

# **Proceeds of Crime, Freezing and Forfeiture: Purpose, Evidence and Strategy**

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## Introduction

- 1 This paper considers civil applications for freezing and forfeiture, of accounts and cryptocurrency, under Part 5 of the Proceeds of Crime Act 2002 (“POCA”). It draws on the authors’ experience of such applications.
- 2 A key message is that, while freezing applications may be obtained relatively urgently on the basis of reasonable suspicion, forfeiture applications may only be obtained on the basis of proper evidence and fair disclosure. It is therefore essential to set a clear strategy from an early stage as to what evidence to obtain and how best to present it to the Court.

## The purpose of POCA civil recovery proceedings

- 3 The provisions relating to freezing and forfeiture of money held in accounts are to be found in Chapter 3B of POCA, inserted in 2017. The provisions relating to cryptocurrency came later, in Chapter 3D, inserted in 2023.
- 4 The tests (as to which, see below) for each stage – freezing and then forfeiture – are similar to that for civil cash forfeiture. So, the case law relating to all such applications is often instructive.
- 5 In **R v Ahmad** [2015] AC 299 (confiscation proceedings), the Supreme Court observed (at [38]):

*“When faced with an issue of interpretation of the 2002 Act, the court must, of course, arrive at a conclusion based both on the words of the statute and on legal principles, but it is also very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights. The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay. Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as predictable, and as effective, as possible. Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 and are only to be deprived of assets in accordance with A1P1 [Article 1, Protocol 1 of the ECHR, protection of property].”*

- 6 The explanatory notes to the Criminal Finances Act 2017, through which the account forfeiture provisions came to be inserted into POCA, stated:

*“1. The Criminal Finances Act 2017 makes the legislative changes necessary to give law enforcement agencies and partners new capabilities and powers to recover the proceeds of crime, and to tackle money laundering, corruption and terrorist financing.*

*2. The measures in the Act aim to: improve cooperation between public and private sectors; enhance the UK law enforcement response; improve our capability to recover the proceeds of crime, including international corruption; and combat the financing of terrorism.*

*3. Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. The best available estimate of the amounts laundered globally are equivalent to 2.7% of global GDP, or US\$1.6 trillion in 2009, while the National Crime Agency (NCA) assesses that billions of pounds of proceeds of international corruption are laundered into, or through the UK. Her Majesty’s Revenue and Customs (HMRC) estimate that over £4.4bn was lost to attacks against the tax system in 2013/14. The UK’s drug trade is estimated to generate revenues of nearly £4bn each*

*year. The Serious and Organised Crime Strategy 2013 and Strategic Defence and Security Review 2015 (SDSR) set a goal of working with the private sector to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime or corruption. The Criminal Finances Act is a part of achieving that objective.”*

- 7 In other words, the Criminal Finances Act 2017 and POCA were intended by Parliament to make it easier for law enforcement to work together to tackle financial crime, including crime against the tax authorities, and robust, even novel, applications for freezing and forfeiture orders are to be expected.

## The test for freezing

8 Applications are made to the Magistrates’ Court by an enforcement officer – usually, for police forces, a constable, who must be authorised to make the application by a senior officer: POCA sections 303Z2(2) and 303Z36(3).

9 Remember that the application is not against a respondent in their personal capacity, but rather is “*in rem*” – against particular funds held in accounts or crypto wallets, which must therefore be considered separately.

10 For an account freezing order, the Court “*may*” make the order “... *if satisfied that there are reasonable grounds for suspecting that funds held in an account (whether all or part of the credit balance of the account) – (a) is recoverable property, or (b) is intended by any person for use in unlawful conduct*”.

11 The account must be with a “*relevant financial institution*”, which means a bank, building society, electronic money institution, or a payment institution.

12 That same test is adopted in the test for the making of a crypto wallet freezing order, section 303Z37, in respect of which the suspicion must attach to some or all of the cryptoassets held in a wallet.

