CIVIL RECOVERY – Part 5, Proceeds of Crime Act 2002

Introduction

Part 5 of the Act deals with two distinct schemes. The first scheme,[1] (which came into force on the 24th February 2003)[2] enables the Director of the *Asset Recovery Agency*[3] to recover in civil proceedings, property which is or represents property obtained through unlawful conduct. "Unlawful conduct" is defined by the Act [s.241].[4] "Property" means property of all types including 'money' [section 316(4)] irrespective as to whether it is situated in the United Kingdom or abroad. The property must have been "obtained through unlawful conduct" [see section 242 and section 241].[5] It will be seen that by section 304(1) "property obtained through unlawful conduct" [section 242] is also prima facie "recoverable property". Thus, where a thief steals a valuable painting, the painting is "property obtained through unlawful conduct" [section 304] and it is recoverable from him if he retains it. Frequently 'original property' will have passed through other hands before action is taken by the Director. Sections 304-310 explain the extent to which the Director can trace original property, or converted property, into the hands of others in the hope of recovering property from them. By section 308(1), property is deemed no longer to be recoverable from a person who acquires it in good faith, for value, and without notice that it was recoverable property. There are limited safeguards: for example, even if property is strictly speaking "recoverable", the court has a discretion not to make a recovery order if it would not be just and equitable to do so in circumstances where a person acquired property in good faith (albeit not for value) but that person "took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it…[and] he had no notice that the property was recoverable" [s.266(3),(4)]. Again, the Act provides that a recovery order "may not make" – presumably 'must not make' - in a recovery order, a provision which is incompatible with the HRA 1998 [s.266(3)(b)]. This might be a particularly important safeguard for third parties who would otherwise suffer hardship were a recovery order to contain a provision adverse to their interests. Note that the Director should not start proceedings unless she/he reasonably believes that the value of recoverable property is at least £10,000

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1 Part 5, chapter 2.

2 S.I. 2003/120; and note SI 2002/3015 in relation to ss.240-242 inclusive.

3 The Director is the relevant enforcement authority in England and Wales.

4 Conduct that is contrary to the criminal law of any part of the United Kingdom is "unlawful conduct". This seems to mean that conduct that is unlawful, for example in Scotland but not in England, would nevertheless be "unlawful conduct". Furthermore, conduct which (a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part, is also unlawful conduct. This provision envisages a dual criminality test to the extent that conduct must be unlawful where the acts were performed, as well as being unlawful if committed somewhere within the United Kingdom (e.g. England, even if the conduct would not be unlawful in Scotland). It is for the court, on a balance of probabilities, to resolve issues arising under section 241.

5 Property will be obtained 'through unlawful conduct' if the respondent acquires it as a fruit of that conduct (e.g. stealing a painting) or 'in return for the conduct' (e.g. X was given cash to drive a lorry loaded with cannabis from Spain to the United Kingdom). It is immaterial that the person who obtained the property did not perform the 'unlawful conduct', (e.g. a painting obtained by X was stolen on his behalf). There is an argument for saying that the definition of property obtained through unlawful conduct is narrower than the definition of 'benefit' for the purposes of Part 2 of the Act. Thus section 76(4) states that a person 'benefits from conduct if he obtains property as a result of or in connection with the conduct' [emphasis added]. The proceeds from the sale of a book that explained how the author committed a high-value armed robbery might be a benefit for the purposes of section 76(4), but arguably not "property obtained through unlawful conduct".

[SI 2003/175], and note the 12-year time limit imposed by s.288 of the Act amending s.27 of the Limitation Act 1980. Some may be surprised to see that the threshold for civil recovery under Part 5 chapter 2, is set so low – perhaps fuelling concerns that the targeting priorities of ARA might become skewed in favour of pursing so-called 'soft targets', rather than expending high sums targeting 'big fish'. That said, it is the expressed intention of the Director to use the powers of ARA in a fair and proportionate way.

The second scheme (which came into force on the 30th December 2002)[6] is much simpler, and enables ill-gotten *cash* to be recovered in the Magistrates' Court (in England and Wales): see Chapter 3 to Part 5 of the Act [see s.240(1)(b), and ss.289-303]. Note that proceedings (in England and Wales) are initiated not by the Director, but by the Commissioners of Customs and Excise, or by a constable. These provisions replace and expand a scheme originally enacted under the Criminal Justice (International Co-operation) Act 1990 and later under Part II of the Drug Trafficking Act 1994. Note that chapter 3 includes cash intended to be used for the commission of an unlawful act [see section 240(1)(b)] and ss. 289(1), (2); s.294(1), (2); s.298(2)] – i.e. cash as an instrument of unlawful conduct, including the proposed use of cash abroad if the conduct contemplated would be unlawful somewhere in the United Kingdom and in the State where the conduct was to be performed: see section 241(2).

