

Asset Recovery 2022

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Asset Recovery

2022

Contributing editors**Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam**
Reed Smith LLP

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Asset Recovery*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Russia and the United Arab Emirates.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam of Reed Smith LLP, for their assistance with this volume.



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CIVIL ASSET RECOVERY – JURISDICTIONAL ISSUES

Parallel proceedings

1 | Is there any restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter?

No, there is no legal restriction on civil proceedings progressing in parallel with, or in advance of, criminal proceedings on the same subject matter. The courts have discretion to stay civil proceedings where there is a real risk of substantial prejudice that could lead to injustice. However, the courts rarely exercise this discretion. In *Shiva Ltd v Boyd* [2021] EWHC 371 (Admin), the court refused a stay of proceedings and emphasised that there is a high bar for what constitutes a real risk of substantial prejudice. It stressed that there is a 'public interest in civil proceedings being determined in a reasonable time'.

Forum

2 | In which court should proceedings be brought?

Except for small value claims, which proceed in the County Court, proceedings should be brought in the Business and Property Courts division of the High Court of England and Wales. Within the Business and Property Courts, claimants have a choice of commencing proceedings in specialist divisions. In practice, most large-scale asset recovery cases are brought in the Commercial Court, which has significant experience in dealing with ancillary orders that are common in fraud and asset recovery, such as freezing and receivership orders.

Limitation

3 | What are the time limits for starting civil court proceedings?

Asset recovery claims span a range of different types of claim, which all have different time limits. Under the Limitation Act 1980, the limitation period for tort and contract claims is six years. In fraud claims, the limitation period does not start until the claimant has discovered the fraud or reasonably could have discovered it. Where the claim is based on foreign law, the English courts generally apply the foreign limitation law, although there are some exceptions to this. There is no time limit for starting claims for a fraudulent breach of trust or claims by a beneficiary of a trust to recover trust property. Different limitation periods apply in insolvency claims. Claims for wrongful or fraudulent trading are generally subject to a six-year limitation but claims to set aside transactions and recover property may be subject to a 12-year limitation period under section 8 of the Limitation Act 1980.

Proceedings to enforce English High Court judgments are not subject to any limitation period, although delays may make them more difficult. Proceedings to enforce arbitration awards are generally subject to a six-year limitation period. Enforcement of foreign judgments

has different limitation periods, depending on the basis on which the judgment is being enforced.

Jurisdiction

4 | In what circumstances does the civil court have jurisdiction? How can a defendant challenge jurisdiction?

For the English courts to establish jurisdiction, proceedings must be served. If a defendant can be served in England, the English courts automatically have jurisdiction, although defendants can challenge this by arguing that England is not the proper place for the claim to be heard. An English jurisdiction clause also automatically gives jurisdiction to the English.

In other circumstances, Part 6 of the Civil Procedure Rules contains jurisdictional gateways. The gateways that are most frequently used in asset recovery cases are:

- a defendant is domiciled in England;
- in cases with multiple defendants, if one defendant is subject to English jurisdiction and there is a real issue to be tried against them (which is reasonable for the English courts to hear), the claimant can treat them as an anchor defendant and obtain the court's permission to sue any other necessary or proper party to that claim. This gateway is very often used in conspiracy claims;
- a claim relates to a contract made within the jurisdiction or is subject to English law, or both;
- a claim relates to a breach of contract committed within the jurisdiction of the English courts; or
- in tort claims, England is the place where the harmful event occurred or may occur.

The English courts permit the enforcement of foreign judgments and awards. There are various registration regimes or it is possible to enforce under common law provided the judgment satisfies certain criteria, including that the judgment is final and for a definite sum of money.

The United Kingdom has adopted the United Nations Commission on International Trade Law Model Law in the Cross Border Insolvency Regulations 2006 and recognition is regularly granted to foreign insolvency proceedings.

A defendant can challenge jurisdiction. To do so, they must file an acknowledgement of service that disputes the jurisdiction of the English courts and specifies why jurisdiction is disputed.

CIVIL ASSET RECOVERY – PROCEDURE

Time frame

5 | What is the usual time frame for a claim to reach trial?

The courts actively manage claims and the aim is that, on average, the time for a claim to reach trial will be between one to two years.

