paid to victims by the enforcing magistrates' court.

The Home Office operates an Asset Recovery Incentivisation Scheme (ARIS) by which money enforced in respect of domestic and overseas confiscation orders is shared between the agencies involved after liquidators, receivers and compensation are paid and payments are made in accordance with any international treaties, conventions and asset sharing agreements. The Home Office retains 50 per cent,

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law enforcement and prosecutors receive 18.75 per cent and the HMCTS receives 12.5 per cent.

The CPS Asset Recovery Strategy sets out that the CPS will work with its partners in the criminal justice system to improve the enforcement of confiscation orders.

HMCTS is ultimately responsible for collecting the debt owed by a defendant on a confiscation order. However, the CPS assumes responsibility for cases that require prosecution input in order to enforce effectively. The criteria for determining the lead enforcement agency is set out in the Service Level Agreement between the CPS and HMCTS. When there is nothing more we can do to enforce the debt, we shall remit the case back to HMCTS.

It is essential that CPS plays an active role in the enforcement of confiscation orders by making applications to the Crown Court for the appointment of enforcement receivers and/or by requesting the listing of applications at the enforcing magistrates' court to activate the default sentence of imprisonment, if the defendant fails to pay the confiscation order. Any inordinate delay in taking enforcement action may amount to a breach of the offender's right to a fair trial within a reasonable time under Article 6.1 of the ECHR and, in consequence, the criminal powers of enforcement under POCA may be lost.

Where the CPS participates in the enforcement of confiscation orders, that work will be undertaken by CPS POC.

## **Restraint Orders**

Restraint Orders do not come to an end when a confiscation order is made, but remain in force until the confiscation order is satisfied: see the definition of proceedings are concluded in s.85(5)(a).

A restraint order may be made for the first time after a confiscation order is made if there is a risk that assets may be dissipated whilst an appeal or enforcement action is pending.

## ***Living Expenses***

The right to draw on restrained funds to meet general living expenses does not continue indefinitely but comes to an end when a confiscation order is made. If the defendant appeals against the order or his conviction, the right to draw on the restrained fund comes to an end when all domestic avenues of appeal have been exhausted: see *Stodgell v Stodgell* [2009] EWCA Civ 243 and *Revenue and Customs Prosecutions Office v Briggs-Price* [2007] EWCA Civ 568.

Most restraint orders now provide that such payments should come to an end when a confiscation order has been made. Where the order does not contain such a

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provision, a prompt application should be made to the Court for a variation to prevent further funds being dissipated for such purposes.

### **The Joint Asset Recovery Database ("JARD")**

All restraint, confiscation, cash seizure and civil recovery orders made throughout the United Kingdom should be recorded on the JARD, together with brief details of the assets taken into account in making such orders. It is maintained by the National Crime Agency. Most law enforcement agencies and HM Courts and Tribunals Service have access to it.

It is essential that full details of all confiscation orders are entered on JARD as soon as possible after they are made and thereafter that it is kept up to date. Full details of all enforcement action taken should be entered on the database as and when it is taken.

### **When is payment due?**

The amount to be paid under a confiscation order must be paid on the date of the making of the confiscation order (s.11). If the defendant shows that this is not possible, he or she may be given a time to pay ("TTP") period of up to 3 months. That period can be extended upon application, for a further 3 months (6 months in total from the date of the making of the confiscation order). For further details see 'Set the time to pay' section in Chapter 3 above. The court must permit the prosecution to make representations prior to considering any application to extend the TTP period.

### **What sum is due?**

The value to be paid under the terms of the confiscation order will clearly be set out on the face of the order. There are however, some additional considerations to be borne in mind when enforcement action is required.

### ***Interest***

Interest is payable on the unpaid amount of the confiscation order to encourage prompt payment. If the confiscation order is not paid by the due date, the amount of interest is added to the confiscation order and is treated as if it were part of the order (s.12(4)).

The rate of interest is that specified in s.17 of the Judgments Act 1838 and is currently 8%.

Interest is not payable if an application to extend time to pay has been made by the defendant within the relevant period and has not been determined by the court (s.12(3)).

Interest is added to the sum due by operation of law and the Court has no discretion to waive payment: see *Hansford v Southampton Magistrates' Court* [2008] EWHC 67 (Admin).

