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23. Proceeds of Crime Act 2002 and Terrorism Act 2000

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Introduction

23.1 Introduction

This chapter deals with the Proceeds of Crime Act 2002 (PoCA02) which provides both criminal and civil procedures for the protection and realisation of assets where it is suspected that they are acquired with the proceeds of crime. This guidance will assist the official receiver when dealing with the assets of a company in liquidation or a bankrupt who is subject to one of these procedures.

See paragraphs 23.02 to 23.12 for an outline of the different types of procedures available under PoCA02 and who may take these proceedings.

The chapter also provides guidance where the insolvent's property is subject to a forfeiture or restraint order under the terrorism legislation (see paragraphs 23.152 to 23.159).

The Proceeds of Crime Act 2002

23.2 The Proceeds of Crime Act 2002

The Proceeds of Crime Act 2002 (PoCA02) consolidates and strengthens the powers for the confiscation of the financial benefit that an offender has obtained from their criminal activity.

The Act covers a wide range of matters relevant to UK law on the powers of investigation and recovery of proceeds of crime.

23.3 An overview of PoCA02

PoCA02 provides the following processes:

(a) Confiscation proceedings in the crown court.

- Restraint orders – the defendant cannot use or move specified property without agreement by the court. A restraint order effectively freezes the property to protect it during a criminal investigation (usually followed by a confiscation hearing) see paragraphs 23.13 to 23.52.
- Confiscation orders – the defendant must pay an amount set by the court based on their benefit from crime following conviction, see paragraphs 23.53 to 23.84.

(b) Civil recovery in the High Court, see paragraphs 23.85 to 23.122.

- Freezing orders – prohibits any person to whom the order applies from dealing in any way with specified property without agreement by the court (see paragraphs 23.104 to 23.106).
- Interim receiving orders – appoints an interim receiver to take custody of specified property (see paragraphs 23.107 to 23.109).
- Civil recovery orders – appoints a trustee to realise specified property which is believed to be the proceeds of crime, without a conviction (see paragraphs 23.115 to 23.117).

(c) Forfeiture in the magistrates' court, see paragraphs 23.123 to 23.146.

- Cash seizure – cash may be seized on reasonable suspicion that the cash represents the benefit from unlawful conduct or is intended for use in unlawful conduct (see paragraphs 23.125 to 23.128).
- Cash forfeiture – where the court is satisfied that cash seized is recoverable or is intended by any person for use in unlawful conduct it will be forfeited (i.e. surrendered) to the authority who seized it (see paragraphs 23.129 to 23.130).
- Tax assessments (Revenue function) – power by The National Crime Agency (NCA) to raise tax assessments and to collect specific or general taxes where a person is suspected of having income, gains or profits from the proceeds of crime, see paragraphs 23.147 to 23.151.

23.4 Realisable property

Realisable property is any free property (property which is not subject to an order of deprivation or forfeiture)¹ held by the defendant, and any free property held by the recipient of a tainted gift (see paragraph 23.75)².

1. Proceeds of Crime Act 2002 section 83

2. Proceeds of Crime Act 2002 section 77

23.5 Definition of property

Property is broadly defined in PoCA02 to cover property wherever held and it includes money, all forms of real or personal property, things in action and other intangible or incorporeal property¹. As the definition covers all property 'wherever situated' this would include assets held in foreign jurisdictions, see paragraph 23.6.

1. Proceeds of Crime Act 2002 section 84

23.6 Enforcement abroad

Where realisable property is held abroad the prosecuting authority may send a request for assistance to another country to prohibit any person from dealing with realisable property, and/or to sell realisable property and apply the proceeds in accordance with the law of that country¹.

1. Proceeds of Crime Act 2002 section 74

23.7 Law enforcement agencies

A number of different agencies, including NCA, the Police and HM Revenue and Customs (HMRC) have power to bring proceedings to confiscate or recover property that has been obtained through unlawful activity (see paragraph 23.87). NCA has responsibility for overseeing this process.

23.8 NCA

NCA uses PoCA02 to protect assets during the course of a criminal investigation and to enforce a convicted individual to forfeit the proceeds of their crime. NCA provides assistance to other enforcement authorities, taking on cases for civil recovery or tax action, on a referral basis from HMRC, the Police and law enforcement authorities in accordance with agreed criteria. NCA also has the power to carry out general tax recovery functions in relation to a company or person if there are reasonable grounds to suspect that income arising or gain accruing to a company or person is a result of the company's or person's criminal conduct, or as a result of another's criminal conduct¹, paragraphs 23.147 to 23.151.

1. Proceeds of Crime Act 2002 section 317

More information on the work of NCA can be found on its website, at www.nationalcrimeagency.gov.uk. NCA absorbed the predecessor Serious Organised Crime Agency in late 2013.

23.9 Time for asset recovery process through Court

Asset recovery processes must be taken through court and so take time. Confiscation cases take an average of two years, from the start of a criminal investigation to enforcement of the confiscation order. For larger more complex cases, like those undertaken by NCA, this can be much longer. Civil recovery and tax cases can take several years.

23.10 The Joint Asset Recovery Database

NCA has the responsibility for maintaining a Joint Asset Recovery Database which records all restraint, confiscation, cash seizure and civil recovery orders made throughout the United Kingdom, together with brief details of the assets taken into account in making such orders. Most law enforcement agencies and HM Courts and Tribunals Service have access to it.

23.11 Contact details: NCA can be contacted at:

Units 1 - 6 Citadel Place,

Tinworth Street,

London SE11 5EF

Tel: 0370 496 7622

23.12 Contact with enforcement authority

The official receiver should contact the relevant enforcement authority (whether NCA, the Police, HMRC or another) in any case where they has reason to believe that an order has been made or is about to be made under PoCA02. For example, in cases where a criminal conviction has already been obtained against a company or a bankrupt, in cases where an interviewee has indicated that proceedings under PoCA02 are pending, or where the official receiver has reason to believe that this might be the case from other information available.

Action against assets in criminal cases - restraint orders

23.13 Scope of part

This part deals with restraint orders obtained under PoCA02. To assist in locating information in the part, a breakdown of the part is provided as follows:

- Restraint orders – general information (paragraphs 23.14 to 23.25)
- Restraint order made before insolvency order (paragraphs 23.26 to 23.37)
- Restraint order made after insolvency order (paragraphs 23.38 to 23.41)
- Application to vary/discharge restraint order (paragraphs 23.42 to 23.47)
- Management receivers (paragraphs 23.48 to 23.52)

23.14 Restraint orders

An application for a restraint order is made by a prosecuting authority or an accredited financial investigator to a Crown Court¹.

1. Proceeds of Crime Act 2002 section 42

The aim of a restraint order is to prevent the person specified in the order from dealing with realisable property (see paragraph 23.4 to 23.5) during a criminal investigation or criminal proceedings. The order prohibits the specified person from dealing with the property held whether or not they is the suspected offender (or defendant where criminal proceedings have been commenced). For ease the term defendant is used in the chapter.

A restraint order has the effect of freezing property anywhere in the world that may be liable to confiscation following a trial and subsequent conviction of a defendant (see paragraphs 23.53 to 23.84).

