COMMENT&ANALYSIS

Restraining Property 'wherever situated' and Civil Recovery

Rudi Fortson QC
Barrister, 25 Bedford Row, London.
Visiting Professor of Law, Queen Mary, University of London

Part 5 of the POCA 2002 empowers the High Court to make a civil recovery order in respect of property that is (or represents) property 'obtained through unlawful conduct' (s. 240). For the purposes of Part 5, 'property' is defined by s. 316(4) as 'all property *wherever situated*...' (emphasis added).

On 1 January 2006, the 'enforcement authority' (usually SOCA) became empowered under the POCA 2002 to apply for a 'property freezing order (whether before or after starting the proceedings)': see s. 245A.

Given the words 'wherever situated' in s. 316(4), in *SOCA v Perry* both Mitting J ([2010] EWHC 1711 (Admin)) and a strong Court of Appeal (Kay, Hooper, Tomlinson LJJ; [2011] EWCA Civ 578) held that a recovery order could be made in respect of any form of property, and wherever in the world that property was situated. However, by a majority of 7-2 (Lords Judge and Clarke dissenting), in *Perry v SOCA* [2012] UKSC 35, the Supreme Court held that Part 5 makes provision for *in rem* proceedings in respect of property within the UK 'but not outside it' (per Lord Phillips at [12], (viii)). Accordingly, that Court held (at [78]) that there is no jurisdiction to make a worldwide freezing order under s. 245A. By contrast, the dissenters opined (at [184]) that recovery orders take effect *in personam* subject to the local law, or *lex situs*.

At first sight, the majority decision of the Supreme Court may seem surprising, not least because the expression 'property wherever situated' appears in ss. 84(1), 150(1), 232(1), 286, 316(4), 326(5), 340(9) and 414(1). Furthermore, on the facts of *Perry v SOCA*, SOCA had not got to the stage of obtaining a 'recovery order'. Its application was for a worldwide freezing order under s. 245A. Arguably, it was open to the Supreme Court to have drawn a distinction between (i) the power of the court to make a recovery order (even if such an order might be unenforceable overseas) and (ii) the jurisdiction - or rather, the lack of it - to make a worldwide property freezing order under s. 245A.

At the risk of oversimplification, there was no quarrel with the proposition that Parts 2, 3, and 4 of POCA (i.e. confiscation following conviction) apply with the aim of realising property either within or outside the UK. The related powers under those Parts, to make restraint orders can therefore be exercised in relation to property situated overseas, such that 'the securing and realisation of such property will be dealt with by means of requests to foreign governments for assistance' (per Lord Reed at [116]). So why should the position be different for the purposes of Part 5? The answer, according to the majority in the Supreme Court, is that the question of whether the location of property, 'wherever situated', is subject to a territorial restriction 'depends upon the context', which requires a consideration of 'the structure and the language of the Act having regard to relevant principles of international law' (per Lord Phillips at [14]). Of those three considerations, it is the international law context that makes the judgment of the majority strongly persuasive and (to a lesser extent) the structure of POCA 2002, rather than the language of the statute which (it is submitted) is plain.

The striking feature of the Part 5 regime is that, although the property must be proved (on a balance of probabilities) to have been obtained through 'unlawful conduct' (defined by s. 241), it is unnecessary to identify the person who had perpetrated the conduct, or to prove that the person who holds or owns the property obtained it through criminal conduct. On SOCA's analysis of Part 5, the person who owns or holds property, or 'associated property', might be required to submit to a UK court exerting *in personam* jurisdiction, notwithstanding that 'neither they nor the property had any connection with that jurisdiction' (per Lord Phillips at [70]). Not only might such an order be made unopposed, but it would also be likely to be unenforceable. The majority therefore saw, '....no compelling reason why Parliament should have wished to confer on SOCA a right to seek a recovery order in respect of the proceeds of a crime that was not committed within the United Kingdom where those proceeds are not within the United Kingdom' (per Lord Phillips at [73]).