Note that civil recovery of property other than just cash (chapter 2) is limited to property "obtained through unlawful conduct", and does not extend to recovering property intended to be used as an instrument of crime, e.g. a boat intended to be used to smuggle controlled drugs, or a house intended to be used to produce amphetamine [see s.242, and s.241 for the definition of 'unlawful conduct'].

Neither scheme is triggered by the conviction of any person. The Government is of the view that both schemes are manifestly civil in nature (including for the purpose of the Human Rights Act 1998) and hence the reason why the two schemes appear together in Part 5 of the Act.

Applications for the civil recovery of property (other than just cash) are to be heard in the High Court (namely the Administrative Court) because such cases might be complex, involving many parties.

Civil recovery of property - other than just cash

Background

Variously styled 'civil forfeiture',[7] 'asset recovery'; 'confiscation without conviction', and now 'civil recovery', the new powers are intended to provide an alternative method of tackling crime – particularly organised crime. The Government has made no secret of the fact that current asset recovery laws following conviction, have produced disappointing results: see para.4.2 of the HOWGC, 3rd Report 1998. Relatively few confiscation orders under the Drug Trafficking Act 1994 and Part VI of the Criminal Justice Act 1988 have been made 'against major criminals with substantial assets' [para.4.3, ibid]. The *Performance and Innovation Unit (*Cabinet Office) supported the introduction of 'civil forfeiture' on the grounds that it would take away from individuals, property that 'was never legally owned by them' or which is intended for use in committing crime, and "open up a new route to tackling the assets of those currently beyond the reach of the law, by targeting the activities of organised crime heads who are remote from crimes committed to their order, yet who enjoy the benefits" [para.5.2 of the P.I.U. Report [8]]. The Government wants to make the message clearer than

6 See S.I. 2002/3015.
7 Home Office Working Group on Confiscation; Third Report, November 1998.
8 see *Recovering the Proceeds of Crime*, June 2000

ever that "crime does not pay" [see the speech of the Attorney General, *Hansard*, May 13 2002, HL., col. 54].

Critics of civil recovery schemes tend to voice a mix of ideological and practical concerns, of which the most frequent are (i) that there will be cases where a recovery order will taint the reputation of a respondent almost as much as if a confiscation order was made against him, namely, where there is a finding that his unlawful conduct generated the recoverable property, (ii) the civil process should not be used as a way of avoiding the rigours of due process in the criminal law, (iii) if defects exist in the rules of evidence and procedure in the criminal law that make it more difficult to prosecute offenders to conviction, then the solution is to change the rules of the criminal law; (iv) major criminals will not 'stand around waiting for an interim receiving order to be served on them' [see Lord Lloyd of Berwick, Hansard, May 13 2002, HL., cols. 65 to 69]. The Government's response is that "the experience in Australia, in Italy, in Ireland…and in the United States is that this process is an effective and important one; and indeed, that it does work" [per the Attorney General, *Hansard*, May 13 2002, HL., col.74/75]. Whether Part 5 'works' begs the question as to how success, or lack of it, is to be measured. The value of assets seized might be one indicator, but the rate of offending or the availability of illegal controlled drugs, might be better ones.

International developments

The effectiveness of civil recovery is linked to the extent to which other States adopt similar legislative regimes. Unlawfully acquired property that might be recovered by courts in one State, might be 'safely' held in another. Mutual recognition of foreign judgments in civil or criminal cases requires some harmonisation/approximation of laws. Accordingly, it is highly likely that other States will introduce stronger civil recovery laws.

Civil recovery laws in the USA are well developed, complex, and have existed for many years.

In Ireland, the *Proceeds of Crime Act 1996* empowers the High Court to restrain property that is or represents the proceeds of crime and which is in the possession or control of any person [section 2] and shall only be released if the claimant satisfies the court that the property should be released [section 3]. Note that the interim order restraining the property, can only be made if the Court is satisfied (i.e. on a balance of probabilities) that the specified property is directly, or indirectly, the proceeds of crime.

In New South Wales, a civil forfeiture regime exists by virtue of the *Criminal Assets Recovery Act 1990* [CARA], but that Act is aimed at persons against whom it is proved (to the civil standard) that he/she committed a "serious offence" within the previous 6 years. All of that person's property is liable to forfeiture unless he/she proves it was lawfully acquired. Australia has recently passed a federal criminal/civil recovery regime along CARA lines: *Proceeds of Crime Act (Aus) 2002* [note for example ss.48 and 49]; *and see "Restraining the Global Threat"* C. D. Davey.