23.15 Restraint orders and interaction with confiscation orders

The restraint order protects property which may be required to be sold to satisfy any confiscation order that may be made by the court should the suspected offender (defendant) be found guilty. A confiscation order is an order that a convicted defendant pay to the Crown a certain sum of money representing the defendant's benefits from crime. Guidance on confiscation orders is provided in (see paragraphs 23.53 to 23.84).

Generally speaking, where the prosecution is taking action against a defendant's property, the first order to be obtained will be a restraint order. Following the trial, if the defendant is convicted, the court may make a confiscation order (see paragraph 23.54).

23.16 Enforcement of restraint orders

Failure to comply with a restraint order or the breach of any of its terms is contempt of court¹. It can be punished by a maximum of two years imprisonment and/or an unlimited fine².

1. Criminal Procedure Rules 2010 Part 59.2(6)

2. Criminal Procedure Rules 2010 Part 62

23.17 When can a restraint order be made?

A restraint order may be made:

- At any time after a criminal investigation has been commenced, if there is reasonable cause to believe that the defendant has benefited from their criminal conduct¹.
- Where proceeding for an offence have been started and not concluded and there is reasonable cause to believe that the defendant has benefited from their criminal conduct².
- Where certain applications relating to a confiscation order are made by a prosecutor and not concluded, or the court believes such an application will be made, and there is reasonable cause to believe that the defendant has benefited from their criminal conduct^{3 4}

1. Proceeds of Crime Act 2002 section 40(2)

2. Proceeds of Crime Act 2002 section 40(3)

3. Proceeds of Crime Act 2002 section 40(4)

4. Proceeds of Crime Act 2002 section 40(5)

23.18 Scope of restraint order – any specified person

The legislation does not require the person restrained to be the alleged defendant and a restraint order can be made against any specified person¹. A person who has possession of property in which the defendant has an interest; or who has an interest in property in which the defendant has an interest; may be specified in a restraint order, e.g. the defendant's spouse with an interest in the family home (see paragraph 23.35).

1. Proceeds of Crime Act 2002 section 41(2)

23.19 Defendant's interest in property held with third party

Under PoCA02 the defendant is said to hold any property in which they has an interest¹. This applies even where a third party may have a legitimate and even greater interest in that property, such as where the third party is the sole legal owner of a property but it is believed that the property may have been purchased, or part purchased, with the proceeds of crime.

The third party interest is only taken into account following the conviction of the defendant as part of the hearing for a confiscation order. The value of the defendant's interest in the third party property must then be decided by the court as part of the confiscation proceedings (paragraphs 23.65 to 23.66).

1. Proceeds of Crime Act 2002 section 84

23.20 When does a restraint order end?

Restraint orders do not come to an end when a confiscation order (see paragraphs 23.53 to 23.84) is made, but remain in force until the confiscation order is satisfied and/or the restraint order is discharged by the court, see paragraph 23.42 and 23.47¹.

1. Proceeds of Crime Act 2002 section 42(5)

23.21 Restraint order – after trial

A restraint order may be made for the first time after a confiscation order is made, following the conviction of the defendant (see paragraphs 23.53 to 23.84). The court can grant the order if there is a risk that assets may be dissipated whilst an appeal or enforcement action is pending^{1 2 3}

1. Proceeds of Crime Act 2002 section 40(4)

2. Proceeds of Crime Act 2002 section 40(5)

3. Proceeds of Crime Act 2002 section 40(6)

23.22 When should a restraint order be made?

An application for a restraint order should only be made where there is a reasonable risk that realisable property (see paragraph 23.4) may be dissipated¹. Without a real risk of dissipation of assets being established, there is no justification for interference with a suspect's human rights².

The court needs to consider the affect personally or commercially on the defendant or any third parties prior to making a restraint order, and must ensure that the order is proportionate in relation to protecting the public interest.

1. R. v B [2008] EWCA Crim 1374

2. European Convention on Human Rights 1950 Protocol 1 article 1

23.23 Property exempt from restraint order

In making a restraint order, the court will aim to strike a balance between keeping the defendant's assets available to satisfy a potential future confiscation order should the defendant be convicted (see paragraphs 23.53 to 23.84, and making provision to meet the defendant's reasonable general living expenses, legal expenses or funds to enable the continuation of a trade, business, profession or occupation requirements pending any trial^{1 2}.

1. Proceeds of Crime Act 2002 section 41(3)

2. Re: Peters (Edgar) [1988] 3 All E.R. 46

23.14 General restraint order

Where the prosecuting authority believes that a defendant has a criminal lifestyle (see paragraph 23.64), a request may be made for a restraint order which restrains the defendant from dealing with all of their assets. It may extend to all realisable property transferred to the defendant after the order is made¹. This is known as a general restraint order.

1. Proceeds of Crime Act 2002 section 41(2)

23.15 Specific restraint order

Where the prosecuting authority is not alleging that the defendant has a criminal lifestyle the court will be asked to decide whether the defendant has benefited from their particular conduct. In such circumstances the defendant may be restrained from dealing with specific assets which together total in value the amount that they may

have benefited from the particular criminal conduct. This is known as a specific restraint order.

Where a specific restraint order is made, the official receiver should realise or deal with any property not covered by the restraint order as they would in any other case.

23.26 Restraint order made before winding up order

Where the restraint order has been made prior to the date of the winding-up order or the date of a resolution for the company to be voluntarily wound up, then the liquidator (or provisional liquidator) is prevented from taking any action against the property of the company subject to that restraint order¹. This is the case even where the restraint order is made after the winding up petition has been presented to court or a provisional liquidator has been appointed².

[Annex A](#) shows the interaction of insolvency orders and restraint orders.

1. Proceeds of Crime Act 2002 section 426(2)

2. Proceeds of Crime Act 2002 section 426(9)

23.27 Restraint order made before bankruptcy order

If a restraint order is in force as at the date of the making of the bankruptcy order then any property subject to the restraint order¹ does not form part of the bankruptcy estate². This is the case even where an interim receiver has been appointed and the powers of the receiver will not apply to assets subject to the restraint order^{3 4}.

[Annex A](#) shows the interaction of insolvency orders and restraint orders.

1. Proceeds of Crime Act 2002 section 41(2)

2. Proceeds of Crime Act 2002 section 417(1)

3. Insolvency Act 1986 section 286

4. Proceeds of Crime Act 2002 section 417(4)

23.28 Action to be taken when restraint order made before insolvency order

Where a restraint order is made by the court prior to the date of the winding-up order or bankruptcy order then the official receiver should contact the relevant prosecuting authority and inform them of the making of the order. The official receiver should attempt to establish the current position regarding the restraint order and the appointment, or otherwise, of a management receiver (see paragraph 23.48). The official receiver should also request a copy of the restraint order in order to ascertain what assets are covered by the order.

Although the property subject to the restraint order will be excluded from the insolvent estate (see paragraphs 23.26 to 23.27) the prosecuting authority should be asked to note the official receiver's interest in any property subject to the restraint order and request that they be notified if the order is discharged. Where the order is discharged, the property will return to the company to be dealt with by the official receiver as liquidator, or vest in the official receiver as trustee as part of the bankrupt's estate¹. If there is a surplus after satisfaction of any confiscation order (see paragraph 23.30) the official receiver should request that the surplus funds be remitted to the liquidator/trustee.