However, the effect of the decision of the majority is that, even in cases where a person holds property outside of the UK, being property that he had obtained through unlawful conduct committed in the UK, it would not be open to an enforcement authority

to seek a recovery order under Part 5 in respect of it. The appropriate course in such a case (said the majority in *Perry v SOCA*) is to obtain a *confiscation* order under Part 2, 3 or 4 (as the case may be), 'and to make a request for assistance via the Secretary of State in accordance with s. 74' (per Lord Phillips at [73]). Section 74 of the Act is headed 'enforcement abroad' and provides the statutory means by which it may be possible to enforce in other jurisdictions, restraint orders made under s. 40. Similar provision is made in Parts 3 and 4 of the Act, for the purposes of confiscation orders made in Scotland and in Northern Ireland. But, such a course of action is only possible if the enforcement authority would be able to prove the commission of a criminal offence, to the criminal standard of proof, and that there are no impediments to the making of a confiscation order under Part 2, 3 or 4 of the Act (for example the death of the alleged, or proven, offender).

Although the Supreme Court spent much time discussing whether Part 5 operates *in personam* or *in rem*, the realisation or recovery of property held abroad requires the cooperation of judicial and law enforcement agencies in the territory where the property is located. Without effective and timely cooperation, as well as mutual recognition of final judgments, the full potential of asset recovery regimes can never be attained. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005 No. 3181), of which Part 2 is headed 'Giving effect in England and Wales to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings', is merely one of many legal instruments and treaty instruments that aim to improve international co-operation and the mutual enforcement of court orders. It is conceivable that Part 5 of POCA 2002 was brought into force in the expectation (as yet unfulfilled) of significantly improved cooperation and harmonisation of legal rules pertaining to confiscation, money laundering, and civil recovery of the proceeds of crime. However, the reality is that even within the EU, progress in this area has been slow. Despite four major framework decisions (2001/500/JHA; 2003/577/JHA; 2005/212/JHA; 2006/783/JHA) and one Council decision (2007/845/JHA), a European Commission 'Explanatory Memorandum' reveals 'several obstacles to effective confiscation' and that Member States have been slow in transposing the Framework Decisions, which have often been 'implemented in an incomplete or incorrect way' (see the Proposal for a Directive on the freezing and confiscation of the proceeds of crime in the European Union (Com (2012) 85, final, 12th March 2012)). The European Commission proposes the introduction of new provisions on non-conviction based confiscation, and 'introducing more effective rules on the mutual recognition of freezing and confiscation orders'. The global harmonisation of rules relating to civil recovery of the proceeds of crime is a long way off.

In *Perry v SOCA*, the Court of Appeal and the Supreme Court, diverged on the significance to be attached to the fact that there are no provisions in Part 5 of POCA 2002 that relate specifically to the enforcement overseas of court orders, and which mirror the provisions of ss. 74, 141, and 222 of the Act (Parts. 2, 3, and 4, respectively). The majority in the Supreme Court held that *had* Parliament intended Part 5 to extend to property outside the UK, 'they would surely have included provisions parallel to section 74' (per Lord Phillips at [56]). The difficulty is that, apart from analysing the structure and language of the Act, there is little else that anyone can rely on in order to determine the actual intention of Parliament in relation to Part 5. Both the Court of Appeal and the Supreme Court discussed, at length, the terms of the 'Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceed of Crime' ('Strasbourg convention') 1990. However, a consideration of the Convention, although relevant, can be something of a distraction. The UK is often a driving force at international law enforcement conventions but, in any event, there are indications that during the 1990s the UK had it in mind to enact a civil recovery regime regardless of whether this was a requirement of the 1990 Convention or not. Transnational crime occurs globally, whereas the Strasbourg Convention is an EU instrument. By 1998, the Home Office Working Group on Confiscation recommended 'civil forfeiture anywhere in the jurisdiction' - presumably referring to the UK – 'of property of any kind representing the proceeds of, or intended for use in [criminal conduct]' (3rd Report). By 2000, the government signalled its intention to enact civil forfeiture powers, drawing on the experience of countries such as Australia, Italy, the United States of America and, in particular, the Republic of Ireland – the latter being 'the most instructive' ('Recovering the Proceeds of Crime', P.I.U. report, Cabinet Office, June 2000). Neither of those two reports sought to justify their recommendations on the grounds that they were necessary in order that the UK could meet its treaty obligations, including the Strasbourg Convention.

