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# Fraud, Asset Tracing & Recovery

Contributing Editor:

**Keith Oliver**  
**Peters & Peters Solicitors LLP**

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# Confiscation Proceedings and Civil Recovery: Proportionality and Abuse of Process



**Colin Wells**  
25 Bedford Row

## Preamble

In 2020, the global pandemic resulted in many lifestyle and business changes, alongside the continued growth of fraud. Fraudsters continue to operate amending and adapting their techniques to cheat corporations, state agencies and individual victims. New technology is being used to increase the opportunity to commit fraud and successfully conceal the proceeds of crime. Tracing and investigatory techniques are also adapting to improve internal and external asset tracing and recovery by forensic accountants, technology experts, fraud examiners and law enforcement. The use of legal remedies by state agencies, private bodies and individuals, will continue to be of use to combat fraud and assist the recovery of the proceeds of fraudulent activity to achieve restorative justice for victims.

This chapter examines the English criminal confiscation and civil recovery regimes, in terms of proportionality and abuse of process, that apply to fraud-related litigation.

## A Criminal Confiscation Proceedings

### Introduction

Criminal confiscation proceedings as a form of restitution were first established in English law in 1987 with the introduction of the Drug Trafficking Offences Act 1986. Statutory provisions developed overtime, with case law decisions interpreting the Criminal Justice Act 1988, Criminal Justice (International Co-operation) Act

1990, Drug Trafficking Act 1994, culminating in the Proceeds of Crime Act 2002 (POCA) with amendments covering a number of different topics (including third party interests in section 10A POCA; see the Supreme Court decision in *R v Hilton* [2020] UKSC 29; *R v Johnson* [2016] EWCA Crim 100, *R v Hayes* [2018] EWCA Crim 100, *R v Box* EWCA Crim 542, *R v Morrison* [2019] EWCA Crim 351, [2019] 2 Cr App R (S) 25 for the available amount calculations).

The structure of POCA, for the purposes of calculating the recoverable amount, is set out below:

The prosecutor has a discretion to instigate proceedings. Guidance on the exercise of the discretion was issued to the Crown Prosecution Service in May 2009. The prosecutor, in deciding whether to seek permission from the court to proceed with confiscation, must bear in mind his or her duty to be fair to the offender: *Rezyvi* [2002] UKHL 1. See also *Wokingham Borough Council v Scott* [2019] EWCA Crim 205.

Where the prosecutor has asked the court to proceed under section 6, the court must decide whether or not the defendant has a criminal lifestyle.

If the defendant does not, then the court must decide, on the balance of probabilities, if the defendant has benefited from particular criminal conduct.

- Section 6 (5) POCA, as amended, provides as follows:

“(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

- (a) decide the recoverable amount, and
- (b) make an order (a confiscation order) requiring him to pay that amount.

Paragraph (b) applies only if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount.”

- Section 7 recoverable amount: which is the lower of the benefit or the available amount.
- Section 8 benefit.
- Section 9 available amount.
- Section 10 criminal lifestyle provisions.

The overall POCA approach is summarised in *May* [2008] UKHL, 28.

- (1) Has the defendant benefited from relevant criminal conduct?

- (2) If so, what is the value of the benefit so obtained?

- (3) What sum is recoverable from the defendant?

The objective and intended effect of criminal confiscation proceedings is draconian in nature. Confiscation legislation focuses on the value of the defendant’s obtained proceeds of crime, whether retained or not. It is an important part of POCA proceedings that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation.

Judicial decisions have made it clear that fraudsters must not be able to defeat confiscation proceedings by making gifts of assets which cannot be recovered. That is why Parliament has included the deliberately severe tainted gifts regime in POCA.

The restorative rather than punitive thrust of POCA is illustrated, by the Supreme Court observations, in *Waya* [2012] UKSC 5:

“[29]... where the benefit obtained by the defendant has been wholly restored to the loser. In such a case a confiscation order which requires him to pay the same sum again does not achieve the object of the legislation of removing from the defendant his proceeds of crime, but amounts simply to a further pecuniary penalty – in any ordinary language a fine. It is for that reason disproportionate...”

Since a confiscation order is not a penalty, but a civil debt, the safeguards surrounding the criminal trial process do not apply. Both the prosecution and defence discharge the burden of proof on the civil balance of probabilities and any contested hearing is determined by a judge alone.

## Proportionality

The test when considering the imposition of a criminal confiscation order is one of proportionality. The Supreme Court in *Waya* ruled that, in terms of challenges to the making of a criminal confiscation order, there was no need to invoke the concept of abuse of process. Instead, the court must consider whether the making of criminal confiscation order would be ‘wholly disproportionate’ or there had been a breach of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (A1P1). Where the POCA benefit exceeds the real benefit, the Judge must decide whether it is proportionate to base the confiscation order on the POCA benefit.



