Criminal Finances Bill

– Forfeiture of Bank Accounts –

Under the Proceeds of Crime Act 2002 ("POCA"), law enforcement agencies have extensive civil recovery powers – and by way of restraint and confiscation in the event of a criminal prosecution – to seize and recover the proceeds of crime. So why does the Criminal Finances Bill include provisions to extend civil recovery powers still further to enable the seizure and forfeiture of suspected funds held in bank and building society accounts, along similar lines to the seizure and forfeiture powers already in place in relation to cash?

When proposing the new forfeiture provisions, the Government's Action Plan for anti-money laundering and counter-terrorist finance, published in April 2016, offered the following explanation:

> *POCA offers a variety of different tools for asset recovery. In practice, however, law enforcement agencies lack a flexible and effective tool to forfeit suspected proceeds of crime held in bank accounts. POCA enables highly effective action to be taken against criminal cash. No similar power applies to money held in bank accounts. POCA civil recovery powers enable prosecutors to recover any form of property, but civil recovery proceedings are complex and the specialist resources in UK law enforcement agencies are rightly focussed on the highest value cases. Therefore, the Government intends to explore whether new powers are needed to enable the quick and effective forfeiture of money held in bank accounts in cases where there is no criminal conviction against the account holder (because, for example, the account was opened under a false identity) and there is suspicion that the funds are the proceeds of crime.*

Under the cash forfeiture regime (Part 5 of POCA), cash over £1,000 can be seized by an officer if he has reasonable grounds to suspect that (1) it is, or represents, property obtained through unlawful conduct or (2) that it is intended to be used in unlawful conduct. Within 48 hours, a magistrates' court must sanction the continued detention of cash for a period of up to six months, which period can subsequently be further extended for up to two years. For the cash ultimately to be forfeited, the court need only be satisfied to the civil standard that the cash derived from or was intended to be used for some kind of (unspecified) criminal activity (*Muneka* [2005]).

During the Committee stage of the Proceeds of Crime Bill in the House of Lords, Lord Goldsmith, the Attorney-General, in resisting a proposal to bring cash within the general civil recovery scheme in the high court, explained:

> *…experience has shown, and it is to be expected, that arguments in the magistrates' court in relation to the cash forfeiture scheme will be narrower than those in relation to the new civil proceedings involving other types of property. They are likely to be narrowed to the derivation or destination of the cash; that is, to whether or not that fits the definition of recoverable property. The Government believe, and experience bears out, that the magistrates' court is an appropriate level for such considerations and*

> *proceedings. It is expected, therefore, that the cash forfeiture schemes will be quick and simple and that there will be little room for complex arguments. Having different venues for civil recovery, where the issues are likely to be more complex, and cash forfeiture, where they are likely to be more straightforward, seems appropriate.*

Money held in bank and building society accounts, which inevitably has great potential for complex factual and legal arguments, was (intended to be) excluded from the summary regime in the magistrates' court. In such circumstances, law enforcement effectively has two options in respect of suspect funds: apply to the Crown Court for a restraint order and with a view to a criminal prosecution; or apply to the High Court for a freezing order with a view to bringing civil recovery proceedings.

However, both options are difficult (and costly) for law enforcement to pursue. An application for a restraint order, for example, can only be made (1) once a criminal investigation has commenced (its purpose is to preserve assets for confiscation in the event of a conviction) and (2) if there is reasonable cause to suspect that the alleged offender has benefitted from his criminal conduct. The prosecution must also establish that there is a real risk of dissipation of assets by the offender. In *Barnes v Eastenders Group* [2014], LJ Toulson set out the careful scrutiny required by the prosecutor and the Court in considering whether the statutory conditions for a restraint order are met:

> *A judge to whom such an application is made must look at it carefully and with a critical eye. The power to impose restraint and receivership orders is an important weapon in the battle against crime but if used when the evidence on objective analysis is tenuous or speculative, it is capable of causing harm rather than preventing it. Where third parties are likely to be affected, even if the statutory conditions for making the order are satisfied, the court must still consider carefully the potential adverse consequences to them before deciding whether on balance the order should be made and, if so, on what conditions. A judge who is in doubt may always ask for further information and require it to be properly vouched.*

In short, there needs to be a high level of scrutiny by a judge with an appropriate degree of expertise; and, if the conditions are not met, then the application should be refused. So again, why the proposal to extend the summary cash seizure and forfeiture regime to money held in banks and building societies?