However, this can vary significantly depending on the complexity of the case and other issues. Hard-fought asset recovery claims sometimes take three or more years to reach trial, particularly if the substantive proceedings are delayed due to heavy interim applications (for example, freezing order applications). Where proceedings are served on parties outside the jurisdiction, there can be an additional delay at the beginning of proceedings, often of a few months or up to a year.

Admissibility of evidence

6 | What rules apply to the admissibility of evidence in civil proceedings?

Evidence that is relevant to the disputed factual issues in the case is generally admissible, although the courts have discretion and there are some exclusions. The key exclusions are:

- opinion evidence;
- evidence protected by privilege; and
- evidence obtained by torture.

As a general rule, the English courts admit evidence rather than excluding it, even if it has been unlawfully obtained. In *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349, the Court of Appeal confirmed that evidence that was allegedly obtained by illegal hacking would not be excluded.

The court has a wide discretion to control evidence under Part 32.1 of the Civil Procedure Rules, including the ways in which evidence is presented and the issues it covers. Evidence by video link is allowed, including where the witness is in another jurisdiction, subject to permission of the English court and any rules governing the giving of evidence in the jurisdiction in which the witness is located.

UK criminal convictions are admissible, but foreign criminal convictions are generally inadmissible, subject to certain limited exceptions.

Witnesses

7 | What powers are available to compel witnesses to give evidence?

In civil proceedings, parties usually rely on a written witness statement (ie, parties do not question their own witness in court). A witness is normally only questioned by the opposing side in a process known as cross-examination.

If a witness within the jurisdiction will not provide evidence voluntarily, a witness summons can be served. This obliges the witness to provide documents or give oral evidence, or both. However, serving a summons can be a risky strategy because, without a witness statement, the party serving the summons often has no advance knowledge of the witness's evidence. If a witness fails to comply with a properly issued summons, the court can fine or imprison the witness, or hold the witness in contempt of court.

If a witness outside the jurisdiction will not provide evidence voluntarily, the party requiring that witness's evidence can ask the English court to send a letter of request from the English court to the court in the foreign jurisdiction. The letter will ask the foreign court to take and send evidence from the witness. The English court has discretion regarding whether it sends letters of request and the English court will evaluate the evidence received for admissibility before it can be deployed in the English proceedings.

Publicly available information

8 | What sources of information about assets are publicly available?

The key sources of publicly available information include the following.

- Companies House operates a database of all UK-registered companies and limited liability partnerships. Available information includes details of shareholders, directors, persons with significant control, registered charges and company accounts.
- The Driver and Vehicle Licencing Agency operates a database of the registered keeper of all taxed vehicles in the United Kingdom.
- The Land Registry operates a database of English and Welsh properties that can be searched if the property details are known. It clarifies if a property is mortgaged, but not the outstanding sums under the mortgage.
- Publicly listed companies are obliged to publish filed accounts on their website and file information with the relevant stock exchange.
- Public registers of certain other assets are also available, including aircraft and ships.

Cooperation with law enforcement agencies

9 | Can information and evidence be obtained from law enforcement and regulatory agencies for use in civil proceedings?

Evidence can be requested from law enforcement and regulatory agencies for use in civil proceedings. It is generally at the discretion of the relevant law enforcement agency whether to comply with a request. In practice, they rarely comply.

In very rare circumstances, the court can grant an order that compels public authorities to provide information. For example, in *Various Claimants v News Group Newspapers & Others* [2013] EWHC 2119 (Ch), the court ordered the Metropolitan Police in London to disclose information obtained in phone hacking investigations to claimants in civil proceedings.

Third-party disclosure

10 | How can information be obtained from third parties not suspected of wrongdoing?

There are various types of order that allow this.

A type of disclosure order called a *Norwich Pharmacal* order is available against third parties (eg, banks) who may have relevant documents or information, but are unlikely to be defendants to proceedings. These orders can be obtained before a claim is issued. These orders normally prohibit the respondent or respondents from disclosing the existence of the order to anyone else (ie, they usually include a gagging order).

Under Part 31.17 of the Civil Procedure Rules, the court can order disclosure against third parties, but only after proceedings have been commenced. An applicant must prove disclosure is necessary to dispose fairly of the claim or to minimise costs, and that the documents requested will support their case or adversely affect the case of the other parties.

Bankers' trust orders are disclosure orders available against third parties, typically banks. They are orders intended to assist in tracing assets where a party has a proprietary claim. These orders require disclosure of any information that may assist in the tracing process.

