

Commercial

A drafting enigma

Daniel Lightman unravels the puzzles within the Proceeds of Crime Act 2002

IN BRIEF

- The extra-territorial ambit of civil recovery investigative powers and civil recovery orders.
- Poor drafting and the Proceeds of Crime Act 2002.

A key innovation introduced by the Proceeds of Crime Act 2002 (POCA 2002) is the power it gave to enforcement agencies, including the Serious and Organised Crime Agency (SOCA), to conduct civil recovery investigations and then to apply for civil recovery orders (CROs) in respect of property which is, or represents, property obtained through unlawful conduct. Ten years after their introduction, the Supreme Court has recently, for the first time, considered the extra-territorial ambit of civil recovery investigative powers and CROs.

Misnomers

The use of the expression “recovery order” is inapposite, since it wrongly suggests that the property at one time belonged to SOCA and that the function of a CRO is to “restore” the property to SOCA, whereas a CRO is in reality a civil forfeiture. When a CRO is made, its proceeds do not go to the victims of the crime, but rather to the UK Exchequer—and the Home Office has a discretion to incentivise SOCA by providing it with a share of the proceeds. “The proposed civil forfeiture regime”, noted a Cabinet Office report in 2000, “is intended to provide: a reparative measure—taking away from individuals that which was never legitimately owned by them; and a preventative measure—taking assets which are intended for use in committing crime.”

Presumably, the words “recovery order” are used in Pt 5 of POCA 2002—the part of the Act relating to CROs—because

the expression “confiscation order” had already been appropriated in Pts 2, 3 and 4 of POCA 2002 to describe value confiscation by the criminal court—although that, too, (as Lord Phillips pointed out in *SOCA v Gale* [2011] UKSC 49) is a misnomer. This is because a confiscation order does not involve actual confiscation of property, but rather the imposition of a personal obligation on the convicted person to pay a sum of money equivalent to the value of any property or pecuniary advantage obtained as a result of or in connection with his criminal conduct.

Because Pt 5 of POCA 2002 focuses not on any particular defendant, but on property that is the product of criminal conduct, wherever in the world that conduct took place, CROs can be made where no criminal proceedings have been brought in connection with the property—or even where there has been an acquittal. The claim form has to be served on the holder of the property, wherever he is domiciled, resident or present. The holder or owner of the property need not be the person guilty of the criminal conduct. By s 266(1) of POCA 2002, if the relevant conditions are met, the court must make a CRO, vesting the recoverable property in a trustee for civil recovery—a person appointed by the court to give effect to a CRO. Pt 5 of POCA 2002 creates an entirely new form of remedy.

Extra-territorial CROs?

To what extent can a CRO be made in respect of property outside the UK?

This issue arose in *Perry v SOCA* [2012] UKSC 35. Both Mitting J ([2010] 1 WLR 2761) and the Court of Appeal ([2011] EWCA Civ 578) had come to the clear view that CROs could be made in respect of property throughout the world. However, in July 2012 a nine-judge panel of the Supreme Court decided (by a 7:2 majority) that there is no jurisdiction for the High Court of England and Wales to make CROs under Pt 5 of POCA 2002 in respect of property outside England and Wales.

Lord Phillips, giving the majority judgment, stated that the courts below had placed undue weight on the definition of “property” at s 316(4) of POCA 2002 as “all property wherever situated”. Unlike Mitting J and the Court of Appeal, Lord Phillips did not consider that the words “wherever situated” should be applied, without restriction, to property in respect of which a CRO could be made.

Rejecting the appellants’ submission that it was a breach of international law for a UK statute even to purport to vest in a UK authority property situated in the territory of another state, Lord Phillips noted that while there is a presumption that a statute does not have extra-territorial effect, states have, by agreement, departed from the customary principles of international law in the case of confiscating the proceeds of crime.

In particular, the 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Convention), to which the UK is a party, recognises that the courts of state A may make an order purporting to vest in the authorities of state A property that is situated in state B in circumstances where the property is the proceeds of the criminal conduct of a defendant subject to the criminal jurisdiction of state A. However, the Convention provides that effect should be given to such an order by confiscation proceedings in state B at the request of state A.

Lord Phillips held that POCA 2002 must be read in the light of the Convention, and that both the scheme and the language of POCA 2002, properly analysed in the light of the Convention, accord with the requirements

of a coherent international scheme for confiscation of the proceeds of crime and with principles of public international law, so long as CROs are limited to property in the UK.