13 Section 303Z20(1) defines, “*cryptoasset*” and “*crypto wallet*” for the purposes of all of Part 5 of POCA:

*“(a) ‘cryptoasset’ means a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically;*

*(b) ‘crypto wallet’ means –*

*(i) software, (ii) hardware, (iii) a physical item, or (iv) any combination of the things mentioned in sub-paragraphs (i) to (iii), which is used to store the cryptographic private key that allows cryptoassets to be accessed.”*

14 The test for reasonable suspicion is not high, as is well known to police officers and lawyers. See for example, **Parker v Chief Constable of Essex** [2019] 1 WLR 2238, in which the Court of Appeal stated (at [115]):

*“... The bar for reasonable cause to suspect ... is a low one. It is lower than a prima facie case and far less than the evidence required to convict ... suspicion may take account of matters that could not be put in evidence ... Suspicion may be based on assertions that turn out to be wrong ...”*

15 The Court will also appreciate that, at the freezing stage, the investigation into the source of the money or crypto will be far from complete. Indeed, it may not have even started yet.

16 The confidence of the Court will, however, be lost – with potentially significant consequences, including costs – if the applicant has failed to be candid. Applicants must include information which tells against the making of an application, such as potentially legitimate sources for the funds in issue or matters which materially undermine the intelligence or evidence said to give rise to reasonable suspicion.

## The test for forfeiture

17 That same duty of candour applies of course in respect of forfeiture applications, though by this stage, there should usually have been a structured approach to meeting that duty, including case management orders for disclosure and evidence on both sides.

18 The foundation for any forfeiture application is that a freezing order has already been made in respect of the targeted funds. Section 303Z14(4) then provides:

*“The court or sheriff may order the forfeiture of the money or any part of it if satisfied that the money or part –*

*(a) is recoverable property [hereafter Limb A] or*

*(b) is intended by any person for use in unlawful conduct [hereafter Limb B].”*

19 Again, likewise in respect of crypto, the test for forfeiture is whether the Court is satisfied as a matter of fact, not merely reasonable suspicion: section 303Z37(2).

20 What is “recoverable property”? By section 304(1) POCA, recoverable property is “property obtained through unlawful conduct”.

21 What is “unlawful conduct”? By section 241 POCA:

- a. Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part (e.g. England & Wales); and/or
- b. Conduct which occurs in a country or territory outside the UK is unlawful conduct if (i) it is unlawful under the criminal law applying in that country or territory, and (ii) if it occurred in a part of the UK, would be unlawful under the criminal law of that part.

22 Hence, for example, if the source of funds is drug dealing in the Netherlands, then it is necessary to obtain evidence from Netherlands law enforcement, or a suitably qualified Netherlands lawyer, confirming that drug dealing is a criminal offence in the Netherlands, as well as, of course, to submit that drug dealing is a criminal offence in the UK.

23 By section 242 POCA, “Property obtained through unlawful conduct” is defined as follows:

*“(1) A person obtains property through unlawful conduct (whether his own conduct or another’s) if he obtains property by or in return for the conduct.*

*(2) In deciding whether any property was obtained through unlawful conduct – (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct, (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct.”*

24 The deliberately open-textured words chosen by Parliament for the definition of recoverable property in section 304 POCA, “obtained through”, are not seemingly limited to beneficial ownership: see e.g. **R (Fresh View Swift Properties Ltd) v Westminster Magistrates’ Court** [2023] 1 WLR 3321.<sup>1</sup>

25 The standard of proof is the civil standard (balance of probabilities: what is more likely than not), and the burden of proof is on the applicant (the Commissioner or Chief Constable).

26 However, that does not mean that a respondent, claiming an interest in the funds and defending against forfeiture, is immune from the consequences of remaining silent.

27 For example, in a case in which an applicant has alleged (supported by evidence) that the respondent has earned substantial business revenue into an account, in respect of which no income or VAT has been paid whatsoever, the Court may be willing to draw an adverse inference from the failure of the respondent to give any evidence as to payment of tax, such as a witness statement, disclosure of returns or payments to HM Revenue & Customs (“HMRC”).

28 In **Serious Organised Crime Agency v Namli** [2013] EWHC 1200 (QB), Males J observed:

“48. Whether an adverse inference is appropriate will inevitably depend on the detailed circumstances of each individual case. But, in an appropriate case, it is clear that such an inference can properly be drawn from a failure to provide an explanation of apparently suspicious dealings and that doing so does not involve an inadvertent reversal of the burden of proof, which remains on [the applicant] throughout ...