- The question to consider is whether or not an order is proportionate to the achievement of the statutory objective of depriving criminals of the proceeds of their criminality.

The case law authorities make clear:

- (1) that the word “proportionate” does not reintroduce by the back door the notion of a residual judicial discretion;
- (2) an assessment of proportionality is not to be made by a balancing of factors and competing interests in the way that may be appropriate in some public, procedural or family law contexts; and
- (3) proportionality is not assessed by reference to the proportion which the available amount bears to the benefit.

What is ‘proportionate’ is factually sensitive and considered on a case-by-case basis. Accordingly, it is neither appropriate nor helpful to seek to set out an exhaustive list of circumstances in which the proportionality exception may be satisfied. However, an illustrative example of the proportionality exception in practice can be found in the facts of *Waya*. There, the loan obtained by the mortgage fraud was repaid because there was enough equity in the property which was purchased to do that. The Supreme Court reduced the confiscation order, finding that:

*“Where the mortgage loan has been repaid or is bound to be repaid because it is amply secured, and absent other property obtained, a proportionate confiscation order is likely to be the benefit that the defendant has derived from his use of the loan, namely the increase in value of the property attributable to the loan”* (paras 35, 78-81).

The concept of proportionality was further considered in *Harvey* [2015] UKSC 73. The Supreme Court held that a trader in a criminal lifestyle case had obtained the VAT element in the sums he had obtained by fraud even where he had accounted to HM Revenue and Customs for those sums. It would nevertheless be disproportionate to make an order in that sum and the VAT element should be stripped out from the amount to be paid. This was said to be “quite similar” to the *Waya* situation where the property which had been obtained had been restored to the loser by the offender.

### Residual protection

There is a residual area of procedural protection, outside the application of the terms of

the confiscation legislation, which the abuse of process remedy offers. For example, in *Ali* [2010] EWCA Crim 2727, the Court of Appeal considered the question of the defendants’ absence and whether or not a fair hearing on that basis could be held. Whilst concluding that the judge had not exercised his discretion improperly to conclude that no unfairness would occur, the Court of Appeal emphasised the need to proceed with caution in relation to the abuse of process jurisdiction.

### Oppressive confiscation

In *Morgan and Bygrave* [2008] EWCA Crim 1323, the Court of Appeal set out the circumstances where confiscation proceedings might be oppressive (now disproportionate) based on prior agreed restitution:

*“...where demonstrably (i) the defendant’s crimes are limited to offences causing loss to one or more identifiable loser(s), (ii) his benefit is limited to those crimes, (iii) the loser has neither brought nor intends any civil proceedings to recover the loss, but (iv) the defendant either has repaid the loser, or stands ready willing and able immediately to repay him, the full amount of the loss.”*

### Lifestyle

Another example of the factually sensitive nature of a criminal confiscation order being overturned on appeal is *Shabir* [2008] EWCA 1809. The offender pharmacist had fraudulently over-claimed £464 of prescription fees. His benefit figure was correctly calculated to include all the fees he had received (£179,731), the vast majority of which were legitimate, and the indictment was drawn so as to engage the criminal lifestyle provisions. The result was a confiscation claim of over £400,000 and an order for £212,464.17. In *Waya*, the Supreme Court endorsed the result that the Court of Appeal had arrived at in *Shabir* and concluded that such a set of facts would also make for a ‘disproportionate’ order in the use of the POCA ‘lifestyle provisions’.

In *Beazley* [2013] 1 WLR 3331, there was nothing inappropriate in making an order based upon the entirety of the proceeds of a business that was founded entirely on illegality. There is a distinction between that situation and one where a defendant would have been entitled to the monies notwithstanding the commission of an offence (e.g. the failure to obtain a permit). In *Sumal and Sons* [2013] 1 WLR 2078, the Court of

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Appeal held that where a landlord would have a complete right to obtain rental payments that would be due to it, those sums were not obtained for the purposes of the confiscation legislation if there was a failure to obtain a licence to rent the property out. Although not strictly an application of proportionality, the distinction is important.

### Benefit calculation

Having determined that a criminal confiscation order is required, the court will next proceed to calculating the benefit obtained by a defendant either by way of their criminal conduct (see for example *Panayi* [2019] EWCA Crim 413), or as a result of a criminal lifestyle.

### Joint benefit

When considering the value of the benefit figure in confiscation proceedings, the Supreme Court, in *Abmed and Fields* [2014] 2 Cr App R (S) 75, decided that where there was a joint obtaining of benefit (which was still the correct approach in appropriate cases), it would be disproportionate to make an order against two or more persons the result of which would be at least 'double' the recovery of the benefit obtained.