### ***Voluntary satisfaction of the order by the defendant***

The defendant will normally be given the opportunity to satisfy the confiscation order voluntarily before enforcement action is pursued in the courts. There are many advantages to the offender in agreeing to make voluntary payment including:

- He will avoid liability to pay interest provided he pays before time to pay expires;
- He will avoid the risk of having to serve the default sentence;
- He will avoid the risk of having a receiver appointed over his assets; and
- As soon as full payment is made, any restraint order will be discharged (subject to any applications for the reconsideration of aspects of the confiscation order).

From the perspective of the prosecutor, voluntary satisfaction by the defendant results in the speedy enforcement of the confiscation order without the delays and expense involved in taking court proceedings.

Where a restraint order is in place the prosecutor will continue to be engaged in the process and have some degree of oversight by dealing with variations to the restraint order to permit the realisation of assets subject to it. A house sale, by way of example, will only be allowed subject to conditions ensuring it is sold for the best possible price to a bona fide purchaser and subject to an undertaking from the conveyancing solicitor to pay the net proceeds of sale directly to the enforcing magistrates' court in satisfaction of the confiscation order.

### **Who may enforce a confiscation order?**

The magistrates' court is responsible for the enforcement of a confiscation order however, where appropriate, and in accordance with the Service Level Agreement between the CPS and HMCTS signed in December 2017, CPS POC will become the lead enforcement agency.

In such cases, the prosecutor has an important role in enforcement by applying to the Crown Court for the appointment of an enforcement receiver to realise the defendant's assets, and/or to the Magistrates' Court for an enforcement hearing, so that the court can activate the sentence imposed in default of payment of the confiscation order.

## **Preliminary Steps**

Where a confiscation order is to be enforced by CPS POC, the prosecutor should take steps to determine the status of the order (whether there is an outstanding appeal; what if any monies have been paid and what the earliest date of release may be of the defendant if they are serving a sentence).

### ***Time to Pay Letter***

The prosecutor should then send a letter to the defendant or defendant's representatives indicating the preferred enforcement process (voluntary payment or application for receiver) and enclosing any relevant documents for signature (for example: authorities for accounts, policies, motor vehicles, jewellery).

The letter will inform the defendant that failure to satisfy the confiscation order by the due date and / or failure to cooperate the preferred enforcement process may lead to the activation of the default sentence. The debt will not be expunged after the default sentence is activated. It cannot be remitted and will increase due to the accrual of interest at the relevant rate. Enforcement action to realise assets will continue even after the default sentence is imposed.

The prosecutor should obtain confirmation of changes in the defendant's earliest release date and current location by emailing the Prisoner Release Service at [prisoner.location.service@hmps.gsi.gov.uk](mailto:prisoner.location.service@hmps.gsi.gov.uk). Where the defendant's earliest release date pre-dates the expiry of time to pay, the prosecutor should ensure that any enforcement action is completed before the defendant's earliest date of release, and preferably before the expiry of time to pay, so that the magistrates' court can issue a warrant of commitment in relation to any unpaid amount while the defendant is in prison.

### ***List an enforcement hearing in the Magistrates' Court***

At the request of the prosecutor, the Magistrates' Court should list an enforcement hearing to see why the default sentence should not be imposed and for the court to enquire of the defendant how they intend to pay their order. The prosecutor should supply the Court with copies of the relevant correspondence to and from the defendant showing its efforts to pursue funds.

The court, usually at the request of the prosecutor (where CPS POC are the LEA) can consider taking steps to enforce the confiscation order such as issuing payment orders, distress warrants, or activating the default sentence.

Once a default sentence has been imposed, it cannot be remitted and must be served in full, or until such time as the Confiscation order is satisfied, whichever is earliest (noting that part-payment of the order will lead to a pro-rata reduction in the sentence to be served). However, offenders committed to prison to serve their

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default sentences have the right to be released from custody unconditionally after serving half of the default term: see section 258 of the Criminal Justice Act 2003.

If the offender fails to attend the enforcement hearing, the justices only have the power to issue a warrant for his arrest if they are considering the activation of the default sentence. If the court is only considering the use of civil enforcement powers there is no power to issue a warrant: see *R (on the application of Rustim Necip) v City of London Magistrates' Court* [2009] EWHC 755 (Admin).

## Common Enforcement Tools

### ***Payment Orders (s.67)***

Section 67 makes specific provision for the Magistrates' Court to order money held by banks and building societies be paid into court in answer to confiscation orders in order to ensure that effective enforcement of orders is possible.

