

WHAT IS POCA?

Overview

The Proceeds of Crime Act 2002 (“POCA”) sets out the law in relation to the recovery of criminal assets with criminal **confiscation** being the most commonly used power. Confiscation normally only occurs after a conviction has taken place. The 2002 Act codified previous legislation and provided that **proceeds of crime** can be recovered where there has been no conviction i.e. cash seizure, civil recovery etc.



Simply put, the primary aim of POCA 2002 is to close loop-holes and deprive criminals of the use of their assets, recover the proceeds of crime and to show that crime doesn't pay. It also has the effect of causing business people to think twice before undertaking a criminal enterprise and for those who advise such people to give robust advice so that such criminal enterprises don't get started.

Between 2010 and 2014 the Home Office has indicated that more than £746 million of criminal assets has been seized. Over the same period, assets worth more than £2.5 billion have been frozen denying criminals access to these resources and £93 million has been returned to victims. As of December 2014, there were nearly 1,250 live confiscation orders under the responsibility of the Crown Prosecution Service, amounting to nearly £500 million, of which 31.5% was deemed collectable.

In addition, the 2002 Act confers a number of investigative powers and tools:

- search and seizure;
- production orders and disclosure orders;
- orders for **restraint** of assets to prevent assets being disposed of **prior** to a confiscation order being imposed.

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The Act is comprehensive and sets out the legislative schemes of recovery which is broken down into parts. The relevant parts for POCA cases which arise in England are:

- Part 2: Confiscation in England and Wales
- Part 5: Civil Recovery, including cash seizure
- Part 6: Revenue Functions
- Part 7: Money Laundering
- Part 8: Investigation

A copy of the act can be found at
<http://www.legislation.gov.uk/ukpga/2002/29>.

All cases need to be treated on an individual basis so suspects need to seek expert advice on such cases as soon as possible.



WHAT IS CONFISCATION

Confiscation is the process of recovery of the value of assets obtained by or through criminal conduct. Confiscation Orders are usually the end result of POCA proceedings. The aim of the State is to obtain any assets/monies which the Court believes is the product or attained from the proceeds of crime.

The Act provides that a prosecuting authority may apply for restraint proceedings to be imposed whereby a person's (this is not limited to individuals and may also apply to companies etc.) identified assets/bank accounts are frozen prior to and pending any prosecution or confiscation proceedings taking place.

The Act confers this power to any person who is linked to an investigation (this is to say that the person need not necessarily be arrested and investigated themselves). So it applies to a spouse of a suspect. This can have profound implications on not only your client but others who may be affected by it, such as employees who may not get paid. Can anything be done. The answer is "yes!" However, it won't happen if you ask nicely. Your client needs to instruct Emmersons Solicitors.

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Proceedings may be instigated if a person has been convicted of an offence in the Crown Court; the Defendant has been committed to the Crown Court for sentence or to be considered for a confiscation order and the prosecuting authority requests the Court to consider making a confiscation order; or the Court believes that it is appropriate to consider making such an order. If a person is acquitted and all criminal proceedings withdrawn, then it follows that the confiscation proceedings or interim orders imposed are to be withdrawn also.



The purpose of confiscation proceedings is to obtain an Order at the end which rids the individual of any assets held at the time of conviction with a view to recovering as much money as possible. The State does not acquire the assets themselves but the monetary equivalent. This usually means the Defendant has to dispose of the asset.

The Court, when making a confiscation order must consider and determine whether that person has/had a **criminal lifestyle**. Offences relating to drugs, fraud, trafficking (arms, goods etc) are offences which are by default considered **lifestyle** offences.

The Court must then assess whether someone benefited from general criminal conduct and had a criminal lifestyle. The burden of proof is on the balance of probabilities. This has huge implications. It means that there is a lower standard of proof for POCA proceedings and the burden

of proof (in criminal cases it is the State who must prove your guilt) however shifts to the Defendant. It is the Defendant who must produce cogent evidence that assumptions made by the Crown (such as property held by, disposed of or obtained as a result of a general criminal lifestyle within the relevant period) are not true and it is for the Defendant to convince the Court of this.

Relevant period? This is 6 years from the date of an offence. If the offence spanned a period, then it is when that period is alleged to have begun. This is sometimes how POCA proceedings begin not only after a conviction but before and during the criminal matter. It is therefore imperative your clients have representatives who have specialist knowledge about POCA in addition to fraud, drugs offences etc.

BENEFIT FIGURE

The Prosecuting Authority will instruct a financial investigator who will prepare a statement identifying how much you have benefitted from crime and determine a recoverable amount of such benefit. When calculating a figure, the financial investigator will identify all property purchased, received, transferred by, held by a Defendant and examine all bank accounts and income/expenditure going back 6 years.