Although chapters 1 and 2 to Part 5 of the Act more closely resemble the Irish scheme than Australian/USA legislation, it is best not to attempt to make direct comparisons [but it is interesting to compare the *Proceeds of Crime Act 2002* with a private member's Bill of 2002 in the State of Queensland: *Civil Forfeiture of the Proceeds of Crime*. Part 5 of the *Proceeds of Crime Act 2002* (UK) is intended by Government to be one component in a joined-up strategic approach towards the confiscation of ill-gotten assets.

Prosecution v. Civil Recovery

Deciding whether to pursue civil recovery or to prosecute a 'target' will be the subject of detailed notes for guidance to ensure that priorities of law enforcement are not distorted, or that civil recovery becomes a 'soft option' – ironically for those most culpable and 'untouchable' in the criminal courts. In the House of Lords, the Attorney General (Lord Goldsmith) wanted to emphasise "the hierarchy" [Hansard, 13.5.02; col. 72]. He said:

> "First, I want to emphasise, therefore, the hierarchy. The prosecution of offences will remain the priority in all cases….It is very important to note that the director will have no power to prosecute. The power to prosecute will be the power of the existing prosecution agencies in England and Scotland. It is clear from the hierarchy which has been identified that the prosecution of offences will remain the priority in all cases. That is not intended as a soft option. For example, it is made clear in the draft guidance that it would not be a proper exercise of the prosecutorial discretion—there are two tests for prosecution, the evidential and the public interest test—to say that in the public interest there is no need to prosecute because there is the alternative of civil recovery.
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> However, in what kinds of cases may civil recovery take place? One example would be where the law enforcement authority has carried out a criminal investigation and consulted the prosecuting authority and a decision not to institute criminal proceedings has been taken applying normal evidential and public interest criteria. I acknowledge that that would be such a case, but I emphasise that the decision not to prosecute would be taken without regard to whether civil recovery may be available.
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> But there are many other examples which do not even touch on the possibility that the respondent is actually himself or herself being accused of criminal conduct; where the person suspected of the unlawful conduct through which property was obtained is not available because that person is dead or abroad and there is no reasonable prospect of securing their extradition. That is even before any advice has been given to such people to leave the jurisdiction.
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> A related example would be if a person had been convicted of an offence abroad, for example, for drug-related crime, but had recoverable property in the United Kingdom. The important point is that law enforcement and prosecution authorities will ensure that the possibility of bringing criminal proceedings has been fully considered in every case."

Many of the concerns voiced about the application of civil recovery powers, are tied in with concerns about due-process, and protections that exist in criminal proceedings that might be lost if proceedings are civil in nature. The Government believe that Part 5 is HRA compliant. However, Hansard reveals that some senior figures in the House of Lords were not confident that all aspects of Part 5 are ECHR compliant. For example, property obtained through unlawful conduct is "recoverable property" for the purposes of Part 5 [section 304(1)] and section 316(3) reads that for the "purpose of deciding whether or not property was recoverable at any time (including times before commencement) it is to be assumed that [the Act] was in force at that and any other relevant time". This means that property is recoverable whether it was obtained before or after the Act came into force. If civil recovery is a 'penalty', for the purposes of Article 7 of the HRA 1998, then the argument runs that the 'penalty' imposed by way of a civil recovery order will be greater than the one applicable at the time the offence was committed: see the speeches of Lord Kingsland, and Lord Goodhart, *Hansard*, May 13 2002, HL., col. 59; and Lord Berwick ibid., col.65. However, the Government advanced a strong case in support of the view that Article 7 is not engaged [see Lord Goldsmith *Hansard*, May 13 2002, HL., col.72]. The civil recovery process focuses on the origin of property and not on the culpability of the person holding it. Secondly, civil actions to recover the proceeds of crime are not new to the law of the United Kingdom. Civil

claims based on allegations of fraud do not always result in a finding that the process is 'criminal', or that the order made by the court constitutes a 'penalty' for the purposes of the Human Rights Act 1998. The Attorney General gave examples of cases that could be pursued by way of civil recovery, namely, prosecutions that collapsed due to witness intimidation or other procedural/evidential reasons [see *Hansard*, May 13 2002, HL., col.77]. There is no question of double jeopardy because the same property cannot be recovered twice: see *Hansard*, May 13 2002, HL., col.79.

Power of the Director to investigate the origin of property.

By virtue of Part 8 of the Act, the Director has power to carry out a 'civil recovery investigation' [see section 341(2) and see S.I. 2003/334][9], which means that s/he may ascertain whether property is recoverable, who holds it, the whereabouts of that property, and the extent of that property. Significantly, section 341(3) states that an investigation ceases in cases where "an interim receiving order applies to the property in question" [section 341(3)(b)]. In other words, before the Director successfully applies for an interim receiving order, the Director may investigate matters relating to recoverable property but thereafter, the Director loses those powers and the interim receiver takes over those tasks under the supervision of the Court: see section 255.

