Assets subject to POCA 2002 and sanctions freezes—AFO exclusions and OFSI licensing (R (on the application of National Crime Agency) v Westminster Magistrates' Court; R (on the application of Ingliston Management Ltd) v Westminster Magistrates' Court)

This analysis was first published on Lexis®PSL on 01 November 2022 and can be found here (subscription required).

Corporate Crime analysis: The High Court has thwarted attempts to set aside and vary Account Freezing Orders (AFOs) at Westminster Magistrates' Court under the Proceeds of Crime Act 2002 (POCA 2002). The AFOs affected the assets of two UK companies associated with an individual, Petr Aven, who was designated under regulations made under the Sanctions and Anti-Money Laundering Act 2018 (SAMLA 2018) (specifically, the Russia (Sanctions) (EU Exit) Regulations 2019 (the RSRs 2019)), following similar measures in the EU. The variations sought, by making exclusions to the AFOs, to give effect to a licence granted under the RSRs by the Office for Financial Sanctions Implementation (OFSI), to enable payments to meet basic needs of Mr Aven and his family. As well as confirming the test for setting aside an AFO, the judgment offers various observations on the AFO regime and the interface between POCA 2002 (including exclusions to AFOs) and financial sanctions laws (including OFSI licences). Written by John Binns, partner at BCL Solicitors LLP.

R (on the application of National Crime Agency) v Westminster Magistrates' Court; R (on the application of Ingliston Management Ltd and another) v Westminster Magistrates' Court [2022] EWHC 2631 (Admin)

What are the practical implications of this case?

Although asset freezes under POCA 2002 and financial sanctions laws (latterly SAMLA 2018) have been around for some time, the expansion of scope this year of the RSRs 2019, SI 2019/855 has vastly increased the potential for UK businesses and courts to have to deal with overlaps between the two. AFOs have proven popular with law enforcement since their introduction in 2017, establishing a low threshold of 'reasonable grounds to suspect' for courts to freeze accounts that may contain the proceeds of, or be intended for use in, unlawful conduct, as a precursor to forfeiture if this can ultimately be proven to the usual civil standard.

The basis for 'asset freezes' under the RSRs 2019, SI 2019/855 is different, their stated purpose being to coerce, constrain, and/or signal disapproval of, the actions of the Russian government in Ukraine, with (currently) no scope for forfeiture. Importantly, though, both POCA 2002 and the RSRs 2019, SI 2019/855 contain provisions ('exclusions' to AFOs, and 'licences' from OFSI, respectively), by which frozen assets can be made available for (among other things) living expenses.

What happens, then, where an application to vary an AFO would create an exclusion whose effect is the same as an OFSI licence? Mr Aven, and the companies through which OFSI were happy for living expenses to be routed, could perhaps be forgiven for having thought it would be straightforward. Unfortunately, errors in approach by the court below, both to the exclusions (which it granted) and to the companies' related application to set the AFOs aside (which it refused), led the High Court to undo both decisions.

What was the background?

The companies, both owned and controlled by a Mr Gater, existed solely for the maintenance and security of Mr Aven's three UK households. Shortly before Mr Aven was designated in the EU, and between that and his designation under the RSRs 2019, SI 2019/855, there were various movements

of funds from an account in Austria (deriving from a trust of which he was the sole beneficiary) to, and between, UK accounts of Mr Aven, his wife, the companies, and Mr Gater.

The National Crime Agency (NCA) obtained from the court below, without notice, AFOs against the companies' accounts, based on grounds for suspicion that they contained the proceeds of, and/or were intended for use in, circumvention and/or breaches of the RSRs. Meanwhile, Mr Aven and the companies had applied to OFSI to license the receipt of funds from the Austrian account into the companies' accounts, and the use of the latter to make payments for living expenses. When that licence was granted, the companies applied to vary the AFOs (granting 'exclusions') 'to give effect' to it, while also, for good measure, applying to have the AFOs themselves set aside.

The results of the two applications, sadly, pleased no-one. The NCA criticised the court's decision to grant exclusions, which it said had relied improperly on OFSI's licence, ignoring the question of whether other assets were available to pay living expenses, rather than drain most of the accounts for these purposes. The companies meanwhile criticised the refusal to set the AFOs aside, in which the court had cited what it said was a failure by them to show a 'change in circumstances' since the AFOs had been made.

What did the court decide?

The High Court's decision, on one level, can be very simply expressed—by requiring a 'change in circumstances' since the AFOs before considering an application to set them aside, the court below had applied the wrong test; rather, the statutory threshold for that application is the same as it was at the outset (are there 'reasonable grounds to suspect'). Given that, the exclusion decision fell to be reconsidered as well, there being factual issues in common that meant it should be looked at afresh after that application had been re-heard.

For good measure, however, the High Court also made various observations, including on the interface between POCA 2002 and SAMLA 2018, and between exclusions and OFSI licences. In short, the companies (and, indeed, anyone else with such preconceptions) were wrong to expect the magistrates' court to follow OFSI's lead and grant an exclusion to give effect to an OFSI licence, as to the two regimes had very different purposes and effects. Notably, the NCA was right that the court should ask what other assets were available to pay these expenses, even if OFSI had not.

A moment's pause for reflection should confirm that this conclusion, perhaps counterintuitive at first glance, does flow from the two statutory regimes. The purpose of AFOs is to keep assets available for potential forfeiture under POCA 2002, which in turn is ultimately designed to ensure that 'crime should not pay'; exclusions, therefore, would not be appropriate for expenses that could be met from another source. The RSRs 2019, SI 2019/855 are designed to deny designated persons access to any assets in the UK, usually working in tandem with equivalent regimes overseas; licences, therefore, can and should be granted for UK expenses on the basis that ours is the most appropriate jurisdiction to deal with them, and without needing to ask about other assets here (or in other jurisdictions where sanctions apply).

The result is that there is, sadly, no shortcut in the scenario where assets are frozen under both regimes, and licensed under one; those affected, and their advisers, will need to consider both (and, indeed, often overseas regimes as well). In an increasingly complicated world, this should not come as a surprise to anyone.

Case details:

- Court: Administrative Court, Kings Bench Division, High Court of Justice
- Judge: Mrs Justice Collins Rice
- Date of judgment: 10 October 2022

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