1. Insolvency Act 1986 section 306A(2)

23.29 Need to defer company dissolution

Where there is a possibility that assets subject to a restraint order will later come back under the control of the liquidator (see paragraph 23.30 9A.30), the official receiver should defer the dissolution of the company for 6 years.

23.30 Need to review cases where assets covered by a restraint order

A restraint order operates to prevent dealings with restrained assets until the criminal hearing. If the defendant is found not guilty the restraint order will be discharged. If the defendant is found guilty it is likely that a confiscation order will be made. The restraint order will be discharged once the confiscation order has been satisfied. Where the restraint order is discharged, it is possible that the assets will come back under the control of the liquidator/trustee (see paragraph 23.47). Where restrained property is used to satisfy a confiscation order, the official receiver will be entitled to any surplus funds from the sale of that property as liquidator/trustee (see paragraph 23.82).

The official receiver as liquidator or trustee should ensure that the case is regularly reviewed until the conclusion of the criminal proceedings.

23.31 Restraint order contains onerous obligations – company

It is possible that the terms of the restraint order over a company's assets may be onerous to the insolvent estate. For example a restraint order over specified property may require the official receiver, as liquidator, to preserve the asset and to ensure its value does not diminish. The official receiver may therefore have an obligation to insure the property at a cost to the estate. Such an obligation to insure is onerous as it is possible that the property may be sold to satisfy any confiscation order should the offender subsequently be found guilty by the court and that there will be no financial benefit to the estate.

In such circumstances the official receiver should consider making an application to the court for the terms of the restraint order to be varied (see paragraphs 23.43 to 23.44).

23.32 Restraint order against company property where individual is under investigation

A restraint order can be made over an individual's personal property, shares of a company and the assets of that company where an individual is being investigated under PoCA02. Before a company's assets can be considered to be part of a defendant's assets the court must first lift the corporate veil. Once the veil has been lifted the company assets can subsequently be used to pay a personal confiscation order, which will only be lifted in cases of impropriety or dishonesty. The court will consider whether the veil of incorporation should be lifted if the defendant is found guilty at the hearing for a confiscation order. This is covered in more detail in paragraph 23.81.

23.33 Restraint order where fixed charge

Where company property is subject to a fixed charge, then the charge-holder's rights take priority over any restraint order made later. A restraint order will usually contain a clause allowing a charge-holder to enforce their security under the terms of the charge.

23.34 Restraint order and floating charge

Where company property is subject to a floating charge, the floating charge does not attach to any specific property until it has crystallised (e.g. where the loan is in

default). This has led to some uncertainty over whether the floating charge or restraint order would take priority in such cases. It may be possible for a floating charge-holder to apply to court for the appointment of an administrator after a restraint order is made, as this is not specifically prohibited^{1 & 2}.

1. Insolvency Act 1986 Schedule B1, paragraph 14 or 35

2. Ice Media International Ltd (in liquidation) v Q3 Media Ltd [2006] EWHC 1553

23.35 Jointly owned property subject to a restraint order

Any specified person who holds assets jointly with the defendant may be specifically restrained from dealing with those jointly owned assets. This may include a third party not subject to the criminal investigation e.g. money held in a joint bank account. Separate restraint orders may be made against both the defendant and the joint owner.

Where the restraint order(s) were made prior to the bankruptcy order, the official receiver will not be able to deal with the restrained property unless the restraint order is lifted/varied (see paragraph 23.27). The official receiver should seek to establish the legal and beneficial ownership of the property (see paragraph 23.36).

Where restraint order(s) were made against jointly owned property after the date of the bankruptcy order, the official receiver should consider applying to the court to vary/discharge the restraint order in relation to assets that vest in the official receiver as trustee of the bankrupt's estate (see paragraphs 23.43 to 23.44).

23.36 Restraint order against jointly owned property – where one party is bankrupt

Where the bankrupt and another individual jointly own property subject to restraint proceedings and the bankrupt's beneficial interest in the property vests in the trustee (i.e. the bankruptcy order pre-dates the restraint order, see paragraph 23.38), then the restraint order should be consulted to see if the order clarifies the beneficial interest division.

It is likely that the restraint order will remain in force until the criminal hearing. If the defendant is found guilty any subsequent confiscation hearing will consider the jointly owned property and draw conclusions as to the beneficial interest split (see paragraph 23.78).

23.37 Restraint order against jointly owned property– where both parties bankrupt

Where both joint owners are bankrupt, and a restraint order was made against jointly owned property prior to the bankruptcy orders then the official receiver as trustee of both estates will only have an interest in the property if the restraint order is subsequently discharged, or in any surplus should one arise after any confiscation orders are satisfied (see paragraph 23.27).

It is possible that a subsequent confiscation order will be made against one party only, and in this situation, the bankrupt not subject to the confiscation order will have their restraint order lifted dependent on any decision the court may make in the confiscation proceedings as to the beneficial interest split (see paragraph 23.78). That bankrupt's interest in the property will then vest in the official receiver as trustee¹ see paragraph 23.47.

1. Insolvency Act 1986 section 306A(2)

23.38 Restraint order made after the date of the insolvency order – no action to be taken in respect of assets restrained

Where a winding-up order or bankruptcy order is made before a restraint order, the restraint powers of PoCA02 are not exercisable in respect of property held by the company¹, or the bankrupt², see paragraph 23.39 below. Any property comprised in the insolvent estate will not be available to satisfy any confiscation order however a confiscation order may still be made, albeit the prior insolvency might affect the enforcement of the confiscation order³ (see paragraph 23.59). In such circumstances the official receiver should take no action to realise assets subject to the restraint order, as to do so may be acting in contravention of the court order. For action to take in such circumstances, see paragraph 23.40.

1. Proceeds of Crime Act 2002 section 426

2. Proceeds of Crime Act 2002 section 418

3. R. v Shahid (Abdul) [2009] EWCA Crim 831

23.39 Property which cannot be dealt with following the making of an insolvency order

The powers of POCA02 cannot be exercised, and a management receiver (see paragraphs 23.48 to 23.52) cannot be appointed over:

- Property held by a company¹
- Property of which the functions of liquidator are exercisable²
- Property comprised in a bankrupt's estate³
- Property which may be claimed as after-acquired property in bankruptcy⁴
- Property or income due to a bankruptcy estate as a condition of discharge from bankruptcy⁵
- Where a confiscation order has been made and the amount to be paid has been fully paid, any remaining sums⁶

1. Proceeds of Crime Act 2002 section 426(4)

2. Proceeds of Crime Act 2002 section 426(5)

3. Proceeds of Crime Act 2002 section 418(3)(a)

4. Proceeds of Crime Act 2002 section 418(3)(b)

5. Proceeds of Crime Act 2002 section 418(3)(c)

6. Proceeds of Crime Act 2002 section 418(3)(d) and (e)

23.40 Restraint order made after the date of the insolvency order - application to lift or vary restraint order

Where a restraint order is made after the date of the insolvency order, in respect of assets comprised in the insolvent estate, the official receiver is prevented from dealing with those assets as a consequence of the terms of the restraint order. If the official receiver were to deal with the assets it is likely they would be acting in breach of the court order. The official receiver should therefore take no steps to realise the assets but should obtain a copy of the restraint order in order to verify the assets subject to restraint. The official receiver should inform the prosecuting authority that it is their opinion that the application has been incorrectly obtained and request that an application is made to court to have the order lifted or varied^{1 2}. This is especially important if the assets are onerous, as a disclaimer cannot be issued whilst the restraint order remains in force.