49. Putting this in crude terms, and not forgetting [the applicant’s] burden of proof, if a transaction looks like money laundering and has not been satisfactorily explained by a defendant who ought to be in a position to explain it if there is an innocent explanation, that is probably what it is.” **2**

## Arguing Limb A and Limb B in the alternative

29 There is scope for taking a robust approach to the statutory phrases “obtained through” and “intended by any person for use in”, in order to target as much in the suspect accounts and the cryptoasset as is reasonably arguable. It is also often wise – depending on the facts – to allege Limb A and Limb B in the alternative.

30 **Fletcher v Chief Constable of Leicestershire** [2014] Lloyd’s Rep FC 60 was a section 298 POCA cash forfeiture application, in which an apparently honest man found a large amount of money which was subsequently made the subject of a forfeiture order.

31 On appeal by way of case stated, Lewis J considered Limb A and particularly Limb B, and concluded (at [34]):

“Parliament intended to enable property obtained through unlawful conduct or intended for use in unlawful conduct to be liable to forfeiture as appears from the preamble and the structure of the Act. Section 298(2)(a) and (b) [viz. Limb A and Limb B] achieve that purpose. The Act was not intended to restrict forfeiture to cases of property being obtained through criminal conduct. It intended to provide for forfeiture in a broader range of cases. The fact there may be very many cases where property could be forfeited under 298(2)(b), but could not be forfeited under section 298(2)(a) of the 2002 Act would not, therefore, lead to results which are contrary to the Parliamentary intention. In the circumstances, therefore, in my judgment, on a proper interpretation of section 298(2)(b), the cash was capable of being forfeited in the present case on the basis of the inferences that the Crown Court drew.”

32 In **Sandhu v Chief Constable of the West Midlands Police** [2019] EWHC 3316 (Admin), the applicant alleged Limb B – “intended by any person for use in unlawful conduct” – on the basis that the future intended offence was a money laundering offence (POCA sections 327, 328 and/or 329). The case concerned a large quantity of cash. Some key points were:

- a. The applicant asserted that the circumstances were such as to give rise to an irresistible inference that the cash could only have been derived from crime and was therefore intended to be used for money laundering offences in the future (at [3]).
- b. The applicant was unable to prove that the source of the cash was a specific crime, or crimes, or one of a specific type of crime.
- c. At [19]-[22], the Court cited with approval the case of **Fletcher**, referred to above. In that case, the Court said, Lewis J had also held that:

*“... the Crown Court had been entitled to find on the balance of probabilities that the cash had originally been obtained by unlawful conduct of an unidentifiable kind, and that the hider had intended to use it in unlawful conduct, because almost any use of the cash would almost inevitably have involved an offence under section 327 of the 2002 Act ...”*

- d. At [20], the Court in **Sandhu** referred to **R v Anwoir** [2009] 1 WLR 980, in which the Court of Appeal (Criminal Division) held that, for the purposes of sections 328 and 340 of POCA, there were two ways in which the prosecution could prove property derived from crime:

*“a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or  
b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.”*

- e. At [22], the Court in **Sandhu** referred to the conclusion in **Fletcher** at [34], already quoted above, and agreed with the analysis therein. The Court then concluded:

*“29. ... the unchallenged finding of the Crown Court in the present case was that the cash seized from the appellant came from some form of criminal activity, although the type of activity could not be identified, and that the appellant intended at some future time to conceal, transfer or convert it. Anwoir, which is Court of Appeal authority binding on this court, makes clear that for the purposes of section 327 of the Act, it is not necessary to show the precise type of crime from which the property was acquired if the circumstances are such as to give rise to an irresistible inference that it could only be derived from crime. In those circumstances the Crown Court was in our judgment correct to order forfeiture. It was entitled to infer on the balance of probabilities that the cash came from criminal activity and that the appellant’s intended use of it would constitute a money laundering offence. The cash was therefore ‘criminal property’ as defined in section 340(11) of the 2002 Act, and the appellant’s intended use of it would be a criminal offence and would thus be ‘unlawful conduct’ as defined in section 241(1). Thus all the necessary elements for an order pursuant to section 298(2) (b) were established.*

