

## Proceeds of Crime Act 2002 Using Civil Recovery Powers Retrospectively

**It is common knowledge that, if found guilty of a criminal offence, confiscation proceedings are often commenced to recover the proceeds of crime. But did you know that assets considered to be obtained through unlawful conduct can also be 'recovered' through civil proceedings, without the need to obtain a guilty verdict in criminal proceedings?**

**In this edition of our monthly ebriefs brought to you by Jane Fowler, Managing Director of Aquila Advisory, the boutique forensic accounting company, we look at how, by going through the Civil Courts, the Crown can pursue the recovery of assets that they believe are the proceeds of a crime, even if the defendant is acquitted in the Criminal Courts.**

### An overview

In a recent case, former tycoon Asil Nadir was convicted of stealing £28.8m from Polly Peck in the 1980s. Through confiscation proceedings, he was then ordered to pay £5m within two years or face up to a further six years in prison, giving the victims of the collapse of Polly Peck the opportunity for compensation.

Under Part 5 of the Proceeds of Crime Act 2002 (POCA), the High Court is awarded an entirely new jurisdiction for making a 'Recovery Order'. The order enables any Enforcement Agency (EA) to recover property which is, or which represents, 'property obtained through unlawful conduct'.

The EAs that can make such an application to the High Court are:

- Director of the Serious Organised Crime Agency (SOCA);
- Director of Public Prosecution (DPP);
- Director of the Revenue and Customs Prosecutions (RCPO); and
- Director of the Serious Fraud Office (SFO).

In the case of Mr Nadir, the application was made by the SFO.

### Is this an alternative to criminal proceedings?

No, it is not intended that this route be seen as an alternative to criminal proceedings, in that defendants can bargain their way out of prosecution by agreeing not to contest a civil claim on their property. But it should be seen as an adjunctive power if:

- There is a specific reason that criminal prosecution is not feasible
- A criminal prosecution is in the public's best interest
- There is insufficient evidence to secure a guilty verdict, or
- A guilty verdict has not been obtained.

## When is a civil route to recovery appropriate?

Although not an exhaustive list, the Home Secretary and Attorney General's office issued joint guidance as to when the EAs might wish to use the civil route to recovery, these being:

- a. The only known criminal activity is overseas and there is no extra-territorial jurisdiction to pursue a criminal case in England, Wales or Northern Ireland;
- b. There is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction;
- c. Proceeds of crime can be identified but cannot be linked to any individual suspect or offence;
- d. A law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction;
- e. A criminal investigation has been conducted, but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction; and lastly
- f. A prosecution has been conducted, but has not resulted in a conviction e.g. the defendant has been acquitted.

It is easy to see the sound arguments behind there being a civil route to recovery.

## A Recovery Order and unlawful conduct

In order to obtain a Recovery Order through civil procedures, the EA must prove that the property against which recovery is sought, has been obtained through unlawful conduct. Unlawful conduct basically means a crime wherever it is committed which is unlawful under UK law; or if the crime has been committed elsewhere was a crime there and would have been a crime in the UK if it had been committed in the UK.

There are a growing number of cases where the EAs have invoked the civil route to obtain a Recovery Order.

### Example cases

#### Case 1

In the case of *SOCA v Agidi & Anor* [2011], SOCA was successful in recovering assets through civil proceedings where it was alleged that the property and monies had been obtained as a result of bribery and corruption in Nigeria. SOCA was successful in their civil proceedings, despite the judge at the criminal trial ruling there was insufficient evidence for a trial, having declared the main witness statement inadmissible. Due to the differences in the burden of proof and admissibility rules, it was found that there was sufficient evidence in the civil proceedings to prove unlawful conduct and the Recovery Order was granted.

#### Case 2

In the case of *The Asset Recovery Agency v Virtosu & Anor* [2008], the Asset Recovery Agency (ARA) was successful in obtaining a Recovery Order under Part 5 of the Proceeds of Crime Act 2002 by relying on a conviction for people trafficking in France in 2004. Under section 241 of POCA, where the criminal conduct occurs abroad the EA must prove not only that it was criminal in the country in which the conduct occurred, but also that it would have been a criminal offence if it had occurred in England. Despite Mr Virtosu protestations that he had been wrongly convicted but the French courts, the UK courts ruled that the French conviction was admissible as evidence of criminal conduct and was sufficient to demonstrate the conduct amounted to criminal conduct in France and England.

The Director of the ARA went on to argue that, with no evidence of any real income, the assets must have been obtained from unlawful conduct and a Recovery Order was granted.

Both the above cases demonstrate clearly the need for a civil route to recovery of the proceeds of crime, but what is not so clear is the jurisdiction of the High Court to determine unlawful conduct when a defendant of criminal proceedings has gone through a full criminal trial, whether in the UK or elsewhere, and been acquitted.

## Guidance notes

Under the guidance notes a defendant who has already faced trial in the criminal court and been acquitted by a jury could find themselves facing civil proceedings. The proceedings seek to prove that property held by the defendant was obtained through unlawful conduct i.e. he is guilty of the criminal conduct he has already been acquitted of.

## In conclusion

There is some question as to whether this is fair and just? Our criminal legal system<sup>1</sup> works on the presumption of innocent till proven guilty. An acquittal at a criminal trial means that the defendant has not been proved guilty and therefore is still presumed to be innocent and yet, because of a lower burden of proof in the civil legal system, faces the possibility that his conduct could be found to be unlawful and his assets ceased.

The disparity arises because the civil proceedings focus on the recovery of the proceeds of crime, to effectively act as a deterrent, and can be brought against individuals that are not the ones to have committed an offence, but merely hold the property. It is not a punitive process in that it does not seek to punish the defendant, merely retrieve the assets. The EA is required to prove unlawful conduct in relation to how the assets arose or were obtained and, in that respect, is asset focused. Therefore the protections available to the defendant under the criminal legal system, such as not being prosecuted of the same offence on the same facts following an acquittal, are not available. One waits to see how this plays out in real life.

<sup>1</sup> Human Rights Act 1998 Schedule 1, Article 6(2)

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### CONTACT AQUILA ADVISORY:

**Jane Fowler, Managing Director**

Tel: 020 7397 8318  
Email: [info@aquilaadvisory.co.uk](mailto:info@aquilaadvisory.co.uk)  
Website: [www.aquilaadvisory.co.uk](http://www.aquilaadvisory.co.uk)



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