Documents can be obtained under section 7 of the Bankers' Books Evidence Act 1879. This permits any party to a legal proceeding to inspect entries in a banker's book for the purposes of those proceedings. In *Wangzhou Meng v HSBC & Others* [2021] EWHC 342 (QB) the court held that this only applies to legal proceedings in England, and that the types of documents that can be inspected are documents with a transactional focus and not, for example, records that are maintained for regulatory compliance.

CIVIL ASSET RECOVERY – REMEDIES AND RELIEF

Interim relief

11 | What interim relief is available pre-judgment to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud?

The English courts have some of the widest powers in the world when it comes to pre-judgment interim relief in fraud cases.

The courts can grant worldwide freezing orders pursuant to section 37 of the Senior Courts Act 1981 and Rule 25.1 of the Civil Procedure Rules. These order a party not to deal with, diminish or dispose of their assets. The definition of 'asset' is wide and includes assets that the party controls, the definition of which extends to informal control. Similarly, ownership is widely defined to cover assets that are legally or beneficially owned. Freezing orders also apply to third parties that hold assets belonging to the defendant (for example, banks, agents and nominees). Worldwide freezing orders cover global assets but do not have extraterritorial effect unless recognised by the relevant foreign court.

Freezing orders can be obtained directly against third parties against whom there is no underlying claim if there is sufficient evidence that they are holding or controlling a defendant's assets (known as the *Chabra* jurisdiction after the judgment in *TSB Private Bank International SA v Chabra* [1992] 1 W.L.R. 231). Subject to certain restrictions, freezing orders can even be obtained against unidentified defendants (persons unknown) if there is no clarity on the identity of the perpetrators of fraud. This issue has become more prominent in the context of online fraud, where the defendant's identity is often not known.

In connection with a freezing order, the court also often makes disclosure orders. These usually order a defendant to disclose their worldwide assets (by value and location). The defendant is usually given very limited time to do this (often just 48 hours).

Where there is a claim to an asset itself, claimants can seek proprietary injunctions. These prevent a party from dealing with, disposing of or diminishing the value of the specific asset.

The courts can grant search and seizure orders, which allow a claimant's solicitors to search premises and seize documents to preserve evidence. This can include private premises, such as a home, and business premises. These orders usually include imaging orders, which provide for forensic technicians to image all electronic devices at the relevant location. To obtain a search order, the claimant must prove that there is a real possibility that the defendant will destroy documents and that the damage that would be caused to the claimant will be very serious.

The English courts have the discretion to appoint a receiver to preserve assets in appropriate cases, for example, where a freezing order does not provide adequate protection. The receiver's powers will be set out in the court order and depend on the circumstances of the case. The receiver's primary duty is to collect and preserve the relevant asset or assets. These orders can be extraterritorial, but to have effect abroad, need to be recognised by relevant foreign courts.

Non-compliance with court orders

12 | How do courts punish failure to comply with court orders?

The courts normally penalise non-compliance with case management orders by making adverse costs orders.

However, injunctions – including freezing orders and search orders – contain a penal notice. This notice warns the recipient of the order or anyone within the jurisdiction with notice of the order that breach of the order may result in the respondent being held in contempt of court. The courts can hold a party that disobeys an order with a penal notice in contempt of court and punish them with fines, asset seizure, and imprisonment for up to two years.

Obtaining evidence from other jurisdictions

13 | How can information be obtained through courts in other jurisdictions to assist in the civil proceedings?

The English courts can issue letters of request to courts in other jurisdictions to obtain information to assist in civil proceedings under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (the Hague Evidence Convention).

Assisting courts in other jurisdictions

14 | What assistance will the civil court give in connection with civil asset recovery proceedings in other jurisdictions?

The English courts will respond to letters of request issued in compliance with the Hague Evidence Convention. Further, the English courts will grant freezing orders in support of foreign proceedings under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 in appropriate cases.

There are various reciprocal enforcement conventions in force, such as the Hague Convention on Choice of Court Agreements 2005, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. Orders that fall under these conventions can be enforced through a registration process. Foreign arbitration awards can be enforced under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Causes of action

15 | What are the main causes of action in civil asset recovery cases, and do they include proprietary claims?

The main causes of action in civil recovery cases are the following.

