







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 Micheal Robinson of Emmersons Solicitors on 0191 5676667 or michael@emmersons-solicitors.co.uk



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