Initiating a Civil Recovery Action

The Director of the Asset Recovery Agency (the 'enforcement authority') may initiate civil recovery proceedings in the High Court against any person whom the Director "thinks" holds "recoverable property" [s.243]. The claim is made to the Administrative Court.[10] "Recoverable property" is defined by section 304 to mean property obtained by a person "through unlawful conduct" i.e. "by or in return for [unlawful conduct as defined by section 241]": see section 242.

The Director may take steps to recover property in two ways: either by serving a Claim Form for a *recovery order* under s.243, or by applying for an '*interim receiving order*' under s.246. Experience may show that the latter route is most often used by the Director.

If the Director applies for an Interim Receiving Order, the application must be made to a High Court judge in accordance with Part 23 of the CPR.[11] An application may be made 'without notice' [s.246(3)] if the Director considers that s/he must act swiftly to avoid recoverable property being moved out of the jurisdiction, or concealed.[12] The Director may apply for an interim receiving order before, or after, serving a Claim Form on the respondent, and on other persons who hold 'associated property' [see s.243]. The procedure for making an 'interim receiving order' under the Act builds on the long experience of the High Court in respect of applications for restraint orders under earlier confiscation laws (notably under the Drug Trafficking Offences Act 1986, the Drug Trafficking Act 1994, and Part VI of the Criminal Justice Act 1988), and in respect of applications for *Mareva* injunctions. The court has discretion to make an interim receiving if it is satisfied that the conditions set out in s.246(5) and (6) are met.[13] The Practice Direction make clear that "Part 69 (court's power to appoint a receiver) and its

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9 See also Code of Practice re investigations: *http://www.homeoffice.gov.uk/proceeds/code_of*

10 See Practice Direction, 2.1

11 See Practice Direction, 5.1

12 See Practice Direction, 5.2

13 "(5) The first condition is that there is a good arguable case-
(a) that the property to which the application for the order relates is or includes recoverable property, and

practice direction apply to an application for an interim receiving order with the following modifications: (1) paragraph 2.1 of the practice direction supplementing Part 69 does not apply; (2) the Director's written evidence must, in addition to the matters required by paragraph 4.1 of that practice direction, also state in relation to each item or description of property in respect of which the order is sought (a) whether the property is alleged to be (i) recoverable property; or (ii) associated property, and the facts relied upon in support of that allegation; and (b) in the case of any associated property (i) who is believed to hold the property; or (ii) if the Director is unable to establish who holds the property, the steps that have been taken to establish their identity; and (3) the Director's written evidence must always identify a nominee and include the information in paragraph 4.2 of that practice direction."

If the Director wishes to initiate proceedings for a *civil recovery order*, then s/he must do so using the Part 8 CPR procedure.[14] Particulars of Claim may be served subsequent to service of the Form [s.243(4)]. If the Director commences proceedings by way of a Claim Form, the form must (1) identify the property in relation to which a recovery order is sought; (2) state, in relation to each item or description of property (a) whether the property is alleged to be recoverable property or associated property; and (b) either (i) who is alleged to hold the property; or (ii) where the Director is unable to identify who holds the property, the steps that have been taken to try to establish their identity; (3) set out the matters relied upon in support of the claim; and (4) give details of the person nominated by the Director to act as trustee for civil recovery in accordance with section 267 of the Act.[15]

Whichever route the Director takes, the object is ultimately to persuade the High Court to make a "recovery order" under section 266 in respect of "recoverable property".

Property may remain 'recoverable property' even if it passes into the hands of another e.g. a money launderer [consider section 304(2)] but it will not be recoverable if one of the exceptions apply (e.g. a person who bought the property in good faith without notice of the unlawful conduct, see section 308).

Frequently, 'recoverable property' will be mixed with the legitimate interests of third parties. For example, freehold land might be purchased by a landlord using his proceeds of unlawful conduct, but an innocent third party might have bought a tenancy unaware of the history of the landlord. In this situation, the proprietary interest of the third party is "associated property" [defined by section 245] - the value of which is not "recoverable property'. The Act therefore distinguishes between the interests that are tainted (and thus recoverable property) and interests that were innocently acquired (but which are associated with the recoverable part of the property). The practical relevance of property being treated as 'associated property' is that the Director may take action in respect of the entirety of the property, but ultimately, the value of 'associated property' is not recoverable, and some way will have to be found to reflect that fact e.g. payment equal to the value of the 'associated property'.

The Director might wish to apply to the Court for orders as to the disposal or use of the property under a 'recovery order', whilst endeavouring to safeguard the interests of the person holding 'associated property'.

(b) that, if any of it is not recoverable property, it is associated property.

(6) The second condition is that, if-

(a) the property to which the application for the order relates includes property alleged to be associated property, and

(b) the enforcement authority has not established the identity of the person who holds it,

the authority has taken all reasonable steps to do so."