- Fraud. This is known as the torts of deceit or fraudulent misrepresentation. Fraud involving multiple defendants is usually brought as a conspiracy to defraud claim.
- Breach of trust or breach of fiduciary duty. These types of claims can include proprietary claims, (ie, claims that the complainant has a direct interest in an asset in dispute).
- Knowing receipt (which means receiving trust property in breach of trust) and dishonest assistance (which means assisting someone else in committing a breach of trust). For a claim for knowing receipt, the claimant must show that the defendant knew that the property they received was received in breach of trust. For a claim for dishonest assistance, the claimant must have evidence of the defendant's dishonesty. These types of claims can include proprietary claims (ie, asserting claims over the assets themselves).
- Bribery, or the receipt or payment of a secret commission.
- Unjust enrichment. Here, the claimant brings claims that a defendant who received funds, by which they were unjustly enriched, must repay an equivalent sum to the claimant.
- A transaction defrauding creditors claim under section 423 of the Insolvency Act 1986. This is applicable to cases where a defendant has entered into a transaction at an undervalue for the purpose of putting assets beyond the reach of claimants or potential claimants, or has otherwise defrauded current or future creditors.
- Insolvency office holders (ie, administrators, liquidators and trustees in bankruptcy) have powers to pursue other claims (for example, to set aside transactions) that are often used in asset recovery litigation.

Remedies

16 | What remedies are available in a civil recovery action?

The principal remedies in asset recovery claims are restitution (to restore to the claimant the benefit that a defendant obtained at the claimant's expense) or an award of damages to compensate the claimant for losses they have suffered.

Where a claim relates to trust property or unjust enrichment, a proprietary remedy may be available to recover the relevant assets (ie, the disputed asset, or its traceable proceeds, are returned to the claimant). In these cases, the court will usually impose a constructive trust over the asset. Equitable tracing claims may also be available to recover specific assets.

Where a claim is against a fiduciary (for example, a trustee or director of a company) acting in breach of duty or trust, the defendant may be ordered to provide an account of profits. This remedy can also apply in some other claims, depending on the circumstances.

Punitive damages are not generally available. However, in cases involving the tort of deceit, punitive damages may, very rarely, be awarded.

Judgment without full trial

17 | Can a victim obtain a judgment without the need for a full trial?

If the defendant does not respond to the claim, a judgment can be ordered in default and without a trial. If the defendant responds to the claim but their defence has no real prospect of success and there is no other compelling reason for the claim to go to trial, summary judgment is available. The bar for succeeding on these applications is high, particularly in fraud cases.

In extreme cases, where a defendant is in contempt of court for disobeying an injunction or repeatedly breaching court orders, the court may bar the defendant from defending the claim unless they cure their contempt. While this still results in a full trial, if the trial is undefended, it may be reduced to proceedings that last just one day.

Post-judgment relief

18 | What post-judgment relief is available to successful claimants?

Freezing orders are available both post-judgment and pre-judgment.

The court can also order a judgment debtor to provide information under oath regarding their assets under Rule 71 of the Civil Procedure Rules. If a judgment debtor fails to attend court to provide information, the court can hold them in contempt of court and penalise them with fines, asset seizure or imprisonment, or a combination of these penalties.

The court can also appoint a receiver post-judgment to preserve assets. Finally, insolvency office holders have extensive powers under English law, and claimants and judgment creditors should consider whether an insolvency process would put them in a better position than enforcement. This will usually depend on what other creditors are pursuing the same debtor.

Enforcement

19 | What methods of enforcement are available?

The main methods of enforcement available are:

- a charging order over land, following which a creditor can seek an order for sale;
- a third-party debt order, which can be obtained over assets like bank accounts and require the third party (for example, a bank) to pay money to the judgment creditor instead of their client;

- an attachment of earnings order, requiring an employer to pay a proportion of the debtor's salary to the judgment creditor;
- a writ of control, which enables a court officer to take control of a judgment debtor's assets and sell them to satisfy the debt; and
- a court-appointed receiver with the power to manage income from the judgment debtor's assets and apply it to satisfy the judgment debt.

Personal bankruptcy or liquidation proceedings are an alternative route to enforcement, although they are collective processes (ie, any monies realised by the insolvency officer will be divided between creditors).

Funding and costs

20 | What funding arrangements are available to parties contemplating or involved in litigation and do the courts have any powers to manage the overall cost of that litigation?

