

# **Confiscation and ‘Criminal Lifestyle’**

David Winch, May 2006

**Increasingly courts are hearing cases concerning confiscation of assets of a defendant following his conviction, in which the defendant is said to have a ‘criminal lifestyle’.**

**The statute law in the UK relating to the confiscation of assets of a person convicted of one or more criminal offences is now contained in the Proceeds of Crime Act 2002 (PoCA 2002) which applies where the relevant offence, or offences, was committed or commenced after 23 March 2003.**

**References in this article are to the law in England and Wales found in part 2 of PoCA 2002. Similar provisions apply in Scotland and Northern Ireland under parts 3 and 4 of the same Act.**

PoCA 2002 consolidated and extended earlier legislation relating to confiscation. The earlier legislation continues to apply where one or more of the relevant offences were committed, or commenced, before 24 March 2003. Detailed transitional provisions are to be found in the Proceeds of Crime Act 2002 (Commencement No. 5, Transitional Provisions, Savings and Amendment) Order 2003 SI 2003 no 333.

## **First steps following conviction**

Following conviction the prosecutor may request that the Court proceed to confiscation under s 6(3). Alternatively the court may proceed of its own volition if considered appropriate.

The court must then decide whether the defendant has a ‘criminal lifestyle’ (as defined by s 75 and schedule 2 of the Act).

In practice the prosecutor, who may be based in a Regional Asset Recovery Team or in the Serious Organised Crime Agency, is likely to prepare a statement of information under s 16 of the Act. This statement will indicate whether the prosecutor believes that the defendant has a ‘criminal lifestyle’ and his opinion as to the defendant’s benefit from the offence of which he has been convicted and, where a ‘criminal lifestyle’ is asserted, his (assumed) general criminal conduct.

## **Criminal lifestyle**

The defendant will be deemed to have a 'criminal lifestyle' if, and only if, one of the following conditions is satisfied:

- He has been convicted of at least one offence listed in schedule 2 to the Act;
- He has been convicted of conduct forming part of a 'course of criminal activity' from which, in total, he has obtained benefit of at least £5,000; or
- He has been convicted of an offence of any description committed over a period of at least six months from which he has obtained benefit of at least £5,000.

The offences itemised in schedule 2 include trafficking of drugs, people or arms; directing terrorism; money laundering such as transferring, concealing, disguising, converting or removing criminal property (but not its mere possession, use or acquisition); facilitating the acquisition, retention, use or control of criminal property by or on behalf of another person; counterfeiting or infringing copyright; blackmail; offences relating to pimps and brothels; and related inchoate offences such as conspiracy, incitement, aiding and abetting.

Conduct forms part of a 'course of criminal activity' if either on a single occasion the defendant is convicted of four or more offences of any description from which he has benefited, or he is now convicted and has been previously convicted on at least two separate occasions in the previous six years of offences of any description from which he has benefited.

## **The statutory assumptions**

Where the defendant has a 'criminal lifestyle' the four assumptions set out in s 10 of the Act come into play.

- The first assumption is that any property transferred to the defendant at any time after the 'relevant day' was obtained by him as a result of his general criminal conduct and was obtained by him at the earliest time he appears to have held it.
- The second assumption is that any property held by the defendant at any time after the date of his conviction was obtained by him as a result of his general criminal conduct and was obtained by him at the earliest time he appears to have held it.
- The third assumption is that any expenditure incurred by the defendant at any time after the 'relevant day' was met from property obtained by him as a result of his general criminal conduct.
- The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.

In this context 'property' includes money.

**But the Court must not make a required assumption in relation to particular property or expenditure if, on the balance of probabilities, the assumption is shown to be incorrect or there would be a serious risk of injustice if the assumption were made.** If the Court does not make one or more of the required assumptions it must state its reasons.

In the Court of Appeal the Lord Chief Justice Lord Woolf has held that:

“While a defendant is required to show that an assumption in his case is incorrect, if he fails to do this, the court must still not apply an assumption where there would be a "serious risk of injustice in the defendant's case if the assumption were to be made". As to the weight that has to be given to the word "serious", any real as opposed to a fanciful risk of injustice can be appropriately described as serious. The court, at the end of the confiscation process, has therefore a responsibility not to make a confiscation which could create injustice.” *R v Benjafield & Others [2000] EWCA Crim 86 at paragraph 41(4)*.

Later in the same judgement, at paragraph 97, His Lordship held that:

“The number of convictions is all-important in determining the punishment of a defendant. Under the legislation, the object of confiscation is not punishment but the forfeiture of an illicit profit. Clearly, the greater the number of convictions the greater the likelihood of benefit, but the statutory minimum of convictions is all that is required for the confiscation process to be put in motion. In the course of that process, the court can take into account the number of offences proved because they are probative either of the likelihood of the defendant having benefited or not benefited from his offences.”