A Magistrates' Court may order a bank or building society to pay the money to the designated officer of the Court towards satisfaction of the confiscation order if the following conditions occur:

- money is held by a defendant in an account which he holds with a bank or building society; or
- money is held in a bank or building society account by another person and a determination of the defendant's interest in that money has been made under s10A; or
- money has been seized by a constable under section 19 of PACE 1984 and is held by a police force in an account which it holds with a bank or building society; or
- money has been seized by a customs officer under section 19 of PACE 1984 and is held by the Commissioners of Customs and Excise in an account which they hold with a bank or building society; and
- a confiscation order has been made against the defendant; and
- an enforcement receiver has not been appointed in relation to the money.

If the bank or building society fails to comply with such an order, the magistrates' court may order it to pay an amount not exceeding £5000 and this money will be treated as payment towards the confiscation order (see s.67(6)).

### ***Appointment of an Enforcement Receiver***

In circumstances where a defendant is unable or unwilling to realise assets, it is open to the prosecutor to apply for the appointment of an enforcement receiver. Receiverships are dealt with in Chapter 5 below.

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Regular contact should be maintained with the enforcement receiver and their regular reports considered in order to monitor their progress.

### ***Enforcement abroad – International Cooperation***

Realisable property is often held abroad. If a restraint order has been made in respect of 'all assets' or specifically those located abroad, a prosecutor can make a request by way of Mutual Legal Assistance (MLA) or where available, under the EU provisions of Mutual Recognition (MR) to have the UK restraint order registered and enforced in that other jurisdiction.

Where a confiscation order includes assets located in foreign jurisdictions, a similar request can be made under MLA or MR to register and enforce the UK confiscation order against those specified assets.

If the assets are sold by the requested country, the money raised from that sale may be returned in whole or in part (subject to either treaty obligations or an asset sharing agreement) but the whole sum raised by the sale of those assets will be applied to the outstanding confiscation order. To assist in that process a certificate should be obtained from the executing State confirming that the property has been sold, the date of sale and amount of the proceeds.

### **Enforcement – Other Key Issues**

#### ***The role of third parties***

In the course of confiscation proceedings, the Crown Court will determine the defendant's interest in property held by third parties, whether this property is held jointly, is a tainted gift, or is property otherwise held in the names of third parties.

Where that property is held by the defendant, any third parties who wish to claim an interest in that property can potentially be heard in the course of the confiscation hearing with the court empowered to make declarations about the extent of the defendant's interest under s.10A. Note that because the property must be in the hands of the defendant, s.10A does not extend to tainted gifts and is only intended for use in relatively straightforward cases.

Where such declarations are made, they will be binding on subsequent proceedings under POCA. They are not binding on any other court, for example, the family court.

Where no such declarations are made and third parties are not heard, either because the issues were not known to the parties at the material time or the court chose not to exercise its discretion to deal with the issues at that stage, the Court at the confiscation stage will only be tasked with determining the amount of the defendant's free property, in order to calculate the recoverable or available amount in which to make an order for a sum of money and will not be concerned with the

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property itself. Any determinations as to the defendant's interest at that stage cannot be binding on third parties, as they were not parties to the proceedings (see *Re Norris* [2001] UKHL 34).

Subsequently, where third party assets are restrained and/or at the enforcement stage, action is taken by a receiver to realise property in which third parties may be claiming an interest, the third parties are entitled to have their claims determined by a court (see '*Third Parties and Receivership Applications*' in Chapter 5 below).

### ***The matrimonial home***

A confiscation order is an order to pay a sum of money and may be enforced against any property held by the defendant, even if some or all of that property was legally obtained. Accordingly, the matrimonial home may be made subject to an order for possession and sale, if the defendant fails to pay. Subject to the operation of section 31 of the Family Law Act 1996, this may result in the eviction of other family members.

The court may not, however, order the realisation of any share in the matrimonial home owned by the spouse or partner, unless it can be shown that the share was a tainted gift (see *Buckman* [1997] 1 Cr.App.R.(S.) 325).

It sometimes occurs that the spouse of an offender petitions for divorce and seeks the transfer of the matrimonial home into his or her sole name in ancillary relief proceedings. Where this occurs, it may be necessary for the CPS to seek leave to intervene in the financial remedies proceedings. The family court will take into consideration the innocent spouse's knowledge and complicity in the criminality when it assesses how the matrimonial home will be distributed, *Webber v Webber and CPS* [2006] EWHC 2893.

### **Inadequacy of available amount**

If the defendant, enforcement receiver or the prosecutor applies to the Crown Court to vary the order the court must calculate the available amount. If it finds that the available amount is inadequate to pay the amount outstanding under the confiscation order the court may substitute the amount that it thinks just (s.23).