Parties are legally permitted to use the following.

- Third-party funding. The market in England is well established, although still nascent in the context of asset recovery litigation. Litigation funders cannot exercise full control over the claim.
- A damages-based agreement under which a lawyer takes a percentage of the damages recovered instead of a traditional hourly billing arrangement. These arrangements have not been common, due to a lack of clarity in the regulations. However, following the court's clarification of the regulations in early 2021 in *Zuberi v Lexlaw* [2021] EWCA Civ 16, damages-based agreements may become more common.
- A conditional fee agreement under which a lawyer agrees to charge no fee or a lower fee if the claim is unsuccessful, but an increased fee if the case is successful.
- After-the-event insurance, which typically covers liability for an opponent's legal costs if an adverse costs award is made. This can also cover a party's liability for its own disbursements and legal costs, although this is rare.

In England, the court normally orders the party that loses litigation to pay part (or sometimes all) of the winning party's legal costs. All the arrangements listed above are legal, but the additional costs (over and above lawyers' standard costs) that they incur cannot be recovered from a counterparty in litigation. For example, a claimant will still be able to recover their own legal costs (ie, the lawyers' costs funded by a litigation funder), however the claimant will not be able to recover the costs of the litigation funding itself.

In small claims, the courts exercise significant control over costs by setting cost budgets. Where the value of a claim is over £10 million, the courts do not usually exercise direct control over costs by setting budgets. However, the court exercises indirect control, for example by taking into account the reasonableness of costs when it makes an order for the losing party to pay the winner's costs. Usually, the courts only order part of these costs to be paid.

CRIMINAL ASSET RECOVERY – LEGAL FRAMEWORK

Interim measures

21 | Describe the legal framework in relation to interim measures in your jurisdiction.

The Proceeds of Crime Act 2002 (POCA) provides the legal framework for interim measures in relation to the proceeds of crime:

In circumstances where a criminal investigation has been opened in England and Wales and where the court concludes there are reasonable grounds to suspect a defendant in a criminal investigation or

prosecution has benefitted from the criminal conduct under investigation, the Crown Court (the senior criminal court of first instance in England) can make a restraint order under section 41 of POCA. This prohibits the defendant from dealing with the restrained assets (ie, specific assets or the defendant’s assets as a whole). A restraint order binds third parties on notice of it and deliberate breach is punishable by contempt of court, the penalties for which include fines, asset seizure or up to two years of imprisonment. Ancillary orders can also be made to ensure the restraint order is effective. The two most common ancillary orders for restraint are provision of information orders and repatriation orders.

Under Part 5 of POCA, a property freezing order can also be sought by law enforcement agencies pending determination of any claim by an enforcement authority, such as the Serious Fraud Office (SFO) or the National Crime Agency (NCA) in the High Court (the senior civil court). This type of freezing order requires a good arguable case that the property frozen represents property obtained through unlawful conduct.

Where a police officer, officer of the SFO or Her Majesty’s Revenue and Customs (HMRC) finds cash and there are reasonable grounds for suspecting that the cash in question is or represents the proceeds of unlawful conduct, or is intended by any person for use in unlawful conduct, the Magistrates’ Court (a lower criminal court) has the power to order it to be detained pending the outcome of the officer’s enquiries under section 295 of POCA. An application can then be made for the cash to be forfeited.

Balances in bank accounts can also be seized and forfeited under Part 5 of POCA, known as account freezing orders. Enforcement agencies can also bring summary proceedings to forfeit listed assets, which include artwork, precious metals, precious stones and watches.

Under Part 8 of POCA, the SFO can also apply to the High Court for an interim freezing order to restrain property subject to an unexplained wealth order.

The court can also, in certain circumstances, appoint a receiver pre-conviction to manage a defendant’s assets.

Proceeds of serious crime

22 | Is an investigation to identify, trace and freeze proceeds automatically initiated when certain serious crimes are detected? If not, what triggers an investigation?

Investigations to identify, trace and freeze proceeds of crime are at the discretion of the enforcement authorities.

Confiscation – legal framework

23 | Describe the legal framework in relation to confiscation of the proceeds of crime, including how the benefit figure is calculated.