[14] See Practice Direction, 4.1

[15] See Practice Direction, 4.2, but note the wording of section 243(3).

Purpose of an "Interim Receiving Order"

The purpose of an interim receiving order is to freeze both 'recoverable property' and 'associated property', and therefore it makes obvious sense for the court to prohibit any person who holds an interest in the property from dealing with it (ss.304 to 310, chp.4; and s.242). This is subject to "exclusions" ordered by the court pursuant to section 252(2)-(5). Typical exclusions relate to assets released to meet 'reasonable living expenses', or 'to carry on any trade, business, profession or occupation'. The court has to strike a balance between the right of the Director to recovery the proceeds of crime, and protecting the interests of persons who hold an interest in the relevant property. At this stage, the court has not made an express finding that the property was obtained through unlawful conduct.

For example, the respondent holds the freehold interest in a house but s/he has let out rooms to third parties. In such a case, the tenancies are examples of 'associated property', and at some stage the court may be asked to make orders that enable the Director to recover the value of the 'recoverable property' whilst preserving (if possible) the value of the 'associated property' of third parties. As a protective measure, an 'interim receiving order' will freeze both 'recoverable property' and 'associated property'. Given the hardship that such orders may cause, the High Court must be satisfied that the conditions in s.256(5) and, if necessary s.256(6) are satisfied. The latter subsection concerns those who hold 'associated property': the Director must take all reasonable steps to identify those who hold such property before applying for an interim receiving order.

At the time an interim receiving order is made, there may be collateral legal proceedings in existence or taken in respect of the property. This has been problematic in previous confiscation legislation where, for example, the wife of a respondent charged with a criminal offence, is pursuing a divorce and seeks property orders in respect of restrained assets: *HMCE v. MCA* [2002] EWCA Civ 1039 (22nd July 2002, CA). The issue is whether the Court must preserve assets for the purpose of satisfying a confiscation order even if that might defeat orders that would otherwise be made in favour of a third party. The effect of section 253 is to give the High Court, and a court in which collateral proceeds exist, discretion to stay or to allow collateral proceedings to continue. What is not entirely clear is what should happen in the event that courts conflict as to whether proceedings should be stayed or continued.

Powers of an Interim Receiver

The interim receiver must focus on matters set out in section 247(2), namely, whether property that is the subject of the order is 'recoverable property', and whether there is more recoverable property in existence, and if so, to ascertain who holds it. He/she must act with the object of 'securing the detention, custody or preservation of the property to which the order applies'. The phrase 'preservation of the property' may in practice be synonymous with 'preserving the value of the property'. By virtue of Para.5 to Sch.6 of the Act, an interim receiver has the power to manage property and to sell assets 'before their value diminishes'.

It follows that the interim receiver is not merely required to manage recoverable property, but has an investigative role too.

By schedule 6 to the Act, an interim receiver has wide powers including the power to 'obtain information', and (controversially) 'to require a person to answer any question' subject to the protections in Sch. 6, para.2, and to 'manage any property' [sch.6, para.5].

The power to compel a person to answer questions under Sch.6, para.2, is far reaching. A person must answer questions unless a court makes orders regarding matters subject to legal professional privilege

[see para.4]. Rules restricting the disclosure of information will not spare the interviewee from answering questions [see para.2(2)]. Answers may not used against him in criminal proceedings [para.2(3)] unless the interviewee is prosecuted for perjury, or where in other criminal proceedings he gives evidence inconsistent with his answer to the receiver [para.2(4), (5)]. There is no right against self-incrimination under sch.6 para.2, in respect of civil proceedings.

Managing property includes selling, or disposing of assets 'which are perishable or which ought to be disposed of before their value diminishes' [para.5(2)(a)]. Thus, a receiver may sell perishable goods or goods that significantly depreciate over time e.g. cars, electrical goods such as high value computers. Problems are likely to be encountered where property is jointly owned but the receiver wishes to dispose of property in order to maintain its value. In such a case, a third party who holds 'associated property' may apply to the court under section 251 for directions as to the exercise of the interim receiver's functions and/or make application under section 254 for an exclusion of property on the grounds that his interest/share is not recoverable.[16] However, it will be seen that although the court does have power to exclude non-recoverable property this is subject to court being satisfied that the right of the Director to recover 'recoverable property' will not be prejudiced: section 254(2).

The receiver also has power to carry on a business [para.5(2)(b)]. This often leads to conflicts and tensions between the receiver and the person who ordinarily owns/manages the business.

One of the issues, not directly dealt with by the Act, is who shoulders the burden of paying the receiver's costs. Under previous confiscation legislation, the respondent might be ordered to meet the costs of a management receiver: *Hughes v HMCE* [2002] EWCA Civ 734.