The court must disregard any inadequacy that it believes is attributable in whole or in part to anything done by the defendant to preserve property held by the recipient of a tainted gift in order to prevent it from being used to pay the confiscation order.

### **Discharging the confiscation order**

In exceptional circumstances if less than £1,000 remains to be paid under the confiscation order and the designated officer applies to the Court for the discharge of the order, the Court may consider whether the available amount is inadequate.

If the Court finds the available amount to be inadequate to meet the amount remaining to be paid, and if this is due to fluctuations of currency exchange rates for foreign currency or due to any other reason specified by the Secretary of State, the Court may discharge the confiscation order.

If only a small amount remains outstanding (£50.00 or less) and the designated officer applies to the Court for the discharge of the order, by virtue of s.25, the Court may discharge the confiscation order.

## **Chapter 5 - Receivership**

### **The Role of Receivers**

Receivers have an important role in enabling the CPS to meet the strategic aims set out in the CPS Asset Recovery Strategy by managing assets prior to the making of a confiscation order and by realising assets to satisfy that order when it is made, in circumstances when suspects or defendants cannot, or will not, deal with their assets in a way that is consistent with their restraint or confiscation orders.

### **Management Receivers**

#### ***Introduction***

A management receiver is an officer of the court appointed on the application of the prosecutor to manage assets before the making of a confiscation order. A restraint order must be in place for a management receiver to be appointed, however, the application may be made at the same time as the application for the restraint order. Applications for management receivers will be dealt with by CPS POC prosecutors and all enquiries should therefore be directed to the Pre-Enforcement Team of CPS POC for consideration.

Management receivers will be considered when the defendant's assets require active management *and* the management receiver is able to recover his costs from the assets under management. For instance, where a defendant has a business which he cannot manage as he is in custody, a management receiver may be able to manage that business and prevent the depreciation and/or dissipation of assets which can thereby be preserved for any future confiscation order which may be made. Management receivers can be appointed to carry out a scoping of the assets and to provide an initial report with a proviso that their appointment will be continued only once the report has been considered.

A third party may be forced to give possession of the defendant's "realisable property" to the management receiver but must first be given a reasonable opportunity to make representations to the court. In all cases where a management

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receiver is considered, very careful attention must be paid to assets held by third parties and to whether or not these assets should be included in the management receivership estate. Where such assets cannot be clearly evidenced to be the defendant's or the defendant cannot be shown to have an interest in those assets, these must not be included in the management receivership estate.

### **Overseas assets**

Prosecutors should consider whether it would be appropriate to seek an ancillary order requiring a defendant to repatriate their assets, or to seek Mutual Legal Assistance (MLA) or recognition of a domestic restraint order under Mutual Recognition (MR) to freeze overseas assets, rather than seeking the assistance of a management receiver. Most overseas jurisdictions will not recognise the authority of the court appointed receiver to deal with assets within their jurisdictions in the absence of a signed authority from the defendant or third party in whose name the assets are held.

### **Costs**

The costs of the MR are paid from the assets that he is managing (see s.49(2)(d)), even where the defendant is ultimately acquitted. The CPS will not generally provide receivers with an indemnity as to costs in respect of contracts awarded under the current Framework Agreement.

In the case of *Barnes v Eastenders & the CPS* [2014] UKSC, the Supreme Court identified a liability for prosecutors to pay a MR's fees and disbursements based on a total failure of consideration in the event that it is subsequently established that property included within the terms of a management receivership order should not have been included and there was no reasonable cause for regarding the assets as those of the defendants.

## **Enforcement Receivers**

### ***Introduction***

An enforcement receiver is an officer of the court appointed primarily to enforce the defendant's confiscation order, i.e. to realise the defendant's assets in satisfaction of the confiscation order. The lawyer will seek the appointment of an enforcement receiver in the following cases:

- The defendant agrees that the appointment of an enforcement receiver is necessary in order to realise his assets (because, for example, it will be difficult for the defendant to do so himself as he is in prison); or
- Where a defendant will not voluntarily satisfy the confiscation order; or
- The court is unable to trust that the defendant would realise the assets for the best possible price/market value.

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Although enforcement receivers are appointed after an application by the prosecution, they are independent officers of the court and primarily owe their professional obligations to the court.

Enforcement receivers' fees are paid by the Court Service. These funds are drawn from monies paid towards the individual's confiscation order.

