

LEGAL PROVISIONS AND BEST PRACTICE IN CONFISCATION

- REVERSAL OF BURDEN OF PROOF-UK EXPERIENCE

Background

- **History of problems over effective confiscation in UK. Many different provisions (depending on predicate, e.g. drugs, customs offence) tax) other crimes often neglected and little priority given to action by police, prosecutors and courts.**
- **After PM- led review, all old laws swept away and new provisions created in Proceeds of Crime Act 2002. Also new agency; Asset Recovery Agency. Created.**
- **UK approach based on changing the legal position so as to make identification, freezing and confiscation of criminal assets easier.**
- **UK law offers a menu of measures which can be taken- so if one does not work, recourse can be had to the others. These are:**
 - **Criminal confiscation following conviction**
 - **Civil forfeiture without conviction#**
 - **Cash seizure.**
 - **Taxation .**

The normal assumption will be that the first of these will be used and must be considered first.

A central issue here today is that it is always difficult to prove that certain property was the proceeds of particular crimes. So under our law that is not now necessary.

Let us examine how that works in the 4 categories I have described

- **Criminal Confiscation**

If conviction is for one of range of specified offences (e.g. drug dealing, corruption, ml, counterfeiting, people trafficking)

Or : if he was convicted at that trial of at least 3 other crimes from which he benefited:
Or in the previous six years he was convicted at least twice of other crimes from which he benefited.

Then the court arrives at a total sum of money figure which represents not just the proceeds of that offence but from an assumption which the court is required to make that the defendant had a more general “criminal lifestyle.”

How does it arrive at that sum ?

By assuming that:

- a. all property in his possession at the time of the offence
- b. all property which has passed through his hands in the previous six years
- c. all bills which were paid over past six years
- d. all gifts and transfers of property which have been made

Are the proceeds of crime or were paid for by such proceeds.

Court **must** assume this unless:

- a. contrary to interests of justice to do so (and the court has to explain why) or
- b. the defendant proves to the civil standard (i.e. balance of probabilities) that the property was lawfully obtained.

Theory is that it is not unreasonable to require convicted criminals to be able to say where their money came from e.g. legitimate earnings, legacies.

Eventually the court arrives at a sum which the defendant must pay. He can find this money from anywhere inc. legally obtained money.

Civil Recovery

This is very controversial because

- Does not require a conviction
- Merely that the court is “satisfied” that the property has a criminal origin (defined as “obtained through unlawful conduct”).
This includes such conduct overseas so long as dual-criminality is satisfied.
- This can be proved to the civil standard using any admissible evidence.
- Court can refuse if this is contrary to interests of justice.
- Is also accompanied by an initial freezing order

There is a de-minimis limit of £10,000. Cash cannot be seized on its own.

This is really an in-rem type order directed at property and not people. There is no implication that the current owner of the property behaved unlawfully.

Cash Forfeiture

- Cash can be seized by the police etc (whether at the frontier or inland) if he suspects that it is the proceeds of crime or is going to be used for crime (e.g. to buy a drugs consignment).
- Such seizure can take place anywhere- in a residence, vehicle or on the street.
Specific powers of search on suspicion.
- Such cash can be kept for 48 hours. Application must then be made to the Court for authority for further detention for up to 3 months initially and no more than 2 years in all
- The court can then order the forfeiture of that cash if “satisfied” that it falls into that category.
- “Satisfied” is not defined but applies in effect civil standard of proof.

Note this applies to all crimes ((EXPLAIN old problem re drugs money seizures (i.e. fraud not drugs)).

Tax Provisions

The Act gives the Director of the new ARA, the specific powers of a tax inspector to levy a tax assessment on a suspected criminal if no other method would work.

In all countries, tax laws are strict and throw the burden of proof on to the payer!

Here the law only requires the Director to have “reasonable grounds to suspect” that income or property is the result of criminal conduct he can levy a tax assessment. Then all normal tax laws apply.

Point is that although at most 40% is taken that is better than nothing. But last resort !

HUMAN RIGHTS FACTORS

As I stated UK position is that people should be able to say where they obtained their property, esp. if they are convicted of major crime and have no legitimate employment history.

But

- **A BIG CONCERN Reversal of burden of proof etc.**

No successful challenges in the Courts.

BIG CASE is Philips. READ OUT FROM EM to CoE Convection.

HOW WELL ARE WE DOING??

In some ways the pattern is very good. In 2005/2006 (latest figures), property worth £85.7m was frozen (£50m from tax and civil recovery and £35m from criminal confiscation).

But confiscation lagged behind in 23 cases- £7.2m was confiscated.

This is because the procedures are more complicated and take longer. BUT at least the frozen property is not available to finance criminal lifestyles and other offending!

Any questions?