An interim receiver may require any person to bring property or documents relating to property back into the jurisdiction of the Court [section 250].

Making of a "Recovery Order"

If the court is satisfied that property is recoverable, it must make a 'recovery order': s.266(1). The effect of that order is to vest the property in the 'trustee for civil recovery' [see s.266(2), s.267 and sch.7]. Although many cases will be contested, section 276 empowers the Court to order that proceedings for a recovery order be stayed on terms agreed by the parties if each person (whose property is the subject of proceedings) is both a party to the proceedings and to the agreement. The court has wide discretion to make appropriate orders as part of a consent order: section 276(2)(b). Note that consent orders can only be made with the approval of the court and subject to the court examining the terms of the proposed order. This is to ensure that consent orders are fair and appropriate.

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

Frequently, original property will have been passed on to another (e.g. the handler of stolen goods). In such cases, the original property may be followed into his hands by virtue of section 304(3), because it was obtained by the handler, on disposal of it by the thief. Similarly, by virtue of section 304(3)(b) it may be followed down a line of recipients because each obtained it "on disposal by…a person into whose hands it may…be followed." What is therefore being followed is the 'original property'.

[16] See Practice Direction, 6.1

However, the thief might swap a valuable stolen painting for a car. By section 305(2), the car "represents the original property" and the car may be followed in the same way as the original painting [section 305(3)]. Furthermore, the car also becomes 'recoverable property' [section 305(1)]. If the car is then swapped for a boat, section 305 repeats the process, so that the painting, the car and the boat, become traceable and 'recoverable property'. Where recoverable property is mixed with other property, the proportion of the mixed property "which is attributable to the recoverable property represents the property obtained through unlawful conduct" [section 306(2)]. That takes one back to section 305(1). A similar approach applies to accruing profits (section 307).

In each of the above cases, the property is recoverable, but there are general exceptions, set out in section 308. If any of those exceptions apply, the property ceases to be 'recoverable property'. For example, property purchased in good faith without notice of its illicit origin, ceases to be recoverable: section 308(1).

A court shall not make a recovery order if the original order (or its value) has been satisfied by way of a previous recovery order, or by way of a consent order (under s.276): see s,278(3). Similarly, a court must not make a recovery order in respect of cash that has already been forfeited by summary process under section 298 [s.278(7)], or where property is the subject of the judgment of another court [s.278(8)], or where property is to realised under a confiscation order in criminal proceedings [s.278(9) and (10)].

Section 266 provides further safeguards so that a court may not make provision in a recovery order that would violate the HRA 1998 or the ECHR [section 266(3)]. Again, a court may not make provision in an order if it would not be equitable to do so in the circumstances specified in section 266(4): for example, a person obtained recoverable property in good faith (a car) and he used it in good faith (e.g. he modified the engine and put on alloy wheels) and a recovery order would be detrimental to him: see section 266(4).

By section 281, a person who claims that an item of property belongs to him, may apply for a declaration to that effect. If the application is successful, the property is not recoverable. Such a person must show that he was deprived of that property by unlawful conduct: section 281(3)(a). According to the Government's *Explanatory Notes* this need not be the unlawful conduct relied on by the Director. The example is given of a drug trafficker who steals money to buy further supplies of a controlled drug. Although the Director may seek a recovery order on the grounds of the respondent's unlawful drug trafficking, the victim of the theft may seek a declaration on the basis that he was deprived of the property by unlawful conduct of a different sort - namely theft.

Complex cases are likely to involve a network of transactions that lead to many items of property. Each line of transactions, starts with an item of 'original property'. Branches may emerge from that line that reveals the existence of other items of property that represent the original property ('representative property' – see section 305(2)). The Director is not permitted to recover all of this property but to recover either the original property (if it still exists and if he can recover it), or so much of the representative property as equates to the value of the original property: see section 278. Section 278 enacts rules relating to situations in which a recovery order may be made and sets limits on the Director's ability to recover items of property. The court may recover one, two, or more, items of 'related property' but only to the extent necessary to recover the value of the 'original property'. Accordingly, the court is given wide power to make a recovery order in respect of some or all of the related items [see s.278(5)(a)] or only part or parts of the related items of property [s.278(5)(b)]. The court can thus pick-and-mix, but only in a manner that is appropriate and fair.

A 'recovery order' may sever any property: section 266(7). Note that 'recoverable property' is to be distinguished from 'associated property' (see section 245). Property will often include recoverable property held by the respondent and linked interests ('associated property') held by third parties. The object of section 266(7) – read in conjunction with sections 271 and 272 – is that the court is given power to make orders that enable the trustee for civil recovery to realise property obtained through unlawful conduct whilst preserving the value of the interest of a third party.