REALISABLE/RECOVERABLE FIGURE

Assets will then be identified after the benefit figure is calculated. These may vary from cars, houses, pensions, trusts, bank account funds etc.

What if you have no assets?

This is something which a Defendant must prove and if successful an Order will be made for a nominal amount (this sued to be £1 but will likely increase to £5 in the near future) or for nothing. This will mean nothing is to be paid but the benefit figure will be recorded as X (the amount of benefit determined from criminal conduct). Don't fall into the trap of thinking this is the end of the matter if your POCA was dealt with in this way.



If there are assets

Then that is where extra effort needs to be focused (to avoid those assets being incorporated into any Order). What needs to be understood and is often not, is that the Order doesn't require the asset (i.e. a car) to be handed to the Crown. It requires the value of that asset as identified by the Court to be paid in money. This will mean that vehicles, if purchased by a Defendant but used by the spouse, will need to be sold to raise the funds to pay the Order.

A Defendant is then given a set time period to repay this sum. This used to be 12 months but has now been reduced to 6 months. There is no power in law to extend this period. The Court, if there are circumstances which permit this to be done, can extend the time to pay but enforcement proceedings will have commenced against you by that time.

It is also when this period elapses that interest begins to accrue. If payment is not made, then you may be required to serve a custodial sentence in default of payment. This period will be set by the Court when the Order is made.

The recoverable amount is often less than the benefit figure, for the simple reason that what is identified within the benefit amount is no longer available to be recovered. The benefit figure still has a big part to play but most people forget about it.

Remember the burden to prove that the assumptions made by the Crown are incorrect is on the Defendant. Misinterpreting a client's instructions can have profound mistakes. Moreover what is discussed at the proceedings which gave rise to the POCA matter is relevant.

What if you can't disprove the Crown's assertions or account for unidentified credits? In lots of cases people subject to confiscation proceedings are often involved with small businesses where transactions which are legitimate in that they are not related to criminal conduct are cash transactions and there is no 'paper trail'. Over the relevant period (6 years) transactions such as this can soon add up to a hefty sum. This can sometimes be avoided if correct accounting records are kept but again this is not always the case and all that can be done is to correlate the cash received with expenditure/liabilities of that business, company, firm, person although this is not ideal. The burden of proof is on the Defendant to prove this.



HIDDEN ASSETS

POCA applications are sometimes complicated when allegations that a Defendant has hidden assets. It is even more important to check the calculation of the benefit and realisable figures.

What are hidden assets?

It's exactly what it says: assets which have been hidden to avoid detection or association with the Defendant and to avoid the consequences of applications such as POCA. It is important to note that placing assets in another's name is not a hidden asset but rather a "tainted gift" and the effort to avoid confiscation by this particular method is a waste of time.

The Court can determine that a Defendant has hidden assets even when there are no assets available, the realisable figure being nil or a nominal

amount, which would result in a Confiscation Order being made in the amount a Defendant has benefited (the benefit amount).

What does this look like in practice?

D has been convicted of fraud and the following has been asserted by the Prosecution:

Benefit Figure - £2 million

Realisable Figure - £500, 000

The Defendant will need to reduce those figures as much as possible. For arguments sake let us say that the Defendant can't. Throwing a spanner into the works the Prosecution have alleged hidden assets and the Court has agreed. The Court can either attribute a value to those hidden assets or if a value can't be attributed then order hidden assets. If there is no value on the hidden assets, but the Court has ruled there are hidden assets then the Order will be as follows:

Benefit Figure - £2 million

Realisable Figure - £500, 000

Hidden assets – No value known.

Confiscation Order - £2 million.

The Court is obliged to set the Order in the same sum as the benefit figure. If there is a value of the hidden assets it can be added to the realisable figure.

This is why it is important to deal with all issues that arise in POCA proceedings timeously and robustly.

The onus is again placed on the Defendant to value assets of realisable property to satisfy the Court that the value is less otherwise the confiscation order will be made in the amount of the benefit figure. It does not always follow that if a Defendant is found to have lied that the Court is compelled to make an order in the amount of the full benefit figure. The above cases have identified that the Courts are not bound to make such an order simply because the Defendant lied/hid assets. The Defendant will however then find it extremely difficult to reverse the burden placed upon them that the value of available assets are of a value less than the criminal benefit.

Commonly, what are "hidden assets"? Most commonly they are:-

1. Property abroad
2. Money/investments held abroad
3. Complicated accounts (in both the UK/abroad) eg trusts



THE ORDER

Not only will the Court set what the Order is they will also impose a period of imprisonment to be served when payment of the Order is not made within the allocated time (usually 6 months). This is known as the sentence in default of payment. There is in law no way to extend the length of time to pay. The Magistrate's Court when enforcement proceedings are initiated can decide not to imprison a person and allow them extra time to pay the order before imposing the period of imprisonment but interest will continue to accrue after the initial period to pay has been served.