The Benjafield case was decided in the context of earlier legislation the wording of which has been virtually repeated in s 10 PoCA 2002.

It may be argued that it is inherent in the four statutory assumptions applied in cases of a criminal lifestyle that, if the assumptions are applied indiscriminately and without modification, financial activities of the defendant will lead to an unjust total 'benefit' figure for confiscation purposes.

An example may clarify this point. Suppose a defendant purchased, say, stolen property for £10,000 and then sold it for £15,000. The assumed 'benefit' for the purposes of confiscation would be £25,000 (that is £10,000 under the third assumption and a further £15,000 under the first assumption) although the defendant would have gained only £5,000 from the activity.

The 'relevant day' referred to above is the day six years prior to the day when proceedings for the offence were started against the defendant. Typically proceedings are regarded as started on the day on which the defendant is charged with the offence.

It is therefore necessary in confiscation cases involving an alleged 'criminal lifestyle' to consider a period in excess of six years, commencing with the 'relevant day' and running to the date of the confiscation hearing itself.

The defendant's benefit from criminal conduct is taken to be the aggregate of his benefit from the particular criminal conduct of which he has been convicted and, where he is held to have had a criminal lifestyle, his benefit from general criminal conduct calculated in accordance with the foregoing paragraphs.

### **Confiscation amount**

The amount of the confiscation order is the 'recoverable amount'. The 'recoverable amount' will initially be the amount of the defendant's benefit from criminal conduct, but is restricted where necessary so that the 'recoverable amount' cannot exceed the defendant's 'available amount' (except where an order is made in a nominal figure where the defendant's 'available amount' is nil).

The defendant's 'available amount' is the aggregate of the total of the values (at the time the confiscation order is made) of all the property then held by the defendant (subject to certain minor statutory exceptions) and the total of the values (at that time) of any tainted gifts.

It is for the defendant to show, on the balance of probabilities, that his 'available amount' is less than the benefit of his criminal conduct and that the amount of the confiscation order should accordingly be restricted.

If the Court restricts the confiscation order by reason of the defendant's 'available amount' being less than his benefit from criminal conduct, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding the defendant's 'available amount'.

Where a defendant has assets which are shown not to have been derived from any criminal conduct, those assets will not be taken into account in the calculation of his benefit of criminal conduct. However such assets will be taken into consideration in arriving at his 'available amount' and will be liable to be confiscated in satisfaction of any confiscation order ultimately made at the conclusion of the proceedings.

### **Use of a forensic accountant**

To some extent prosecutors seem still to be 'feeling their way' with these statutory provisions and particularly with the appropriate application of the four statutory assumptions in 'criminal lifestyle' cases. This can result in wholly unrealistic confiscation calculations.

For example we recently were instructed to examine a statement of information issued under s 16 in which the prosecutor had calculated a benefit of assumed general criminal conduct in excess of £250,000 in relation to an individual who had purchased various items of stolen property over a period of time at a cost to him of no more than £5,000.

In such cases the use of a forensic accountant with experience of confiscation cases will prove extremely valuable. Typically prior authority for the forensic accountant's fees can be obtained from the Legal Services Commission.

**David Winch is a forensic accountant specialising in white collar crime including theft, fraud, false accounting, evasion of taxes and duties, drug trafficking, Companies Act offences, money laundering, and associated confiscation, forfeiture and disqualification proceedings, a director of Accounting Evidence Ltd and MLRO Support Ltd, and a co-author of *Money laundering for lawyers: the new requirements and their practical implications* (Butterworths, 2004).**

Accounting Evidence Ltd  
Well House  
Broughton in Furness  
Cumbria LA20 6HS

Tel: 01229 716651

Web: [www.accountingevidence.com](http://www.accountingevidence.com)

Email: [info@accountingevidence.com](mailto:info@accountingevidence.com)

#### Copyright

This document is copyright. However the copyright holder gives permission for this document to be freely copied or distributed with full acknowledgement of its source provided that either the document is copied and distributed in its entirety or that a part or parts not exceeding 200 words is copied or distributed.

#### Disclaimer

This document has been issued by Accounting Evidence Limited. The information in this document is of a general nature and is no substitute for legal or professional advice specific to your circumstances or query. No responsibility can be accepted for any losses (of any nature) arising from reliance on statements, opinions or advice contained in this document.

Legal rights and responsibilities change over time. This document is based on our understanding of the law of England at the time it was written.

This document is provided by Accounting Evidence Ltd and is not the personal responsibility of any director or employee of the company, whether or not it is written in the first person singular or signed by (or on behalf of) an individual or an officer of the company. No personal responsibility is assumed for the advice provided.

© Accounting Evidence Ltd 2006