Recovery of merely cash [Part 5, chapter 3]

Section 289 empowers constables and officers of customs and excise to search for cash that was obtained through unlawful conduct (i.e. 'recoverable property') but the powers are subject to a raft of statutory safeguards to prevent unwarranted, and unnecessarily intrusive, searches being carried out by officers. Accountability is woven into chapter 3.[17] Accordingly, in the ordinary way, an officer must not (in England and Wales) carry out a search without prior approval of a justice of the peace or of a senior officer (e.g. a police officer of at least the rank of inspector). The one exception is when it is impracticable for the officer to seek prior approval for a search because, for example, the officer has reasonable grounds to suspect that cash is about to be disposed of: the officer must act quickly.

Cash on premises

The officer must be lawfully on premises – for example, by way of a search warrant. He may be lawfully on private premises if he is exercising his powers under the Police and Criminal Evidence Act 1984, or under the Customs and Excise Management Act 1979, or where he has been invited to be present on private property. The officer must have reasonable grounds to suspect that the cash is "on the premises" and is either 'recoverable' property' as defined by sections 304 to 310 (i.e. that it is or represents property obtained through unlawful conduct), or that the cash is intended for use in unlawful conduct by any person. The amount of cash must be for the 'minimum amount' [section 303] – a figure specified by the Secretary of State, and which will probably be initially set at £10,000.

Cash carried by a person

Powers exercisable under s.289(2) can only be directed against the person suspected of carrying 'cash'. If the officer holds the requisite grounds for suspicion concerning the cash, he may require the suspect to permit a search of his person (other than an intimate or strip search: see section 289(8)), or to permit a search of any article he has with him e.g. a suitcase or a car [section 289(3)(a)]. If the suspect declines to cooperate voluntarily, the officer may detain the suspect for so long as is necessary for that purpose: section 289(4). What is not clear is whether an officer has power to search a person who is concealing a high value monetary instrument in an intimate place. The answer, by virtue of section 289(8) seems to be 'no', and chapter 3 makes no provision for a power of arrest to carry out an intimate search.

Accountability

In cases where (i) an officer performs a search on his/her own initiative (or with the prior authority of a senior officer), and (ii) the searching officer either fails to seize cash that is recoverable property, or he

[17] See *Home Office Circular Hoc 71/2002*, Date of Issue: December 2002.

is duty-bound to return the cash within 48 hours after seizing it, that officer must submit a written report to a person approved by the Secretary of State [section 290(6)]. The report must include particulars as to why it was not practicable to obtain the approval of a justice of the peace [section 290(7)(b)]. It follows that no report need be completed if the searching officer obtains prior approval from a justice of the peace. The thinking of the legislature appears to be that it can be assumed that a court is impartial and will only give prior approval for a search after carefully examining the merits of the application. The role of the 'appointed person' is to monitor the circumstances, and manner, in which the powers conferred by section 289 have been exercised, and to make recommendations to Government: see section 291. The Secretary of State must draw up a Code of Practice in connection with powers exercisable under section 289 [see sections 292 and 293].[18] The Government clearly wishes to avoid criticisms of the sort that have been levelled in respect of stop-and-search powers. Data and statistics provided by the 'appointed person', regarding the use of powers under section 289, should be invaluable to researchers and commentators on the criminal justice process.

The new powers and the old powers

The powers vested in constables and customs officers to seize cash, to investigate its origins and/or its intended use, and if necessary to apply for its forfeiture before a Magistrates' Court, are a development of well-established rules under previous legislation (namely, the Criminal Justice (International Cooperation) Act 1990, and the Part II of the Drug Trafficking Act 1994).

Whilst many of the statutory provisions in chapter 3 will therefore echo earlier legislation, a number of significant changes to the law should be noted. Under earlier legislation, it was only possible to forfeit cash that directly or indirectly represented any person's proceeds of drug trafficking, or was intended by any person for use in drug trafficking. Chapter 3 applies to cash that represents the proceeds of any form of 'unlawful conduct' or intended to be used for such conduct.

The officer may seize cash if he has reasonable grounds for suspecting that it is either "recoverable property" or "intended…for use in unlawful conduct" [section 294(1)], and he may seize cash even if his suspicion relates to 'part' of it [section 294(2)] – but that part must be worth at least the 'minimum amount' [see section 294(3)]. The latter provision may only be exercised if it is not reasonably practicable to seize the relevant 'part' – for example, the officer finds a wealth of monetary instruments of which 'part' is suspected to be used in unlawful conduct, but only by careful and time consuming examination of the remainder, would it be practicable to seize the relevant 'part'.