The table below is contained in every Crown's POCA statement served by the Prosecution in these types of proceedings. It explains how long can be expected to be served in default of payment for Confiscation Orders of certain amounts.

<u>Amount</u>	<u>Sentence</u>
An amount not exceeding £10,000	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1 million	7 years
More than £1 million	14 years

Those with higher confiscation orders will receive higher default sentences. Precisely why expert advice and representation is essential from the point of arrest or when the investigation commences.

What happens if part of the Order is paid?

It is common for Orders not to be paid within the 6 months allowed and for default sentences to be imposed at the enforcement stage. If we assume an Order is made in the amount of £490,000 then we can safely assume the default sentence will be close to 5 years. If an individual has served his sentence and is serving the POCA sentence and pays £250,000 then his sentence of 5 years will be reduced to 2.5 years. This does not apply for default sentences where the confiscation order is made in excess of 10 million.

ENFORCEMENT

It is common for people to feel that once an Order has been imposed that it was unjust and that they aren't going to pay the Order. This should be avoided.

If the Order is not paid in full by the time to pay period has elapsed the Prosecution can apply for enforcement proceedings to begin in which case they will seek the period of imprisonment for default of payment to be imposed.

The success rate is exceptionally high. Even if the period of imprisonment (which will be set at the time the Order is made which is up to a maximum of 10 years) is served then the Order is still outstanding, except now the amount due will be much higher because of the interest that has been added.

It is also important to note that interest will start to accrue on the amount of the realisable figure once the time to pay has lapsed. The interest rate is particularly high.

Enforcement proceedings are listed in Magistrates' Courts which usually impose the period of imprisonment requested by the Crown. These proceedings are not a chance to repeat POCA proceedings. The Magistrates cannot amend the Order. They also can't reduce the sentence that has to be imposed.

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These proceedings can be defended. If money, but not all, has been paid and offset against the Order then the sentence will be reduced as per the table of sentences above accordingly with the amount outstanding. There are various powers which are available to the Court, such as appointing a receiver to dispose of assets on your behalf so it is important that these matters are dealt with as soon as possible. It would also help to obtain expert advice and representation on Enforcement.

If a defendant does sell assets then they should in most cases sell these at auction or to a reputable dealer. That way it can be indicated to the Crown that the Defendant sold X item for X amount which is in some instances significantly less than the value the Crown placed on the item. As a result the Order would be reduced to the amount that the item was sold for.

There is no power in law to extend the time to pay beyond 6 months.

Even if the defendant serves a term of imprisonment for not paying the confiscation order the defendant will still have to pay the order in full and any interest which has accumulated upon release. Interest accumulates at 8% every year on any confiscation order that has not been paid in full. The daily interest rate for an Order is usually quite high.



The Magistrates' Court cannot change the order made in the Crown Court. There is no point in asking the Magistrates' to reconsider the original Court's findings.

A Confiscation Order will not go away nor will it be forgotten about. All Orders are inputted to national systems which are regularly reviewed by regional confiscation units who have been allocated more funding and resources in recent years. A significant amount of resources is being focused on ensuring that information relating to unpaid/outstanding confiscation orders are made available to regional confiscation units.

50% of any money received is divided between the Prosecution, the Financial Investigators in the case and the Courts. If a person chooses

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to ignore the order, the regional confiscation unit is likely to seek a production order for that person to attend the Magistrates' Court for enforcement proceedings. These types of proceedings can occur more than once and will impact on release from custody (credit rating etc) and if confiscation orders are enforced in civil courts they can be enforced against a deceased's estate.

What you must not do is:

1. assist clients to hide, dispose of or otherwise deal with assets when an investigation is underway or you will find yourself in the dock too; or
2. tip off a client that an investigation is underway. You can advise and should advise that what a client proposes to do with an asset is not really in his/her best interests ie is unlawful; or
3. ignore the client's phone call when he/she states that HMRC or the Police have called at his/her offices. You should direct your client to Clark Robinson of Emmersons Solicitors on 0191 5676667 or clark@emmersons-solicitors.co.uk





Clark | Robinson

Clark joined Emmersons Solicitors having graduated in Law and has built up an enviable record of successful achievement in Criminal Law, Proceeds of Crime Act, Fraud and Prison Law. He prides himself on being supportive, accurate and speedy in the delivery of advice and service. Dealing in often very difficult circumstances, he remains non-judgemental and works across the UK inside prisons gaining the trust of his clients. Indeed, most of Clark's case load comes from recommendations from clients who have achieved the best possible outcomes as a result of his input and advice. Clark also receives referrals from accountants and other solicitors whose clients have been charged with White Collar Crime Offences.