*30. We agree with [the respondent] that this interpretation produces what may at first glance seem an odd result, in that it appears to relieve the relevant authority of a burden which it would carry if it brought its application under subparagraph (a). However, like Lewis J in Fletcher, we regard that as the inescapable result of the statutory provisions and consistent with the intention of Parliament. In particular, we agree with Lewis J at paragraph 30 of his judgment that the interpretation for which [the respondent] contends would make it necessary to read into the statute words which are not there. Further, we accept [the applicant’s] submission that it is difficult to see why, in a provision which in appropriate circumstances would permit the seizure of money of undoubtedly innocent origin, Parliament should have intended to exclude the seizing of property which was clearly criminal ...”*

33 In *Ahmed v Revenue and Customs* [2013] EWHC 2241 (Admin), Carr J (as she then was, now Lady Chief Justice) dealt with an appeal against an order for forfeiture of nearly £227,000 under section 298 POCA. The appellant had operated a legitimate business, but dishonestly under-declared revenue to HMRC and thereby evaded tax over a number of years. He kept the under-declared revenue in cash at his home address. The forfeiture order had been made in respect of most of the cash found.

34 On appeal, the Court held that this had been wrong: the order should have been limited to the amount that represented the pecuniary advantage derived from the tax not paid (at [53], applying section 340(6) POCA). Carr J also stated that, as Part 5 of POCA provides for civil, not criminal, sanctions, there was an “*even greater argument for proportionality*” (at [51]) and that, further or in the alternative, to order forfeiture of the entire sum would be disproportionate on the facts (applying *R v Waya* [2013] 1 AC 294, at [53]-[57]).

35 It may, however, be possible – again, depending on the facts – to distinguish *Ahmed*. In *Ahmed*, the seizing authority had not put its forfeiture case on the additional/alternative Limb B basis because there was no evidence that the appellant had intended to use the cash in future unlawful conduct; all he did was keep the cash in his house.

36 It may be different in a case in which the respondent has obtained even a relatively small pecuniary advantage from unlawful conduct, e.g. fraud or tax evasion, but has co-mingled the criminal funds in an account which contains legitimate business revenue which has not been lawfully declared to HMRC, or upon which a tax liability has not yet accrued. The intended future unlawful conduct may be established by forensic analysis of the previous movement of business revenues through different accounts, and previous non-declaration of revenues/payment of tax or VAT. This could show that the funds are being actively washed and layered through different bank or crypto accounts, and deliberately co-mingled to disguise the origin of the monies and make it impossible to disentangle and identify the criminal property. The point of such conduct would be to confuse and deter HMRC or other law enforcement from investigating – i.e. classic money laundering (sections 327, 328 and/or 329 POCA).

37 In a case like this, the applicant’s argument can be put on the following basis (assume, to make it simple, that a frozen account contains £100 of tax or VAT evaded, and £900 of business revenues):

- a. Limb A – on the basis that the account already contains property obtained from unlawful conduct (the pecuniary advantage of tax or VAT already evaded, £100); and
- b. Limb B – on the basis that all the funds in the account (£1,000) are a necessary and integral part of the criminal plan; all the funds are being ‘used’ to prevent HMRC or law enforcement becoming aware of the criminal property and business revenues; an intention to commit tax evasion and/or money laundering offences in the future (see e.g. *R v K* [2007] 1 WLR 2262 and *R v William* [2015] Lloyd’s Rep FC 704).

38 It should be noted that the above analysis can also be used in a situation where the entire £1,000 in the account derives from legitimate business revenues upon which no VAT or tax liability has yet accrued. In such a case the same argument may be run but relying only on Limb B.

39 In a case where the tax or VAT liability lies in another country, it will be necessary to obtain evidence that no tax or VAT has been paid in that country and that tax/VAT evasion in that country is a criminal offence (and provide evidence that tax/VAT evasion is a criminal offence in the UK).

## Tips for increasing the prospects of success

40 It is important to be clear from the outset whether you are targeting money (fiat currency) held in an account (in which case the account freezing and forfeiture provisions apply), or cryptoassets (in which case the crypto provisions in Chapter 3C or 3D POCA apply). The authors have experience of advising on having to change the basis for a forfeiture application from ‘account’ to ‘crypto’ during the course of proceedings. However, this is not ideal, and being permitted by the Court to have a second chance at getting the basis for an application right is not guaranteed.