The officer must have reasonable grounds for this suspicion. Each case will be decided on its own facts. The officer would be entitled to take into account a number of features including, for example, whether the cash was concealed; explanations offered by persons who have an interest in the cash; the circumstances in which the cash was being handled (see *Bassick and Osbourne*, March 22, 1993, unreported, D.C.); the amount of cash that was being transported; whether traces of a controlled drug were detected on part or all of the cash (see *Thomas*, January 20, 1995, unreported, D.C.). It is not necessary for the officer to suspect that the person carrying the cash has himself been engaged in unlawful conduct or that he intended to use the cash for that purpose: see *Thomas* (above).

Secondly, earlier legislation concerned cash that was being imported into, or exported from, the United Kingdom including cash "being brought to any place in the United Kingdom for the purpose of being exported" [Drug Trafficking Act 1994, s.48(1)]. Now it is immaterial that the cash was not intended for

[18] See Statutory Instrument 2002 No. 3115, *The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2002*; and see the Code available on the Home Office web-site.

import/export. Thirdly, the definition of 'cash' under the 2002 Act is much extended [section 289(6),(7)] and includes postal orders, banker's drafts, bearer bonds and bearer shares, and any kind of monetary instrument. Fourthly, Part II of the Drug Trafficking Act 1994 did not give officers a power to search for cash, but chapter 3 to Part 5 of the 2002 Act does do so.

There is no doubt that proceedings under chapter 3 to Part 5 of the Act are civil in nature and therefore the civil standard of proof applies throughout. This was the position under Part II of the Drug Trafficking Act 1994: see *Best* (May 23, 1995, unreported, D.C.); *Butt v HM Customs and Excise,* and see *Daura v HM Customs and Excise* (unreported, 2002, Admin. Crt.). The rules of evidence are those applicable in civil proceedings and thus the Civil Evidence Act 1995 applies.

Cash that is seized may be detained in accordance with section 295 of the Act.

An order for the detention of cash cannot endure longer than three months (section 295(2)), but further orders can be made by the court provided the total period of detention does not exceed two years from the date of the first order (section 295(2), formerly s.42(3) of the Drug Trafficking Act 1994).

It should be noted that these powers may be exercised even if no criminal proceedings have been instituted (or even contemplated) against any person for an offence in connection with cash seized. Where criminal proceedings are instituted, or where application is made to forfeit the money on the basis that it represents the proceeds of unlawful conduct, or intended to be used for that purpose, the cash is not to be released until the relevant proceedings have been concluded: see section 295(5)(b) and section 296(6)(b).

The fact that there as been a defect in the process by which the application was made, for example, an inappropriate form was used, will probably not render the detention of cash unlawful: see *Luton JJ ex.p. Abecasis (*2000) 164 JP 265.

Section 296 makes provision for cash detained longer than 48 hours so that it is put in an interest bearing account (payable to the Crown if forfeited or to the person entitled to possession if released). The Divisional Court has emphasised that it was important that similar provisions enacted under Part II to the Drug Trafficking Act 1994 were complied with strictly: *Uxbridge Magistrates' Court, ex p. Henry* [1994] Crim. L.R. 581, applied in *Walsh v Commissioners of Customs and Excise* (June 12th 2001).

A party who seeks the release of cash (seized under section 294) has two possible routes. First, he may attempt to persuade a customs officer (or a police officer) to release the cash. The officer can only do so if he is satisfied that its detention is no longer justified and he informs the court that he proposes to release the money. Secondly, and usually, a person may apply to the Magistrates' Court (or to the Sheriff in Scotland) under section 297 for the release of cash. The applicant must be the person from whom the cash was seized: this restriction exist to prevent the court from becoming immersed in a dispute between the person from whom the cash was seized, and the person claiming to be the rightful owner of the cash. There is separate statutory provision under section 301 of the Act for victims and other owners of cash to make an application to the court for the release of the cash, or part of it.

The applicant must establish that the conditions justifying the detention of the cash no longer exist: note the decision of the court in respect of Part II of the Drug Trafficking Act 1994: see *Customs and Excise Commissioners v Shah (*1999) 163 JP 759. It is perhaps arguable that the wording of section 295 and section 297 might lead to a different result.

Section 299 broadly corresponds to section 44 of the Drug Trafficking Act 1994. Note that the time limit is 30 days, beginning on the day the forfeiture order is made. Appeal is to the Crown Court and it is an appeal by way of a rehearing. There is no power to extend the period for an appeal: *West London JJ ex.p. Lamai* (July 6, 2000). Unlike section 44(4) of the Drug Trafficking Act 1994 there is no provision for the release of forfeited cash to meet reasonable legal expenses: and see *Commissioners of C & E v. Harris* (January 29, 1999).

Under section 297, the applicant must be the person from whom the cash was seized: this restriction exist to prevent the court from becoming immersed in a dispute between the person from whom the cash was seized, and the person claiming to be the rightful owner of the cash. There is separate statutory provision under section 301 of the Act for victims and other owners of cash to make an application to the court for the release of the cash, or part of it.

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