The Crown Court can make a confiscation order under Part 2 of POCA if asked by the prosecutor or if the court considers it appropriate. The purpose of a confiscation order is to deprive the defendant of the financial benefit obtained by criminal conduct. In determining whether an order should be made, the court must consider whether the defendant has a criminal lifestyle and, if so, the extent of the defendant’s benefit from general criminal conduct. If the court decides that the defendant does not have a criminal lifestyle it must determine whether he or she has benefitted from his or her particular criminal conduct.

The court must then go on to determine the total value of the defendant’s benefit (the benefit figure) and the total value of the defendant’s free property, minus priority obligations, plus the value of any tainted gifts (in short, transfers of property made by the defendant below market value) (the available amount). A confiscation order is usually then made on the basis of which of those two figures is the

lower (the recoverable amount). If the available amount is determined to be nil, a confiscation order is made for a nominal amount, usually £1.

Confiscation procedure

24 | Describe how confiscation works in practice.

Upon conviction, an application for a confiscation order will be made by the prosecutor or initiated by the court. It is important to note that confiscation is not aimed at removing or confiscating the specific property acquired in the criminal conduct, but it is intended to generate a figure representing the benefit from the conduct, which is then payable by the defendant.

A police financial investigation officer will produce a statement on the amount of the defendant’s criminal benefit to the court. The court may then apply certain assumptions and make a confiscation order in the amount of the criminal benefit, unless the defendant can satisfy the court that the available amount is less than the benefit figure. The court has the power to make a confiscation order in a sum of money and may permit the defendant to pay in instalments. The court has no power to direct payment from a particular source.

Agencies

25 | What agencies are responsible for tracing and confiscating the proceeds of crime in your jurisdiction?

The main agencies responsible for tracing and confiscating the proceeds of crime are the Crown Prosecution Service, the SFO, the Financial Conduct Authority, the NCA, the police forces (including asset recovery teams) and HMRC.

CRIMINAL ASSET RECOVERY – CONFISCATION

Secondary proceeds

26 | Is confiscation of secondary proceeds possible?

Yes, the confiscation order must be paid by the defendant from the assets they have available; it is not targeted at specific assets. Prior to the confiscation order being made, an investigation will be undertaken into the defendant’s available assets and the level of the confiscation order will be based on the court’s assessment of whether the defendant owns sufficient assets, in any form, to meet the order. Where the defendant has made a gift or transfer of property to another for significantly less than its market value at the time of transfer within six years of the commencement of the proceedings – or at any time if the property was obtained as a result of or in connection with general criminal conduct – this is known as a tainted gift (sections 77 and 78 of the Proceeds of Crime Act 2002 (POCA)). A tainted gift is considered the defendant’s property for the purpose of a confiscation order. If the defendant does not meet the confiscation order, a custodial sentence may be activated.

Third-party ownership

27 | Is it possible to confiscate property acquired by a third party or close relatives?

Property in the hands of a third party can be subject to enforcement action by an enforcement receiver, with a view to satisfying an outstanding confiscation order, if a court determines that the defendant has an interest in that property.

Third parties have the right to make representations as to the extent of any interest in the defendant’s property under section 10A of POCA or otherwise at the enforcement stage of confiscation proceedings. However, the legislation does not permit significant discretion. In

R v Morrison [2019] EWCA Crim 351, the Court of Appeal confirmed that, although a confiscation order must be proportionate, it did not permit a general exercise of balancing interests, with the result being that a family home was deemed to be a tainted gift and included in the recoverable amount even though the consequence might be that the family would be made homeless.

Expenses

28 | Can the costs of tracing and confiscating assets be recovered by a relevant state agency?

Where the court considers it just and convenient to do so, an order for costs against the defendant may be made under section 18 of the Prosecution of Offences Act 1985. The amount of the costs ordered can be whatever the court thinks is just and reasonable based on the prosecution's costs estimate. The purpose of the costs award is to compensate the prosecutor and not to punish the defendant. An order should be made where the defendant has the means to pay.

Value-based confiscation

29 | Is value-based confiscation allowed? If yes, how is the value assessment made?

Yes. When the court makes a confiscation order, it requires the defendant to meet it from the defendant's assets, whether those assets are the proceeds of crime or not.

Burden of proof

30 | On whom is the burden of proof in a procedure to confiscate the proceeds of crime? Can the burden be reversed?