41 Account freezing orders may not be made for a period of more than two years (section 303Z3(4)

POCA). Likewise in respect of a crypto wallet freezing order (section 303Z37(4) POCA).

42 That seemingly long period has given rise to an unfortunate tendency (however understandable given limitations on resources and the pressures of work) to breathe a sigh of relief when the freezing order is made – only to panic closer to the two-year deadline, by which time it may be too late to obtain the evidence required for forfeiture.

43 This must be avoided by investigating and assessing the merits of applying for forfeiture and setting a strategy for presenting the case to Court at the earliest possible stage. The focus from the outset needs to be on the ‘end game’. There is a temptation to focus the investigation on the movement of funds through different accounts (i.e. the money laundering aspect), without considering that a money laundering offence can only exist in respect of criminal property. This means that equal consideration needs to be given to what the predicate criminal offence(s) are.

44 Ask: where is the money coming from? The criminality alleged should relate to that. One cannot simply point to the fact that the respondent may be associated with crime. It is the actual money or crypto which has to be linked (“*in rem*”) to prior and/or future criminality. In other words, the focus should be on how the actual frozen funds are said to be derived from, or intended for use in, unlawful conduct – and proving that with reliable evidence.

45 If the funds are said by the respondent to be lawful business revenue, the next question may be whether any tax or VAT has been paid in the UK or in other countries. If not, that may form the basis for an allegation of the common law offence of Cheating the Revenue. This offence is broad in scope and applies to all types of fiscal liability (e.g. income tax, corporation tax or VAT).

46 In cases where the evidence depends on other public authorities, for instance, HMRC, or overseas authorities, or expert accounting evidence, that is going to take time and care (and chasing). Our experience is that such authorities are more comfortable providing generic evidence, such as what tax/VAT liabilities accrue to business revenue and what criminal offences exist in respect of these and confirming what (if any) tax or VAT returns, declarations and payments have been made – rather than providing evidence which opines that the particular respondent has committed offences. Of course, if there is substantial apparent income, but no tax/VAT returns, declarations or payments, the investigation is on the right track.

47 Generic evidence from such authorities is generally sufficient, because it provides the bedrock upon which the forensic investigation can be laid in order to show that the frozen funds must have acquired a tax/VAT liability or will inevitably do so in the future. However, it is important to identify early the specific bedrock evidence that is needed from UK or overseas authorities, so that the applicant ensures that all the right questions have been asked and answered, which is also fundamental to the fairness of the investigation.

48 Not identifying the predicate offences and the bedrock evidence required at an early stage, or getting these wrong, risks leaving significant lacunae in the applicant’s case, which may not be

capable of being remedied later. This in turn leads to litigation risk in that the applicant may fail to “satisfy” the Court that Limb A or B is engaged.

49 It should not be forgotten that these freezing and forfeiture applications are civil proceedings which give rise to potential costs risks if the applicant loses, and the Court considers that the applicant has acted unreasonably or improperly (**R (Perinpanathan) v City of Westminster Magistrates Court** [2010] 1 WLR 1508).

50 Where the funds have been paid into the relevant fiat account or crypto wallet via payment platforms, or the funds or crypto are held in relatively novel e-banks or crypto companies, it is also worth checking the rules of the same, to see whether they have been breached by the respondent.

51 The investigation must then culminate in clear witness evidence obtained by the applicant, disclosure, and careful presentation to the Court in a way which is digestible and proportionate to the value of the case. We have experience of assisting forensic investigators to present evidence effectively, e.g. using i2 charts and schedules summarising voluminous account data.

52 In cases of substantial value, cost risks and/or high profile, it is worth involving specialist counsel at an early stage, to help the applicant identify the types of evidence required, and to assess the merits – before it is too late.

**Footnotes**

**1** This judgment analysed (at [12]) each component phrase, “Was (i) property (ii) obtained (iii) by (iv) conduct which was (v) unlawful?” *inter alia* “To ‘obtain’ means to come into possession of something. The use of the past participle means that in the past someone came into possession of the property. The use of this verb does not carry with it an implication that that person either gained ownership of the property or necessarily derived benefit from it”.

**2** Since cited in e.g. *National Crime Agency v Feyziyev* [2024] EWHC 501 (Admin) per Poole J at [13].