1. Proceeds of Crime Act 2002 section 426

2. Proceeds of Crime Act 2002 section 418

Where the prosecuting authority is not prepared to go back to court to have the restraint order lifted or varied, then the official receiver should consider whether they should make such an application court¹ (see paragraph 23.42 to 23.43).

23.41 Restraint order made after the date of the insolvency order – insurance

Where a restraint order is made after the insolvency order, any assets covered by the restraint order will still form part of the insolvency estate (see paragraph 23.38), and so the official receiver should ensure that the assets are adequately insured and protected pending an application to vary or discharge the restraint order (see paragraph 23.42).

23.42 Variation and discharge of a restraint order

A restraint order may be varied or discharged on application of the person who applied for the order, or any person affected by the order¹. A restraint order may be varied to widen or reduce the property covered. The official receiver is considered to be a person affected by the order (see also paragraphs 23.43 to 23.44).

1. Proceeds of Crime Act 2002 section 42(3)

23.43 Application to court to dismiss or vary restraint order

Where it is considered appropriate for the official receiver, as liquidator or trustee, to make an application to dismiss or vary the restraint the application should be sent, in writing, to the court in which the restraint order was made, and must be supported by a witness statement¹. A copy of the application should be sent to the person who applied for the restraint order (the prosecuting agency), and any person restricted from dealing with the property by the restraint order. This should be sent at least 2 days prior to the hearing. There is no fee for making the application².

1. Criminal Procedure Rules 2011 rule 59.3

2. Criminal Procedure Rules 2011 rule 59.3(4)

23.44 Draft application to court to amend or discharge restraint order

There is no specific form available for an application to the court to discharge or vary a restraint order but a suggested template for a company case is available at [Annex](#)

B and for a bankruptcy case is available at [Annex C](#). Any other relevant facts of the case should also be included in the application.

23.45 Avoiding costs relating to assets subject to restraint

The official receiver should avoid taking possession of assets subject to a restraint order as they will not be able to realise those assets until the restraint order is varied or discharged.

Where the official receiver has taken assets into storage prior to discovering a restraint order against those assets, the storage costs will continue to accrue as a cost to the estate despite the asset not being available to discharge them. The official receiver should therefore ensure that a timely resolution is found for such assets, by application to discharge or vary the restraint order so that they may deal with those assets appropriately (see paragraph 23.43 to 23.44).

23.46 Consequences of dealing in property subject to restraint order

Where a liquidator, receiver and manager or trustee of an insolvent estate deals with property subject to a restraint order, they has a defence against being found liable for any consequent losses or damages, so long as it can be shown that they had reasonable grounds to believe that at the time of seizure/disposal of the assets they was entitled to seize or dispose of the property, and did not act negligently¹².

1. Proceeds of Crime Act 2002 section 432

2. Proceeds of Crime Act 2002 section 433

23.47 Effect on property of discharge of restraint order

Where a restraint order is discharged following an application to the court or following satisfaction of a confiscation order (see paragraphs 23.53 to 23.84), any company property would return to the company (after meeting the remuneration and expenses of any management receiver appointed by the court), and would fall to the official receiver as liquidator to deal with.

Any property excluded from the bankrupt's estate as a result of the restraint order will vest in the trustee as part of the bankrupt's estate (after meeting the remuneration and expenses of any management receiver appointed by the court)¹.

23.48 Appointment of a management receiver

The court may appoint a management receiver to manage property to which a restraint order applies pending the making of a confiscation order¹. The management receiver is given power in the order of appointment to carry out certain acts to manage or otherwise deal with the property (including selling the property in some circumstances)².

1. Proceeds of Crime Act 2002 section 48

2. Proceeds of Crime Act 2002 section 49

A management receiver will usually be appointed where the defendant's assets are of a nature that require active management and the individual is either unable to manage the assets or the court is of the view that they cannot be trusted to manage the assets properly.

23.49 Powers of management receiver

A management receiver is an officer of the court, and so acts on the order of the court rather than the applicant¹. The powers of the management receiver are set out by the court in the order of appointment and are usually limited to preserving the value of the assets for any subsequently made confiscation order². The court may confer the power:

- To take possession of the property;
- To manage or otherwise deal with the property (including to sell that property, to carry on a business or to incur capital expenditure);
- To start, carry on or defend any legal proceedings in respect of the property;
- To realise so much of the property as is necessary to meet the management receiver's remunerations and expenses.

Where a management receiver is unsure as to the power held in relation to certain actions, they should go back to court for directions³.

1. *Re Andrews* [1999] 1 WLR 1236

2. Proceeds of Crime Act 2002 section 49

3. Proceeds of Crime Act 2002 section 62

23.50 Difference between management receiver and enforcement receiver

A management receiver (who is appointed to protect property when a restraint order is in place), is not to be confused with an enforcement receiver. An enforcement receiver may be appointed when a confiscation order is in force and has the power to realise property in such manner as the court may specify for the purpose of satisfying a confiscation order¹, see paragraph 23.73.

1. Proceeds of Crime Act 2002 section 51(2)(c)

23.51 Management receiver's costs

The costs and expenses of the management receiver are paid from the assets that they are managing subject to the restraint order even if the defendant is subsequently acquitted¹.

1. Proceeds of Crime Act 2002 section 49(2)(d)

23.52 Management receiver – application to vary or discharge

Any person affected by the appointment of a management receiver (which could include the official receiver) may apply to court for the order to be varied or discharged¹.

1. Proceeds of Crime Act 2002 section 63

Action against assets in criminal cases - confiscation orders

23.53 General

To assist in locating information, a breakdown of this part is as follows:

- General information – paragraphs 23.54 to 23.56
- Confiscation orders and insolvency – paragraphs 23.57 to 23.63 and paragraph 23.82
- Valuing the benefit – paragraphs 23.64 to 23.68
- Enforcement of order – paragraphs 23.69 to 23.74
- Tainted gifts and antecedent recovery in insolvency – paragraphs 23.75 to 23.77

- Third parties – paragraphs 23.78 to 23.79
- Victim compensation and interaction with compensation order – paragraphs 23.83 to 23.84

See [Annex A](#) for a flowchart showing the interaction of insolvency and confiscation orders.

23.54 What is a confiscation order?

A confiscation order is an order that a convicted defendant pay a certain sum of money (the “recoverable amount”, see paragraph 23.65) representing the defendant’s benefits from crime to the Crown. The order does not, as may be thought, “confiscate” or require the surrender of a particular asset or assets^{1 2}.

The purpose of a confiscation order is to deny a person the benefit of property derived from crime (see paragraph 23.64). The defendant can choose to pay the order voluntarily, but if payment is not made, compulsory enforcement action can be taken (see paragraph 23.72).