Where a defendant is determined by the court to have a criminal lifestyle, POCA allows the court to make certain assumptions in relation to confiscation orders (section 10 of POCA). In particular, it provides that any property transferred to the defendant during the six years prior to the commencement of proceedings and any property obtained by the defendant within the relevant period is presumed to be criminal property, unless the defendant can prove otherwise. The burden of proof in such circumstances is on the defendant on the balance of probabilities.

POCA also places the burden of proof on the defendant to prove that they do not have sufficient assets to meet a confiscation order in the full amount of the criminal benefit.

Using confiscated property to settle claims

31 | May confiscated property be used in satisfaction of civil claims for damages or compensation from a claim arising from the conviction?

Under the Powers of Criminal Courts (Sentencing) Act 2000, the Crown Court has the power to make a compensation order against a defendant and in favour of a victim of the defendant's criminal conduct. Where a court determines that a compensation order and a confiscation order should be made and there are insufficient funds to pay both orders, the court can order that the compensation order should take priority and be paid out of the assets forfeited under the confiscation order. Where the court believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury, or damage sustained in connection with the conduct, the court's duty to make a confiscation order becomes the power to make any order the court sees fit, including to make no order at all (section 6(6) of POCA).

Confiscation of profits

32 | Is it possible to recover the financial advantage or profit obtained through the commission of criminal offences?

Yes. The definition of criminal benefit under POCA is wide and can include profits derived from, for example, corrupt procurement processes. However, confiscating company profits can be difficult where the defendants are individual directors rather than the company itself. In *CPS v Aquila Advisory Limited* [2019] EWCA Civ 588, directors of a company used the company to commit a criminal offence. Following conviction, confiscation orders were made against the directors. However, the court held that a civil action by the company against the directors to recover the secret profit took priority over the confiscation order, with the result being that the funds were not available to satisfy the confiscation order. This judgment has been appealed to the Supreme Court and a decision is pending as at August 2021.

Non-conviction based forfeiture

33 | Can the proceeds of crime be confiscated without a conviction? Describe how the system works and any legal challenges to in rem confiscation.

The proceeds of crime can be forfeited without a conviction if the court concludes on the balance of probabilities that unlawful conduct has occurred and that the property has been obtained through that unlawful conduct. The mechanism is known as a civil recovery order and is granted under Part 5 of POCA. All the main enforcement authorities can apply for civil recovery orders as an alternative to seeking a criminal conviction. Orders under Part 5 of POCA are made in rem over identified property, rather than against the defendant. Proceedings can be issued in the High Court, typically by the National Crime Agency, and there is no need for any criminal proceedings to be underway. In most cases, proceedings start by an application for a property freezing order. A claim for a recovery order is subsequently made identifying the specific property and the grounds on which it is deemed to be recoverable. The defendant can challenge both the interim property freezing order and the application for the civil recovery order on the grounds that the unlawful conduct did not occur or that relevant property was not obtained through the unlawful conduct.

The Criminal Finances Act 2017 extended pre-existing cash forfeiture powers – which allow investigators to detain and forfeit cash in proceedings in the Magistrates' Court – to money held in bank and building society accounts. Money held in a bank or building society account could previously only be restrained through application to the Crown Court and confiscated following conviction.

Unexplained wealth orders (Part 8 of POCA) require a respondent to provide information and documents about property and to explain how that property was obtained. If the respondent fails, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period, the property may be presumed to be recoverable property in civil recovery proceedings. To obtain such an order, the High Court must be satisfied that the defendant is either a politically exposed person or suspected of involvement in serious crime. The order can be challenged by the defendant proving they do not fall within the categories of persons on whom the order can be served or by adequately explaining the provenance of the asset in question.

Finally, the proceeds of crime can be forfeited without conviction by a corporate defendant entering into a deferred prosecution agreement (DPA) with a relevant prosecutor. Typically, such agreements involve the corporate defendant paying financial penalties and cooperating with the prosecutor in return for the prosecuting authority's agreement to suspend the indictment in relation to the conduct that is the subject of

the DPA. DPAs typically include an element of disgorgement to remove the proceeds of the criminal offending to which the DPA relates from the corporate defendant.

Management of assets

34 | After the seizure of the assets, how are they managed, and by whom? How does the managing authority deal with the hidden cost of management of the assets? Can the assets be utilised by the managing authority or a government agency as their own?