### Entire contract value

In *Sale* [2014] 1 Cr App R (S) 60, the Court of Appeal held that in a case where contracts were obtained by a corrupt process, the legislation was apt to include the entire value of the contracts as the benefit. However, a proportionate order would be limited to the profits obtained and the advantage gained by obtaining a market share, excluding competitors and saving on the costs of preparing proper tenders.

### No allowance

It is not disproportionate to make no allowance for any expenses incurred in relation to the criminal activity when it comes to making a

confiscation order: *McDowell* [2015] 2 Cr. App. R. (S.) 14.

### Just order

In relation to a prosecutor's request to increase the value of a confiscation order on the basis of after-acquired assets, section 22 of the Proceeds of Crime Act 2002 specifically requires the court to make a 'just' order. Provided that occurs, an order will be proportionate: *Padda* [2014] 2 Cr App R (S) 22.

### DPP guidance

As a result of the Court of Appeal decisions in *CPS v Nelson, Patbak, and Paulet* [2009] EWCA Crim 1573, the DPP issued 'Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings' in an attempt to secure consistency of approach by prosecutors, both state and private.

The Court of Appeal has made it clear that private prosecutors, whether individuals, commercial companies or trade organisations, can initiate confiscation proceedings under section 6 POCA as part of a private prosecution, and it is not an abuse of process to do so: see *Zinga* [2014] EWCA Crim 52 and R. (*Gurja*) v Crown Prosecution Service [2012] UKSC 52.

### Double jeopardy

Allegations of criminal behaviour not pursued in a separate prosecution, but relied upon in confiscation proceedings for another offence, do not offend the double jeopardy rule, as confiscation proceedings do not amount to the bringing of a criminal charge: see *Darren Bagnall* [2012] EWCA Crim 677.

### Enforcement

Once a confiscation order is made, unless paid, it stands to be enforced as a civil debt. If an enforcement receiver is appointed, it appears that ➔

- ➔ the court's process is capable of being abused although this will, as ever, be rare and difficult to demonstrate.

### Delay

In relation to enforcement in the magistrates' court, either by warrant of commitment to prison, or by civil remedy, proceedings may be stayed if the Article 6 ECHR reasonable time guarantees have been breached.

In *R (Lloyd) v. Bow Street Magistrates' Court* [2004] 1 Cr App R 11, the defendant was committed to custody for non-payment of a confiscation order some five years after his release from custody. The Divisional Court ruled that:

- (i) a defendant enjoyed the full protection of Article 6 (1);
- (ii) the continuing non-payment by a defendant of a confiscation order cannot affect the question of whether he is entitled to the protection of the reasonable time guarantee;
- (iii) the threshold for proving a breach is high and all the circumstances of the case must be taken into account;
- (iv) in deciding what amounts to a reasonable time, attention should be given as to what other efforts have been made by the state to extract payment and the behaviour of the defendant. Any evasion or avoidance of diligent attempts to extract the money will result in the defendant being unable to rely upon any resultant delay; and
- (v) if unreasonable delay is established, the remedy must be proportionate.

Also consider *R (Marsden) v. Leicester Magistrates' Court* [2013] EWHC 919 (Admin), where the

defendants were committed to custody for a term of six years some six and a half years after being released from their sentence. The Divisional Court held, in considering what was a reasonable time, that regard should be had to:

- (i) all the circumstances of the case including the complexity of it, the defendant's conduct, the conduct of the state authorities and the importance of what is at stake for the defendant;
- (ii) whether or not the defendant was aware that the prosecution's intention was to enforce against them by way of commitment to prison in the absence of payment of the order; and
- (iii) that the non-payment of the confiscation order is not relevant to whether or not the state must act within a reasonable time but is relevant to what will be considered a reasonable time or not and raises the bar of proving the same.

Delay in enforcement of a confiscation order can lead to such proceedings being stayed as an abuse of process. In *Malik v Crown Prosecution Service* [2014] EWHC 4591 (Admin), Lord Justice Fulford identified two principal questions to be answered:

- (1) Whether reinstating enforcement proceedings after such a long period of time was oppressive, given the delay caused by the prosecuting authorities.
- (2) Whether the delay for which the prosecution is responsible is so extensive and so culpable or unexplained that a stay is appropriate. In reaching a decision as to whether to impose a stay, the court must ensure that the order it

**In addition to criminal confiscation proceedings, the Serious Organised Crime Agency, the Director of Public Prosecutions and the Director of the Serious Fraud Office can apply under Part 5 Proceeds of Crime Act 2002 to the High Court for civil recovery of the proceeds of crime**

makes is not disproportionate.