1. Proceeds of Crime Act 2002 section 6(5)

2. Proceeds of Crime Act 2002 section 7(2)

23.55 Effect of confiscation order on restraint order and assets

A confiscation order does not impose any restriction on the assets of the defendant, although assets required to be sold to satisfy the confiscation order may have already been made subject to a restraint order by the time of the making of the confiscation order (see paragraph 23.14). Any restraint order in place at the time a confiscation order is made will not normally be discharged until the confiscation order is satisfied (see paragraph 23.20).

23.56 Application for a confiscation order

A confiscation order may be made on the application of the prosecuting authority or, if the court believes it appropriate to make such an order, on its own motion¹. A confiscation order cannot be made unless the person has been convicted in the crown court, committed to the crown court for sentencing, or committed to the crown court for consideration of a confiscation order (this would follow the person being convicted in the magistrates’ court and the prosecutor making a request for committal to the crown court for consideration of a confiscation order)².

1. Proceeds of Crime Act 2002 section 6(3)

23.57 Company – confiscation order made pre winding-up order

The liquidator (in a voluntary or compulsory liquidation) is unable to deal with any property over which a receiver has been appointed in connection with the enforcement of a confiscation order (see paragraph 23.73)¹.

However, where an enforcement receiver has not been appointed, then the liquidator is free to deal with company property unhindered as long as there is no restraint order in force (see paragraphs 23.13 to 23.52).

Where no receiver has been appointed and no restraint order is in force against a company's assets, the official receiver may encounter the position where a company's assets have been offered by the defendant, prior to the winding up order, to help satisfy the confiscation order, and the court/prosecuting authority has accepted that offer. In such a scenario the official receiver should write to the prosecuting authority claiming the assets in the liquidation proceedings.

Where there is a dispute as to ownership of company assets the official receiver should seek to clarify the position with the prosecuting authority. Where monies held in a company bank account are held by the liquidated company on trust for the defendant the monies will not comprise part of the liquidation estate. Additionally, where the court has lifted a company's corporate veil the assets will not form part of the liquidation estate (see paragraph 23.81).

1. Proceeds of Crime Act 2002 section 426(2)

23.58 Bankruptcy – confiscation order made pre bankruptcy order

A confiscation order made before the date of the bankruptcy order does not prevent assets vesting in the trustee. Only the making of a restraint order (see paragraph 23.27) or the appointment of an enforcement receiver (see paragraph 23.73) prior to the making of a bankruptcy order does.

Where an enforcement receiver has been appointed prior to the bankruptcy order the assets subject to a receivership will not form part of the bankruptcy estate¹. However, an enforcement receiver appointed pre-bankruptcy is not allowed to use the powers given under the act against property which is comprised in the bankruptcy estate (i.e. assets not subject to the receivership or a restraint order) once a bankruptcy order is in force^{2 3}.

1. Proceeds of Crime Act 2002 section 417(2)(b)

2. Proceeds of Crime Act 2002 section 51

3. Proceeds of Crime Act 2002 section 418

23.59 Effect of insolvency on confiscation order – confiscation order made post insolvency order

There is nothing in the legislation to prevent the court making a confiscation order simply because a winding-up order or bankruptcy order has already been made in respect of the same company or individual¹. The assets comprised in the insolvency estate will not be available for satisfaction of any confiscation order made^{2 3}.

1. Proceeds of Crime Act 2002 section 418

2 R v Shahid (Abdul) [2009] 2 Cr App R (s) 105

3. Proceeds of Crime Act 2002 section 426(6)

23.60 Where restraint order made following a confiscation order

As part of the confiscation hearing, where no restraint order has been made earlier in the proceedings, the court may make a restraint order to prevent the dissipation of assets prior to the confiscation order being satisfied. Where the confiscation order is made prior to the insolvency order and the restraint order is made after the insolvency order, then the assets will fall to the official receiver as liquidator to deal with or vest in the official receiver as trustee¹. The official receiver will, however, be unable to deal with the assets that are subject to the restraint order without a court order, see paragraphs 23.38 to 23.40.

1. Insolvency Act 1986 section 306

[Annex A](#) shows the interaction of insolvency and confiscation orders.

23.61 Debt due under confiscation order not provable

Any obligation arising under a confiscation order made prior to the bankruptcy order is not a provable debt in bankruptcy proceedings¹, and a bankrupt is not released from the obligation on discharge^{2 3}.

1. Insolvency Rules (England and Wales) 2016 14:2

2. Insolvency Act 1986 section 281(4A)

3. Insolvency Rules (England and Wales) 2016 10:146

23.62 Action to be taken where confiscation order is, or may be, in force

Where the official receiver is aware that a confiscation order has been made the official receiver should contact the relevant authority (see paragraph 23.7) and inform them of the making of the insolvency order and request a copy of the confiscation order, any restraint order in force and attempt to establish the current position regarding the confiscation order and the appointment, or otherwise, of an enforcement receiver.

Where assets are not covered by a restraint order and the only order in force is a confiscation order, then the official receiver should proceed to realise any insolvency assets after notifying the relevant authority of their intention to do so (provided that in the case of a company the corporate veil has not been lifted – see paragraph 23.57).

23.63 Third party assets subject to confiscation order

As a consequence of a confiscation hearing and a confiscation order subsequently being made by the court, the official receiver may become aware of previously undeclared assets. An example of this would be where the court rules that the bankrupt has a beneficial interest in a property where legal title is solely owned by their son/daughter. Where an enforcement receiver has not been appointed nor a restraint order made against assets prior to the insolvency order, then those assets will form part of the estate and be capable of being dealt with by the official receiver as part of the insolvent's estate.

Where monies or property which have been dealt with at a confiscation hearing can be clearly identified as the proceeds of crime (for example, money in an account which can be directly traced as being stolen from the victim of a crime), then that property should not be claimed for the benefit of the insolvent estate.

23.64 Criminal lifestyle

Before a confiscation order can be made, the court must first decide whether the defendant has a criminal lifestyle. This will depend on the nature of the offences committed by the defendant¹. The committing of certain offences (e.g. money

laundering or drug trafficking) will result automatically in the defendant being held to have had a criminal lifestyle².

If the court considers the defendant has a criminal lifestyle the court must then determine whether the defendant has benefited from their general criminal conduct. If the defendant does not have a criminal lifestyle the court must consider whether they has benefited from their particular criminal conduct³. A person benefits from criminal conduct if they “obtains property as a result of or in connection with the conduct”⁴.

1. Proceeds of Crime Act 2002 section 75 (1) & (2)

2. Proceeds of Crime Act 2002 schedule 2

3. Proceeds of Crime Act 2002 section 6(4)

4. Proceeds of Crime Act 2002 section 76(4)

23.65 Recoverable amount

Where the court decides that the defendant has benefited from their general or particular criminal conduct, the court must then determine the recoverable amount. The recoverable amount is the amount specified for payment on the confiscation order¹. This will either be:

- The full amount of what the court has found the defendant has benefited by from any criminal conduct; or
- The value of all the defendant’s remaining assets (included tainted gifts, see paragraph 23.75), called the “available amount”, if that is shown to the court’s satisfaction to be less.