The converse, he held, would be the case were SOCA's submissions as to the extra-territorial effect of Pt 5 to be correct. Lord Phillips stated that he could see "no compelling reason why Parliament should have wished to confer on SOCA a right to seek a CRO in respect of the proceeds of a crime that was not committed within the UK where those proceeds are not within the UK". If SOCA becomes aware of the existence of property in another jurisdiction that it has reason to believe may be the proceeds of crime, he said, the natural course for it to take would be to pass on the information it has about the property to the appropriate authorities in the country where the property is situated.

"What cannot...be the correct construction [of POCA 2002]", as Sir Anthony Hughes, agreeing with Lord Phillips, pithily put it, "is that, as SOCA was obliged to submit, it has jurisdiction to seek a (mandatory) CRO over property in China which is the product of a crime committed in China by an offender who has never left that country."

Information notices

The second issue as to the extra-territorial scope of POCA 2002 which the Supreme Court addressed in *Perry* concerned SOCA's investigative powers under Pt 8 of POCA 2002 when it conducts a civil recovery investigation. A civil recovery investigation is defined by s 341(1) of POCA 2002 as "an investigation into—(a) whether property is recoverable property or associated property, (b) who holds the property, or (c) its extent or whereabouts".

To assist such an investigation, SOCA can apply for a disclosure order under s 357 of POCA 2002, which authorises it to give information notices to "any person" whom it considers has relevant information requiring him or her to answer questions, provide information or produce documents with respect to any matter relevant to the investigation for the purposes of which the order is sought. By s 359 of POCA 2002, it is a criminal offence punishable by a term of imprisonment for the recipient to fail without reasonable excuse to comply with an information notice or knowingly or recklessly to make a false statement in

purported compliance with a requirement imposed under a disclosure order.

In *Perry* the issue arose whether such a disclosure order authorised SOCA to send information notices to persons who are outside the UK. Foskett J ([2010] 1 WLR 910) and a majority of the Court of Appeal ([2011] 1 WLR 542) had held that it did, but the Supreme Court unanimously decided that it did not.

Lord Phillips placed considerable weight on the fact that s 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. He noted that, subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A.

“ Lord Reed described s 286 as ‘a riddle, wrapped in a mystery, inside an enigma’ ”

"Section 357, read with s 359, does not simply make proscribed conduct a criminal offence", Lord Phillips pointed out. "It confers on a UK public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone I consider it implicit that the authority given under s 357 can only be exercised in respect of persons who are within the jurisdiction."

The Scottish provision

An issue which perplexed the Supreme Court in *Perry*, as it had the courts below (Mitting J called it a "puzzle"), was s 286 of POCA 2002, which purports to confer on the Scottish Court of Session the jurisdiction to make a CRO in respect of moveable property outside Scotland provided that either that the holder is domiciled, resident or present in Scotland or the unlawful conduct through which the property was obtained took place in Scotland. Lord Phillips called s 286 "an anomalous enigma" which "cannot justify giving the

provisions of POCA 2002 that relate to the rest of the UK a meaning different from that which they would bear in the absence of s 286".

No coherent rationale could be found for s 286. The explanation which Lord Goldsmith had given when moving the amendment that introduced it in the House of Lords, namely that the intention was to achieve the same effect in all the jurisdictions of the UK, did not make sense. The explanatory notes to POCA 2002 were also plainly incorrect. The Scottish Supreme Court Judge, Lord Reed, considered it "possible that the drafting of s 286(2) and (3) may have reflected a misunderstanding", adding: "As Sir Winston Churchill once said in another context, it is a riddle, wrapped in a mystery, inside an enigma." Even the two dissenting Judges, Lords Judge and Clarke, agreed that POCA 2002 was "poorly drafted".

"Acts of Parliament", noted Francis Bennion in his magisterial work *Bennion on Statutory Interpretation*, "are prepared unscientifically and in haste". Whilst it may be unfair unduly to single out for criticism the drafters of POCA 2002, which was a large and complex Act, lessons should be learnt from its failure to state expressly and clearly (i) in the case of CROs, whether they applied to property outside the UK, and (ii) in the case of disclosure orders, whether information notices can be given to people outside the UK. As the late Sir Harold Kent argued in his autobiography *In on the Act* (perhaps the only published autobiography of a Parliamentary draftsman), in areas of public administration it is "the plain duty of the government and Parliament and the draftsman to enact the law in as detailed a form as is necessary to make its meaning unambiguous and its effect certain".

Lessons, too, should be learnt from the nonsensical explanation given in the explanatory note to s 286 of POCA 2002. Explanatory notes to Acts of Parliament, as Bennion has warned, "are likely to have been produced by persons other than the drafter who may not be skilled in the principles of statute law and may not have the full knowledge of the enactment and its purposes which is possessed by the drafter".

NLJ

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