Where assets are restrained pending a criminal trial, section 69 of POCA requires the restrained property to be preserved as far as possible to meet any later confiscation order. Where assets require active management, the court can appoint a management receiver over the defendant's assets. The costs of the management receiver are paid from the assets they are managing, even where the defendant is ultimately acquitted unless it is subsequently found that the restraint order should never have been made. Although typically management receivers are third parties appointed by the enforcement authority, the Crown Prosecution Service also uses its lawyers as in-house receivers to manage assets where the nature of the assets is such that any risks arising may be adequately managed without the need for insurance.

CRIMINAL ASSET RECOVERY – CROSS-BORDER ISSUES

Making requests for foreign legal assistance

35 | Describe your jurisdiction's legal framework and procedure to request international legal assistance concerning provisional measures in relation to the recovery of assets.

Requests for international legal assistance are made through the mutual legal assistance process. Requests are made by courts or prosecutors in a formal international letter of request pursuant to the Crime (International Co-operation) Act 2003 or section 74 of the Proceeds of Crime Act 2002 and in conjunction with any mutual legal assistance agreements in place between states. The vast majority of requests are made by prosecuting authorities. To make a request, the authority must be satisfied that:

- an offence has been committed or there are reasonable grounds for suspecting so; and
- an investigation is ongoing or proceedings have been commenced.

The request must be confined to evidence for use in the proceedings or investigation. Formal requests can be slow and there are several ways to expedite the process. Overseas production orders under the Crime (Overseas Production Orders) Act 2019 can be used to compel disclosure of electronic data stored overseas. These orders can be served directly on the person or organisation holding the data. However, an international cooperation agreement must be in place to exercise the power. Currently, the only such agreement in place is between the United Kingdom and the United States.

Complying with requests for foreign legal assistance

36 | Describe your jurisdiction's legal framework and procedure to meet foreign requests for legal assistance concerning provisional measures in relation to the recovery of assets.

The United Kingdom will consider requests for mutual legal assistance from any overseas state. The types of assistance the United Kingdom can provide include search and seizure, production orders, asset freezing or restraint, asset forfeiture and confiscation, asset tracing, and account monitoring orders. The decision to comply with a request is

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discretionary, although in practice it is rare for a request to be refused, provided that the Home Office's UK Central Authority is satisfied that an offence under the law of the requesting country has been committed, or there are reasonable grounds for suspecting so and that an investigation or proceedings have been commenced in relation to that offence.

Treaties

37 | To which international conventions with provisions on asset recovery is your state a signatory?

The United Kingdom is a signatory to the following principal conventions:

- the United Nations Convention against Corruption 2003;
- the United Nations Convention against Transnational Organized Crime 2000;
- the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997;
- the European Council Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990; and
- the Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters and its additional protocols, as supplemented by provisions agreed in Title VIII of the EU-UK Trade and Cooperation Agreement.

CRIMINAL ASSET RECOVERY – PRIVATE PROSECUTIONS

Private prosecutions

38 | Can criminal asset recovery powers be used by private prosecutors?

Yes, private prosecutors and state prosecutors can use criminal asset recovery powers under section 6(1) of the Prosecution of Offences Act 1985 by inviting the court to proceed to make a confiscation order under section 6 of the Proceeds of Crime Act 2002. However, in some cases, the private prosecutor must seek consent from the Attorney General or the Director of Public Prosecutions. The latter also has the power to take over private prosecutions in some circumstances.

UPDATE AND TRENDS**Emerging trends**

39 | Are there any emerging trends or hot topics in civil and criminal asset recovery in your jurisdiction?

The English courts have seen a substantial increase in civil interim measures being granted over crypto assets and it is likely that the law will develop further to assist parties to pursue recovery over those assets. Similarly, there are increasing numbers of cases relating to online fraud and the law will likely develop further in this area.

A wider trend is a closer convergence between conventional fraud litigation and insolvency. Claimants and lawyers are more frequently looking at disputes holistically, considering all options including receivers or insolvency processes, to achieve the optimal financial outcome.

Coronavirus

40 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Civil Procedure Rules were temporarily amended, allowing the English civil courts to continue to function throughout the pandemic by online hearings. It seems likely that the courts will continue to use this format for some shorter hearings. In relation to asset recovery specifically, the courts have issued guidance on how to implement search and seizure orders during the pandemic to protect vulnerable parties.

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