1. Proceeds of Crime Act 2002 section 7

23.66 The available amount

Where the defendant proves to the court that the available amount is less than the amount they has benefited from (see paragraph 23.64), then that becomes the recoverable amount (see paragraph 23.65). The “available amount” is the total of all the free property held by the defendant at the time of the order (minus the total amount payable in pursuance of obligations which have priority) along with the total value of all tainted gifts¹. This will then become the amount payable under the confiscation order.

As a confiscation order can be made after an insolvency order, property which is included in the insolvent estate would be excluded when calculating the available amount and would be unavailable in the confiscation proceedings, see paragraph 23.19.

1. Proceeds of Crime Act 2002 section 9

23.67 Confiscation order – statement of findings

Where the court determines an available amount as the recoverable amount, the confiscation order must provide a statement of findings as to the matters relevant in deciding that amount¹.

1. Proceeds of Crime Act 2002 section 7(5)

23.68 Matters the court will take into consideration

When determining the recoverable amount the court will consider matters such as proceedings intended or started by a victim of the person's criminal conduct^{1 2} (see also paragraph 23.83) and any representations made by the defendant^{3 4} prior to making the confiscation order. Having taken these matters into account, the court will, if appropriate, make a confiscation order requiring the defendant to pay a certain amount (which may be a nominal figure if it is shown that the available amount is nil).

1. Proceeds of Crime Act 2002 section 6(6)

2. Proceeds of Crime Act 2002 section 7(3)

3. Proceeds of Crime Act 2002 sections 6(7)

4. Proceeds of Crime Act 2002 section 10A

23.69 When payment is due under a confiscation order

The amount to be paid under a confiscation order must be paid on the date the confiscation order is made unless the court otherwise orders¹.

If the defendant shows that time is required to pay the order the court may extend the due date for payment up to 3 months. In exceptional circumstances the court may extend this time for a further 6 months (see paragraph 23.72)¹.

1. Proceeds of Crime Act 2002 section 11

23.70 Interest payable

To encourage prompt payment interest is payable on the amount of the confiscation order. If the amount is not paid by the date due the amount of interest is added to the confiscation order and treated as if it were part of the order¹. The statutory rate of interest is payable, currently 8%².

The court has no discretion to waive the interest payment³.

1. Proceeds of Crime Act 2002 section 12

2. Judgments Act 1838 section 17

3. Hansford v Southampton Magistrates Court [2008] EWHC 67

23.71 Voluntary satisfaction of confiscation order

The defendant is normally given the opportunity to satisfy the confiscation order voluntarily before any enforcement action is taken. It is in the defendant's interest to pay voluntarily to avoid the liability to pay interest (see paragraph 23.70), serve a default sentence (see paragraph 23.72 9A.72) or to have the costs of a receiver appointed over the assets (see paragraph 23.73).

23.72 Enforcement of confiscation orders

The defendant is required to make payment by the date determined in the confiscation order. Where an enforcement receiver is not appointed by the court (see paragraph 23.73) the order is considered to be a fine and set periods of imprisonment are provided for in legislation for those in default¹.

If the defendant serves a period of imprisonment in default of a confiscation order this will not extinguish the confiscation order and the order will continue to have effect for any other enforcement purposes³.

1. Proceeds of Crime Act 2002 section 35

2. Powers of Criminal Courts (Sentencing) Act 2000 section 139

3. Proceeds of Crime Act 2002 section 38(5)

23.73 Appointment of enforcement receiver

If a confiscation order is not satisfied, the crown court may appoint a receiver, known as an enforcement receiver, in respect of realisable property (see paragraph 23.4)¹. The powers given to a receiver in the court order of appointment may be

wide-ranging to allow for the most effective recovery of the defendant's assets in order to satisfy the confiscation order². Powers given may include the power to manage or otherwise deal with property, other specific management functions conferred by the court, and the power to bring or defend legal proceedings. Third parties holding an interest in realisable property may be ordered to pay the receiver an amount in respect of the value of the beneficial interest that the defendant holds in that property (see paragraphs 23.78 to 23.79).

1. Proceeds of Crime Act 2002 section 50

2. Proceeds of Crime Act 2002 section 51

23.74 Enforcement abroad

Where realisable property is situated abroad, the prosecutor may forward a request for assistance to the Home Secretary, who may forward the request to the relevant government¹. Where property is then realised abroad, the amount that is realised should be deducted from the amount due under the confiscation order.

1. Proceeds of Crime Act 2002 section 74

23.75 Tainted gift

Where the defendant has made a gift or transfer of property to another for significantly less than its market value at the time it was transferred, this is known as a tainted gift¹.

A gift is a tainted gift if:

- it was made within 6 years before the proceedings for the offence commenced (where the court has determined that the defendant has had a criminal lifestyle – see paragraph 23.64), or;
- it consists of, or represents, property obtained by the defendant as a result of, or in connection with, their criminal lifestyle (where the court has determined that the defendant has had a criminal lifestyle), or;
- the gift was made after the earliest offence was committed (where the court has determined no criminal lifestyle is present)².

A tainted gift is considered to be property for the purpose of making or enforcing a restraint order (see paragraphs 23.13 to 23.52) or a confiscation order and will be included in the recoverable amount.

1. Proceeds of Crime Act 2002 section 78(1)

2. Proceeds of Crime Act 2002 section 77

23.76 Effect of insolvency on tainted gifts – antecedent recovery

Where a company or a bankrupt has entered into a transaction at an under value^{1,2}, a preference^{3,4} or a transaction to defraud creditors⁵, which is also a tainted gift (see paragraph 23.75), no action may be taken by the liquidator or trustee to recover the value lost to the insolvency estate if the property in question is subject to a restraint order (see paragraphs 23.13 to 23.52) or over which an enforcement receiver has been appointed prior to the date of the bankruptcy order^{6,7} (see paragraph 23.73). If no restraint order has been made or enforcement receiver appointed, the official receiver as liquidator or trustee, should pursue the antecedent recovery as usual following the relevant Operational Guidance.

Any order made to recover the loss (for example, as a transaction at undervalue) to the insolvency estate after the discharge of a restraint order or the discharge of an order appointing a receiver must take into account any realisation of the property already made under PoCA02^{8,9}. The recipient of the preference or gift should not be made to pay more than the total value of the property in question.

1. Insolvency Act 1986 sections 238

2. Insolvency Act 1986 sections 339

3. Insolvency Act 1986 sections 239

4. Insolvency Act 1986 sections 340

5. Insolvency Act 1986 section 423

6. Proceeds of Crime Act 2002 section 419(2)

7. Proceeds of Crime Act 2002 section 427(3)

8. Proceeds of Crime Act 2002 sections 419(3)

9. Proceeds of Crime Act 2002 sections 427(4)

23.77 Action to be taken in respect of a tainted gift

In cases where the official receiver has identified an antecedent recovery and is aware that a restraint order is in force, or an enforcement receiver has been appointed over that asset prior to the insolvency, the official receiver should inform the relevant enforcement authority (see paragraphs 23.2 to 23.12) or appointed receiver of the making of the insolvency order. The official receiver should attempt to establish the current position regarding the recovery of the tainted gift. The receiver

or the relevant enforcement authority (as appropriate) should be asked to note the official receiver's interest in the matter.

