Note on AFOs

The Law

Section 303Z of the Proceeds of Crime Act 2002 (POCA) is a new statutory provision, brought into force by the Criminal Finances Act 2017, alongside the sections that created now infamous 'unexplained wealth orders'. Although far less heralded, the AFO is in fact the more wide-reaching and potentially draconian of the two powers. Like the UWO, an AFO is an interim power: designed to freeze property whist an investigation is undertaken to determine whether it might be forfeit under Part 5 of POCA; and to preserve it to satisfy any such order that might be made.

Section 303Z1 allows an enforcement officer to apply for an AFO where they have 'reasonable grounds for suspecting' that money held in an account maintained by a bank or building society is either 'recoverable property' or 'is intended for use in unlawful conduct'. 'Recoverable property' is defined with reference to sections 304 and 310 of POCA as 'property obtained through unlawful conduct'. In both instances, 'unlawful conduct' is defined by section 242 of the Act as conduct which either occurs in the UK and is contrary to the criminal law in that part of the country; or conduct occurring overseas which is contrary to the criminal law both in that jurisdiction, and the UK. By section 303Z1(4) an application for an AFO can be made (as here) without notice where "if the circumstances of the case are such that notice of the application would prejudice the taking of steps to forfeit money that is recoverable property".

Section 303Z3 sets out the criteria that the Court must determine in the following terms: ...

> *(2)The relevant court may make the order if satisfied that there are reasonable grounds for suspecting that money held in the account (whether all or part of the credit balance of the account) –*
>
> *(a)is recoverable property, or*
>
> *(b)is intended by any person for use in unlawful conduct.*

Procedure

The governing rules are provided by the Magistrates' Court (Freezing and Forfeiture of Funds in Bank and Building Society) Rules 2017.

Case Study

In this case, an Iraqi national had settled in the UK under the old 'Tier 1' Investor Scheme, and had consequently been obliged to deposit £1million in Treasury gilts for a prescribed period. Having achieved settled status, he realised the gilts and sought to invest them more profitably elsewhere. The money was deposited with a well-known investment firm, who alleged irregularities in the information provided in the opening and operation of the account, and raised a SAR. It was also subsequently alleged before the Magistrates that an intermediary had wider responsibility for other's money laundering, and that various documents submitted were forgeries. The supervening allegation was that the circumstances tended to suggest that the money at issue was the proceeds of corruption, and recoverable property under the Act.

Discussion

Although AFOs are new, other without-notice financial orders have been a part of legal landscape in England and Wales for a long time. The Courts have consistently recognised that those who are made subject to such an order are in an invidious and bewildering position; and have therefore built-in procedural safeguards to protect them.

Rule 3(3) of the 2017 Procedural Rules requires that any person for whom the relevant is operated be given a copy of the written application for the AFO by the applicant. The 'application' is the document in which the investigator will have set out their grounds for suspecting that the money in the account was (in effect) either the proceeds of crime or destined for use in crime, and upon which the Court will

determine the application. Given the manner in which such applications are dealt with (generally short listings in front of lay tribunals) the application will often comprise the totality of the information relied upon to justify the *ex-parte* order.

In this case, despite the clear requirements of the procedural rules, the investigator had failed to provide the subject with the application notice, even after the *ex parte* hearing had taken place. Once instructed, we were able to remedy this failing quickly through correspondence.

Once the application was obtained, it was possible to see that there had arguably been significant failures to disclose to the Magistrates both the weaknesses in the applicant's case, and also the explanations that the subject might have for the apparently suspicious circumstances. Whilst there are as yet no decided authorities on AFOs, there is a consistent line of authority that where (as here) an investigatory power seeks a punitive financial order without notice to the subject, they are required to make what is called "full and frank" disclosure to the Court. In the context of restraint Orders, in *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927, the Court of Appeal held expressly [§6]

> *"Because the initial application is commonly made without notice, the court will not at that stage hear argument on both sides. For this reason, as with other without notice applications, the court insists on full and complete disclosure by the applicant of everything which might affect the decision whether or not to grant the order. There is a high obligation upon such an applicant to put everything relevant before the Judge, whether it may help or hinder his cause".*

The extent of the "full and frank" disclosure duty was reaffirmed in clear terms by Hughes LJ in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137; [2010] 3 WLR 941 at [§191]:

> *'It consists in a duty to consider what any interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under*

POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the applicant is a criminal and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is yet a further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex-parte order must put on his defence hat and ask himself what, if he were representing the defendant or third party with a relevant interest he would be saying to the judge, and having answered that questions, that is what he must tell the judge'.

In this case, it was possible to combine the procedural and disclosure failings into an unassailable case for discharge of the order and return of the money, as was ultimately conceded by the investigatory authority. As with the recent High Court consideration of UWOs in *National Crime Agency v Baker and ors* [2020] EWHC 822 (Admin) it was striking that such a case had been assembled and put before the Court in the first case without the deficiencies being noted; and sadly all too familiar that the summary application hearing had done very little to probe the true circumstances of the case.

Had the subject not sought representation to analyse and challenge the order, it is likely that the money would have remained frozen and potentially ultimately rendered forfeit.

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