An apparent explanation was offered, in January 2017, when the Home Office published its Impact Assessment on the proposals. In explaining why intervention is necessary, the Impact Assessment begins: "*At present, law enforcement agencies cannot freeze and forfeit the contents of accounts where there is a reasonable suspicion that the funds within them are the proceeds of criminality, or may be used to fund criminality or terrorism.*" Oddly, the Impact Assessment makes no mention of the consent regime, which provides law enforcement with almost six weeks following receipt of an "authorised disclosure" to investigate further (during which time accounts are invariably suspended) in order to apply for a court order. Nor does the Impact Assessment mention that another of the proposals in the Criminal Finances Bill is to extend this almost six week period to over six months.

The Impact Assessment goes on to suggest that the principal motivation for the proposals was administrative: there is a growing stock of accounts suspended by banks on suspicion of criminality (between approximately £30 and £50 million at the last count, growing by £2.5 million a year) for which there is no formal mechanism for forfeiting the funds. These are accounts in respect of which there will be no criminal prosecution, and most of which are below the £10,000 threshold for civil recovery. The Impact Assessment further suggested that there was a low likelihood of persons challenging the forfeiture (between 5-30% depending on the age of the account).

The proposals in the Criminal Finances Bill are, however, ill-suited to this aim. They would enable law enforcement officers with reasonable grounds for suspecting that £1,000 or more held in a bank or building society account represents the proceeds of crime, or is intended for use in crime, to apply to a magistrates' court for a freezing order in relation to the account (without notice in certain circumstances) and, within two years, for the money held in the frozen account to be forfeited. Crucially, the proposals do not provide for a maximum amount. From the figures contained in the Impact Assessment, it appears that a significant number of the "suspended accounts" will contain less than £1,000 while, as indicated, accounts of £10,000 or more already fall within the civil recovery regime. In short, the proposals would provide significant new tools to law enforcement well beyond the scope of the problem posed by the "suspended accounts", making largely redundant the civil recovery regime in the High Court. Why would law enforcement choose the higher level of scrutiny in the High Court, when they could have summary justice in the magistrates'?

But perhaps law enforcement would use their discretion and not bring to the magistrates' complex, contested matters, involving large sums? Unfortunately, that possibility can be dismissed at once. Law enforcement are already exploiting a loophole in cash seizure and forfeiture proceedings to seize sometimes millions of pounds in the form of cheques and banker's drafts (included within the definition of 'cash' in Part 5 of POCA) from suspect accounts, having apparently *encouraged* banks to issue such cheques or banker's drafts on account closure, on occasion directly into the hands of law enforcement. The proposals in the Criminal Finances Bill would legitimise this deliberate circumvention of the safeguards provided by informed judicial scrutiny in the Crown and High Courts in the granting of restraint and freezing orders.

Note that these provisions would only be relevant to cases when there is no criminal conviction, while suspicion of money laundering is a low bar indeed. In *R v Da Silva* [2006], the Court of Appeal approved jury directions to the effect that it is sufficient for the defendant to think that there is a possibility, which is more than fanciful, that the property is the proceeds of criminal conduct. In the context of banking relationships, any number of factors might give rise to "suspicions" including unusual or unexplained transactions or activity on the account and any enquiry by the police, whether reasonable or not, and whether directly into the customer or merely in respect of a person with whom they have dealt. The potential, therefore, for innocent individuals and businesses to be caught up in a

money laundering investigation is significant, and applying for a freezing order should not be a simple matter: it could cause significant financial loss, legitimate businesses to collapse, and severe individual hardship. As the government and courts have repeatedly stated, in complex matters it requires expert judicial scrutiny to balance the competing interests, and that is unlikely to be found via summary justice in the magistrates' courts.

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