Where the asset in question is not covered by a restraint order or receiver appointed prior to the insolvency order, then the official receiver should take steps to realise that asset.

23.78 The family home

A confiscation order is an order to pay a sum of money and may be enforced against any property owned by the defendant, including the family home. This is the case even if the property was obtained legally. A solely owned property held by the defendant which is also their family home may therefore form part of the amount to be realised under the confiscation order.

Where the property is jointly owned by the defendant's spouse or partner, their share may not be realised under a confiscation order unless it can be shown that their share was a tainted gift¹ (see paragraph 23.75). Where a defendant has been found guilty and they provided all the funds to purchase the jointly owned property, the court may consider that the spouse or partner's share is tainted (see paragraph 23.75). Alternatively the court may accept the integrity of a joint ownership where there has been a long term relationship and the spouse/partner has contributed in other ways.

When considering property, the starting point for the court is to establish what the beneficial interest is of each joint owner. The court will then give consideration as to whether that beneficial interest is genuine or whether it is a tainted gift. The conclusions reached will be used to calculate the defendant's interest for the purpose of calculating the recoverable/available amount (see paragraphs 23.65 to 23.66).

1. *R v Buckman (Andrew)* [1997] 1 Cr. App. R. (S.) 325

23.79 Third party rights

Third parties with an interest in assets held by the defendant have no right to be heard at a criminal confiscation hearing. At the confiscation stage, the court is tasked with determining the defendant's free property in order to calculate the recoverable amount (see paragraph 23.65) in which to make the order for a sum of money.

Any decisions made by the court in relation to third party interests at the criminal confiscation hearing are not binding on third parties as they are not party to the proceedings. The court has held that the appropriate time for a third party to dispute a confiscation order was at the hearing to enforce that order¹.

The court cannot appoint a receiver to realise or manage property unless it gives persons with an interest in that property a reasonable opportunity to make representations^{2 3}.

1. Re Norris [2001] 1 W.L.R. 1388

2. Proceeds of Crime Act 2002 section 49(8)

3. Proceeds of Crime Act 2002 section 51(8)

23.80 Limited Liability Partnerships

The provisions as to the confiscation, recovery, tainted gifts and winding up also apply to limited liability partnerships capable of being wound up under the Insolvency Act 1986 as if they were companies¹.

1. Proceeds of Crime Act 2002 section 431

23.81 Lifting the corporate veil

Where a defendant has used a limited company to carry out criminal acts, the corporate veil may be lifted by the court in certain circumstances. The court will lift the corporate veil where the defendant has acted with impropriety and dishonesty. In lifting the corporate veil the assets of the company will become those personally of the defendant, this will include any specified company assets subject to a restraint order. The value of the assets can be taken into consideration for the purpose of calculating the amount payable under the confiscation order (see paragraphs 23.65 to 23.66).

The Court of Appeal has held that the corporate veil can be lifted where:

- The defendant attempts to shelter behind a corporate façade or veil to hide their crime and benefits from it.
- Where the defendant intentionally acts in the name of the company in a criminal way leading to the offender's conviction.
- Where the transaction or business structure is an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the court¹.

1. R. v Seager (Mornington Stafford) R. v Blatch (Endon Barry) [2009] EWCA Crim 1303

23.82 Surplus following satisfaction of confiscation order

Where a restraint order has been made or enforcement receiver appointed prior to the making of the insolvency order, then any surplus proceeds remaining after the satisfaction of the confiscation order and related fees and expenses by the receiver,

would fall to the official receiver as liquidator of the company to deal with, or vest as an asset in the bankruptcy estate¹.

1. Insolvency Act 1986 section 306C

23.83 Compensation and confiscation orders

PoCA02 is designed to ensure that compensation for victims and losers takes precedence over confiscation. The court must first make the confiscation order, then fix the amount of the compensation without regard to the confiscation order. Where the defendant doesn't have enough assets to satisfy both orders, then the shortfall in compensation to the victim/loser should be paid from the confiscated amount. If the defendant has sufficient assets, they may end up paying the amount twice over. See paragraphs 23.144 to 23.146 on compensation payable in civil cases.

23.84 Victim may have a provable claim

An obligation arising under a confiscation order is payable to the Crown, and is a distinct liability to that of the liability to the victim of the crime, who may have a provable debt in the insolvency proceedings. Where the liability to the victim is not settled in the bankruptcy proceedings, and the liability arose as a result of fraud or personal injury, then that liability will not be released on discharge¹.

1. Insolvency Act 1986 section 281(3)

Civil recovery

23.85 Introduction

In addition to the powers given in PoCA02 to restrain and confiscate property obtained in the course of unlawful conduct, powers are also provided to bring civil proceedings in the High Court jurisdiction to obtain certain orders for the protection and recovery of property, regardless of whether or not criminal proceedings are brought or are successful^{1 2}. The aim of civil recovery is to recover property obtained through unlawful conduct.

1. Proceeds of Crime Act 2002 section 240

2. Proceeds of Crime Act 2002 section 243

23.86 Civil recovery orders

A civil recovery order enables an enforcement authority (see paragraph 23.100) to recover property which is, or represents property obtained through unlawful conduct¹.

Freezing orders and interim receiving orders are applied for to protect property, where it is considered it has been unlawfully obtained, whilst proceedings for a civil recovery order are ongoing.

1. Proceeds of Crime Act 2002 section 240

23.87 Unlawful conduct

Unlawful conduct is conduct which is unlawful under UK criminal law or, where it occurs in another country, if it is contrary to the criminal law of that country and would be unlawful if it occurred here¹.

1. Proceeds of Crime Act 2002 section 241

23.88 Burden of proof

The burden of proof that the property was obtained unlawfully lies with the enforcement authority who must prove it to the court on the balance of probabilities¹.

1. Proceeds of Crime Act 2002 section 241(3)

23.89 Recoverable property

Property obtained through unlawful conduct (see paragraph 23.87), is known as recoverable property¹. For a definition of property, see paragraph 23.5. Property which represents the original property is also considered to be recoverable, so that recovery is not thwarted by the conversion of the property into something else or by giving a third person interest in it². For example, if the person who obtained a stolen car then swapped it for a boat, the enforcement authority may choose to recover the stolen car or the boat. The property can be followed into anyone's hands until it is acquired in good faith and for value (see paragraph 23.92).

1. Proceeds of Crime Act 2002 section 304

2. Proceeds of Crime Act 2002 section 305

23.90 Mixing of property

If a person's recoverable property is mixed with other property (whether their property or another's), only the portion of the mixed property which is attributable to the recoverable property represents the property obtained through unlawful conduct¹.

Recoverable property is mixed with other property if (for example) it is used;

- to increase funds held in a bank account (see paragraph 23.113),
- in part payment for the acquisition of an asset,
- for the restoration or improvement of land,
- for the discharge (in whole or in part) of a mortgage, charge or other security,
- by a person holding a leasehold interest in the property to acquire the freehold².