Unfortunately, the structure and language of Part 5 may reflect mixed messages from the government of the day (and confused policies) regarding the

purpose and reach of that Part. Thus, para. 11.22 of the 2000 Report states that the UK 'will be vigorous in its pursuit of assets moved overseas', and that 'allowing early restraint in civil forfeiture cases will also increase the opportunity for following through foreign restraint cases in United Kingdom. This will further assist in encouraging cooperation both ways with foreign jurisdictions' (para. 11.50).

But, in its description of the aims of the proposed civil forfeiture regime, the 2000 Report states that it 'should allow the recovery of unlawful assets *held in the United Kingdom*, but derived from crime committed overseas' (para. 5.14; emphasis added). Viewed in isolation, this passage may be said to be another indication that the conclusion of the majority in *Perry v SOCA* is correct. Arguably, the wording of s. 316(1), together with s. 316(5) to (7), provides further support for the correctness of that conclusion (noting the words, 'in the case of land *in England and Wales*'; 'in the case of land *in Scotland*'). However, one also notes that the Proceeds of Crime Bill involved 'considerable drafting changes' from the draft published for consultation in March 2001 (see Research Paper 01/79, p. 53), and significant amendments have been made to Part 5 by the SOCPA 2005 (including inserting s. 245A, which gave rise to the main issue on appeal in the Supreme Court) and, more recently, by the Serious Crime Act 2007. It is submitted that the extent of those amendments may suggest that Part 5 had been drafted at a time when government policy regarding the scope and aims of civil recovery had not yet crystallised, or had not even been fully worked out. The government of the day was feeling its way in relation to a regime that would be new to the UK, and it sought to draw on the experience of some EU and non-EU countries that did have civil recovery regimes (albeit markedly different in structure and reach). Thus, although POCA 2002 has been described as having been 'poorly drafted' (per Lords Judge and Clarke), an alternative explanation is that Part 5 was enacted at speed, with no UK civil recovery experience beyond cash forfeiture (see the revealing evidence given by the then Director of the Assets Recovery Agency (ARA) to the Public Accounts Committee (Q.19; 15th Report 2006-07; 9 July 2007; HC 391).

SOCA assumed and, if so, they were not alone in making the assumption (now shown by *Perry v SOCA* to have been misplaced) that a civil recovery order can be made in respect of property held abroad. In 2006, Dylan Creaven, having been acquitted of an alleged VAT fraud, agreed to pay £18-£19 million in cash and property, including 'a luxury home in Marbella, Spain....Just over £12m went to [the ARA] with £6m to the [Criminal Assets Bureau in the Republic of Ireland]' (see the 'Asset Recovery Action Plan', Consultation Document, Home Office, May 2007, p.21). Note also para. 108 of the judgment of the Court of Appeal in *SOCA v Perry* [2011] EWCA Civ 578, where a Luxembourg court recognised a property freezing order made by the High Court in the UK in respect of a bank account held in Luxembourg.

As originally enacted, only the ARA was empowered under Part 5 of POCA to apply for a civil recovery order. The ARA (now defunct) was created as a specialist agency with the expectation that it would be effective in pursing criminal proceeds in the UK and overseas, noting that:

> There are....international instruments which are available to the director for requesting evidence for his civil recovery investigations such as the Hague convention of March 1970. It is anticipated that he will make use of these for his civil recovery investigations

(per Lord Falconer of Thoroton, *Hansard*, PoCB, 25 Jun 2002: col. 1332).

One might question the value of those instruments (and powers under POCA) in the hands of an enforcement authority if Part 5 is as limited in scope as the Supreme Court has held it to be.

The error made by those who thought that a recovery order could be made in respect of property held or owned overseas was to assume that the words 'wherever situated', as they appear in s. 316(4), meant 'in the United Kingdom or abroad' and, that a distinction exists between the *power* to make a recovery order, and the *ability* (or otherwise) to actually enforce it overseas. This (it is submitted) is the distinction that had been drawn by Mitting J in his judgment at first instance in *Perry v SOCA* (at [20]), by the Court of Appeal and, by Lords Judge and Clarke in the Supreme Court in that case (at [166]). That said, if SOCA's contention was right, the effect would be that it would have jurisdiction:

> ....to seek a (mandatory) civil recovery order over property in China which is the product of a crime committed in China by an offender who has never left that country

(per Sir Anthony Hughes at [158]).

The majority rejected a construction of Part 5 that could have that effect.

Where does Parliament go from here? The short answer is, 'back to the drawing board'.