An enforcement receivership order is usually made on notice to the defendant and affected parties. It is only in exceptional circumstances that an application to appoint an enforcement receiver will be made without notice to the parties (see Part 33.56(2) CrPR 2015). An application for the appointment of an enforcement receiver can be made where the following three conditions are satisfied:

- The court has made a confiscation order;
- The confiscation order has not been satisfied; and
- The confiscation order is not subject to appeal.

If a management receiver is already appointed to manage the defendant's assets, the CPS will apply to court to convert the management receivership to an enforcement receivership.

The lack of a restraint order does not preclude the appointment of an enforcement receiver, however, when considering their appointment the prosecutor should also consider whether making the restraint order application at the same time.

### ***The use of in-house receivers***

The appointment of a CPS lawyer as an in-house receiver may be considered if the nature of the assets is such that any risks arising may be adequately managed without the need for insurance. Typically, this will restrict the use of in-house receivers to enforcement action in respect of bank accounts in third party names. Under POCA, in-house receivers may claim for disbursements, but not their costs.

### ***Overseas assets***

Generally, the CPS will seek Mutual Legal Assistance (MLA) or a request to recognise and enforce the domestic confiscation order under Mutual Recognition (MR) to realise overseas assets rather than make an application to appoint receivers, particularly where the CPS has sought MLA/MR of the relevant jurisdiction for restraint and/or the provision of evidence.

### ***Fees and disbursements***

Monies realised by the enforcement receiver are paid into the relevant magistrates' court (subject to payments made under s.54(2)(a)&(b)). The defendant is then given

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credit for the costs that are paid by the magistrates' court to the ER. The CPS will not provide an indemnity to the ER for fees and disbursements in respect of appointments under the current Framework Agreement.

The amount of an ER's fees will generally be based upon the cost of the receiver's time for the work done to realise the assets subject to the receivership. The type of asset to be realised, including its value, condition and location will also be relevant. There will usually be disbursements and any third party litigation can substantially add to the costs.

In the event that there is disagreement as to the amount of a receiver's fees and disbursements, the court may be asked to order that the costs of the fees and disbursements are taxed.

### **Applications to appoint a Receiver**

Applications for the appointment of receivers will be dealt with by CPS POC.

The appointment of a management receiver is made under s.48 and under s.50 for an enforcement receiver. The procedure is similar for both applications.

Part 33.56(6) CrPR 2015 requires that, unless the application to appoint the receiver is made *ex parte*, the application and witness statement must be lodged with the Crown Court and served on the defendant, any person who holds realisable property to which the application relates; and any other person whom the applicant knows to be affected by the application at least seven days before the date fixed by the court for hearing the application, unless the Crown Court specifies a shorter period.

The witness statement should give the grounds for the application, details of the proposed receiver and, to the best of the witness's ability, full details of the realisable property in respect of which the applicant is seeking the order and specify the person holding that realisable property: see Part 33.56(3) CrPR 2015.

Hearsay evidence is admissible in receivership applications however, Part 33.39 CrPR 2015 provides that no notice need be served identifying the hearsay statements and of the intention to rely upon hearsay evidence in *inter partes* hearings. Section 2(1) of the Civil Evidence Act 1995 does not apply to restraint and receivership applications.

Prosecutors applying for management receivership orders must comply with the "Capewell Guidelines" laid down by the Court of Appeal in *Capewell v Customs and Excise Commissioners* [2005] 1 All ER 900. In particular

1. *Within the witness statement in support of the application to appoint a management receiver, the prosecutor should set out the reasons the*

*prosecutor seeks the appointment of a receiver, and what purpose the prosecutor believes the receivership will serve.*

2. The witness statement in support of the application should also give an indication of the type of work that it is envisaged the receiver may need to undertake, based on the facts known to the prosecutor at the time of the appointment.
3. The witness statement should specifically draw to the Court's attention the proposition that the assets over which the receiver is appointed will be used to pay the costs, disbursements and other expenses of the receivership (even if the defendant is acquitted or the receivership is subsequently discharged).
4. The letter of acceptance of appointment from the receiver, which must be exhibited to the applicant's witness statement, should contain the time charging rates of the staff the receiver anticipates he may need to deploy.
5. In appropriate cases, where it is possible, and this will not be in every case, the receiver should give in his letter of acceptance an estimate of how much the receivership is likely to cost.
6. The prosecutor's witness statement in support of the application should inform the Court of the nature of the assets and their approximate value (if known) and the income the assets might produce (if known).
7. If the prosecutor or receiver is unable to comply with any of the above requirements the prosecutor should explain the reasons for the failure in the prosecutor's application to the court and the matter will be left at the discretion of the court."