Lord Justice Fulford found on the facts of *Malik* that the learned judge was wrong to decide that the civil enforcement proceedings should continue:

*"[36]... Although the threshold for finding a breach of the reasonable time requirement is a high one (see Lloyd [26]) the delay here was not only extensive (six and half years) but it is also culpable and it is essentially unexplained... Moreover, of real additional significance is the fact that the appellant and his solicitors repeatedly sought the co-operation of the prosecution to enable him to discharge his obligations responsibly,"*

concluding that 'all forms of enforcement are to be stayed as an abuse of the process of the court'.

## B Civil Recovery: Part 5 POCA Cases

In addition to criminal confiscation proceedings, the Serious Organised Crime Agency, the Director of Public Prosecutions and the Director of the Serious Fraud Office can apply under Part 5 Proceeds of Crime Act 2002 to the High Court for civil recovery of the proceeds of crime. This power is independent of any criminal proceedings and can be used where a defendant has been acquitted of criminal charges. In civil recovery proceedings, the court need only find on a balance of probabilities that any matters alleged to constitute unlawful conduct have occurred, or that any person intended to use any cash in unlawful conduct.

Whether a claim for civil recovery amounts to an abuse of process has been considered in a number of cases:

- A claim for civil recovery is not an abuse where it is based on unlawful conduct notwithstanding the fact that the unlawful conduct was tolerated by senior police officers, leading to a stay of the related criminal proceedings: see *The Queen (Director of Assets Recovery Agency) v E and B* [2007] EWHC 3245 (Admin).
- Bad faith leading to a stay in criminal proceedings does not preclude a civil recovery claim under Part 5 POCA: see *The Queen (Director of Assets Recovery Agency) v T* [2004] EWHC 3340 (Admin), in which Mr Justice Collins said:

*"... even if it were established that there had been bad faith in the manner in which the prosecution had conducted the criminal proceedings, [it] would not enable the defendants successfully to argue that it was an abuse of process to bring proceedings under Part V. The reason is simply this: these proceedings are civil proceedings instituted by the Director who is an independent person."*

- A confiscation order quashed on appeal does not preclude the subsequent making of a civil recovery order: see *Director of Assets Recovery Agency v Singh* [2005] 1 WLR 3747, in which Lord Justice Latham identified the purpose behind the enactment of Part 5 POCA:

*The clear intention of parliament was to ensure that, so far as possible, criminals should be deprived of the possibility of benefiting from crimes... in the present case the meaning of the words and the purpose of the legislature are both abundantly clear and march hand in hand. To permit the technicality which resulted in the confiscation order being quashed to preclude recovery by the civil recovery route would be to perpetuate a mischief which the 2002 Act was clearly designed to prevent.*

- Compromised settled cash forfeiture proceedings do not preclude a Part 5 SOCA civil recovery order being made: see *Serious Organised Crime Agency v Agid* [2011] EWHC 175(QB). SOCA was entitled under Part 5 POCA to recover property worth £1.2 million (the subject of a Property Freezing Order) from the respondents who had benefited from corrupt relationships with companies in obtaining multi-million \$US dollar contracts from Nigeria. The fact that the Metropolitan Police had settled cash forfeiture proceedings (under section 298 POCA) against the respondents, in the sum of £171,367.53, did not preclude SOCA from subsequently applying and obtaining a Part 5 POCA Recovery Order made under section 266. SOCA had brought Part 5 proceedings within the relevant limitation period, the respondents held recoverable property, SOCA had acted in good faith and the circumstances in which the proceedings were brought were not in conflict with Part 5. The onus was on the respondents to establish abuse and they had, in the judgment of Mr Justice Sweeney, failed to do so. 🚫



**Colin Wells**, barrister at 25 Bedford Row, London, specialises in fraud and money laundering. His reported cases include Supreme Court (extradition of foreign nationals in fraud cases): *OB v SFO* [2012] EWCA Crim 67.

Colin is regularly instructed to conduct internal investigations and offer compliance advice to companies and local authorities facing issues of wrongdoing.

A regular speaker to both English and overseas practitioners and law enforcement agencies, covering fraud investigation, search warrants and powers, case management, abuse of process, private prosecutions, deferred prosecution agreements, and sentencing in fraud cases.

Colin's published work includes: *Abuse of Process*, 3<sup>rd</sup> edition, Oxford University Press; and *Fraud: a practitioners handbook*, Bloomsbury 2014.

✉ [cwells@25bedfordrow.com](mailto:cwells@25bedfordrow.com)

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