A draft receivership order must accompany the witness statement.

## **Receivers' Powers**

The receiver gets his authority to act from the court. This is set out in the order appointing him (sections 49 or 51). It is extremely important that the order appointing a receiver is drafted so as to give the receiver the powers that he needs to operate to manage and/or dispose of the assets.

## **Third Parties and Receivership Applications**

### ***Management Receivers (s.49(8)&(8A))***

Where an application for the appointment of a management receiver is made (including on an *ex parte* basis) the court must not confer the following powers before affording any affected third parties to make representations to the court:

- a) to manage or otherwise deal with property;
- b) to realise so much of the property as is necessary to meet the receivers' remuneration or expenses;

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Similarly, the court may not order a person holding an interest in realisable property to which the restraint order applies to make to the receiver such payment as the court specifies in respect of a beneficial interest held by the defendant or the recipient of a tainted gift, or (on the payment being made) order the transfer, grant or extinguish an interest in the property unless affected third parties have been given the opportunity to make representations to the court.

(Note – these restrictions do not apply to property which is perishable or ought to be disposed of before its value diminishes.)

### ***Enforcement Receivers (s.51(8),(8A)&(8B))***

As outlined above, an application must be served upon all those likely to be affected by it and such third parties have a right to be heard in the course of the application. However, where a third party wishes to make representations, they cannot put forward anything that is inconsistent with a determination made under section 10A, unless

- a) the person was not given a reasonable opportunity to make representations when the determination was made and has not appealed against the determination, or
- b) it appears to the court that there would be a serious risk of injustice to the person if the court was bound by the determination;

Should either circumstance in paragraph (a) or (b) apply, the determination under s.10A does not bind the court.

### ***Resolution of third party interests (where no relevant s.10A determinations made)***

The court may order anyone who has possession of realisable property to give it to the receiver and may order anyone who holds an interest in realisable property to pay the receiver the amount of any interest held in the property by the defendant or the recipient of a tainted gift. Once that payment is made, the interest of the defendant or the recipient of the tainted gift in the property is extinguished. Before such orders are made, Part 33.56(6) CrPR 2015 requires that the defendant or the recipient of the gift must be given notice of the hearing and will, therefore, be able to make representations to the court.

The defendant, or the recipient of a tainted gift, may apply to the court for an order that any property that cannot be replaced should not be sold. Such an order made under section 69(4) may be revoked or varied.

Section 62(3) provides that any person affected by the action or proposed action of a receiver may apply to the Crown Court for an order giving directions as to the

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exercise of the receivership powers. The court may make such order as it believes appropriate.

Any person affected by an order appointing or giving powers to a receiver may also apply to the Crown Court to vary or discharge the order by virtue of section 63(1)(c).

Section 69(3) provides that in exercising the powers given to the court and/or to a receiver, the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him.

In the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift.

In a case where a confiscation order has not been made against the defendant, property must not be sold if the court so orders under subsection (4).

## Appeals

Prosecution appeals in respect of receivership orders may be made with leave in the following circumstances:

- Section 65 (1) to the Court of Appeal in respect of the refusal of the Crown Court to appoint and/or give powers to a receiver;
- Section 65 (2) (a) to the Court of Appeal in respect of an order made by the Crown Court to appoint and/or to give powers to a receiver;
- Section 65 (3) to the Court of Appeal where on a further application by the prosecutor, the Crown Court refuses to make an order;
- Section 65 (4) to the Court of Appeal where on a further application the Crown Court has made an order; and
- Section 66 to the House of Lords in respect of a decision of the Court of Appeal.

The appeal procedure may be found in a combination of POCA, the Criminal Procedure Rules 2015 and in the Proceeds of Crime Act 2002 (Appeals under Part 2) Order 2003 (SI 2003 No. 82).

Notice of Appeal should be served within twenty-eight days, although application can be made for an appeal out of time.

Any decision as to whether a prosecution appeal should be lodged should be taken by the relevant Unit Head (CPS POC).

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In addition, the defendant and/or any person affected by the appointment or powers given to a management receiver; by the grant of powers to the receiver; by the refusal or the giving of directions; or by a refusal to discharge or vary the order, may appeal with leave to the Court of Appeal. Any party appearing in an appeal before the Court of Appeal may appeal to the Supreme Court.

## Useful Sources

[Revised National Best Practice on Confiscation Order Enforcement](#) published November 2013 (originally issued with Home Office Circular 43/2003 and reissued with Home Office Circular 27/2005).