1. Proceeds of Crime Act 2002 section 306

2. Proceeds of Crime Act 2002 section 306(3)

23.91 Accruing profit

Any profits made from recoverable property are also recoverable, even if used to obtain further property¹.

1. Proceeds of Crime Act 2002 section 307

23.92 Property which is excluded from being “recoverable”

The following property is excluded from being recoverable property:

- Property obtained in good faith for value (see paragraph 23.93).
- Property subject to existing civil recovery orders or forfeiture orders (see paragraph 23.94).
- Property subject to a restraint order (see paragraph 23.95).
- Property taken into account in confiscation proceedings (see paragraph 23.96).
- Payments under criminal compensation (see paragraph 23.97).
- Payments following financial services offences (see paragraph 23.98).
- Associated property (see paragraph 23.99).

23.93 Property obtained in good faith

Where property was obtained in good faith and without knowledge of the unlawful conduct from which it originated, for value, and without notice that it was recoverable property it will not be recoverable property¹.

1. Proceeds of Crime Act 2002 section 308(1)

23.94 Property subject to a civil recovery order or forfeiture order

Once property is the subject of a civil recovery order (see paragraphs 23.115) or a forfeiture order (see paragraph 23.129) it ceases to be recoverable property¹.

1. Proceeds of Crime Act 2002 section 308(2)

23.95 Property subject to a restraint order

Where a restraint order is in force (see paragraph 23.14) the property is not recoverable¹. If following criminal proceedings the restraint order is discharged the property will again become recoverable.

1. Proceeds of Crime Act 2002 section 308(8)

23.96 Property taken into consideration in confiscation proceedings

Where property has been taken into consideration in calculating the amount payable under a confiscation order (see paragraph 23.54), it is not recoverable¹. This prevents double recovery of the same proceeds of crime.

1. Proceeds of Crime Act 2002 section 308(9)

23.97 Payments under criminal compensation

Where a compensation order has been made in criminal proceedings (see paragraph 23.84), and is paid out of recoverable property, the property will cease to be recoverable¹. In this way victims of crime are not deprived of compensation as a consequence even if it is paid for from the proceeds of crime.

1. Proceeds of Crime Act 2002 section 308(4) and (5)

23.98 Payments following financial services offences

Where payments are required for restitution following offences under the Financial Services and Markets Act 2000 the amount paid ceases to be recoverable¹.

1. Proceeds of Crime Act 2002 section 308(6) and (7)

23.99 Associated property

“Associated property” is innocently held property with some legal or physical connection with the recoverable property. Recovery proceedings can be commenced against the associated property if that is the only way to seize the recoverable property (provided there is a replacement for the value of the innocent party’s share in the property). An example of associated property is a bond held in the name of joint parties¹.

1. Proceeds of Crime Act 2002 section 245

23.100 Who can take civil recovery action?

Civil recovery proceedings can be taken by certain enforcement authorities, these are the Director of NCA (see paragraphs 23.2 to 23.12), the Director of Public Prosecutions, the Director of the Revenue and Customs Prosecutions and the Director of the Serious Fraud Office.

23.101 Referrals to NCA

Law enforcement agencies or enforcement authorities can refer cases to NCA for consideration for civil recovery or tax action (see paragraphs 23.147 to 23.151). Cases must meet the following criteria:

- Recoverable property has been identified and has an estimated value of at least £10,000.
- Recoverable property has been acquired in the last 12 years (20 years for tax).
- Recoverable property includes property other than cash and cheques (although cash can be recovered in addition to other property, see paragraph 23.102).
- There is evidence proven to civil standards of criminal conduct (see paragraph 23.88).
- For tax cases there must be reasonable suspicion that criminality has resulted in untaxed income (see paragraphs 23.147 to 23.151).

23.102 Commencement of civil recovery proceedings

In order for civil recovery proceedings to be commenced the person in possession of the property must have obtained it through unlawful conduct¹², see paragraph 23.87. The person subject to the order may not necessarily be the person who engaged in the unlawful conduct – simply that they have obtained property as a result of the unlawful conduct³.

Civil recovery proceedings cannot be taken against cash alone but must include an element of other “property” which is the property of the same person⁴. Cash can be seized under a different part of the PoCA02 legislation, see paragraphs 23.123 to 23.146.

1. Proceeds of Crime Act 2002 section 241

2. Proceeds of Crime Act 2002 section 242

3. Proceeds of Crime Act 2002 section 242(1)

4. Proceeds of Crime Act 2002 section 282(2)

23.103 Victims of theft

A person who claims to be an innocent victim of theft may apply to the court for a declaration that certain property is not recoverable property, as the property claimed belongs to them and was not recoverable property immediately before they were deprived of it¹.

1. Proceeds of Crime Act 2002 section 281

23.104 Freezing orders

The relevant enforcement authority (see paragraph 23.100) may make an application for a freezing order before or after starting proceedings for a civil recovery order. The aim of a freezing order is to prohibit any person to whose property the order applies, from dealing in any way with that property¹. An allowance can be made from the property frozen, e.g. allowance of a certain amount from a bank account, for the person to meet reasonable living expenses, or to carry on any trade, business, profession or occupation². The property subject to a freezing order does not become the property of the applicant, it is simply frozen for later determination by the court as to who is entitled to the property.

1. Proceeds of Crime Act 2002 section 245(A)2

2. Proceeds of Crime Act 2002 section 245C

The court may make a freezing order where it is satisfied that there is a good arguable case that the property is recoverable or associated property (see paragraphs 23.89 to 23.99)¹.

1. Proceeds of Crime Act 2002 section 245A(5)

23.105 Freezing order – receiver appointment

The High Court may also appoint a receiver over any property to which the freezing order applies for the purpose of protecting that property^{1 2}. The receiver would have similar powers to those given to an interim receiver, see paragraph 23.109.

1. Proceeds of Crime Act 2002 section 245E

2. Proceeds of Crime Act 2002 section 245F

23.106 Freezing orders and interim receiving orders

A freezing order will generally be applied for prior to an interim receiving order (see paragraph 23.107), which itself usually pre-dates a civil recovery order (see paragraph 23.115).

A freezing order must be discharged prior to the making of an interim receiving order¹.

1. Proceeds of Crime Act 2002 section 245B(2)

23.107 Interim receiving orders

The enforcement authority may apply for an interim receiving order before or after starting proceedings for a civil recovery order¹ (see paragraph 23.115), which will prevent the owner of the property from dealing with it and appoint an interim receiver to detain or preserve that property¹. An allowance can be made for the person to meet reasonable living expenses, or to carry on any trade, business, profession or occupation². The application for an interim receiving order can be made without notice (where, for example, notice may give opportunity for property to be put out of reach)³.

The court may make an interim receiving order where it is satisfied that there is a good arguable case that the property is recoverable or associated property (see paragraphs 23.89 and 23.99)⁴.

1. Proceeds of Crime Act 2002 section 246

2. Proceeds of Crime Act 2002 section 252

3. Proceeds of Crime Act 2002 section 246(3)

4. Proceeds of Crime Act 2002 section 246(5)

23.108 Interim receiver appointed under PoCA02

An application for an interim receiving order must nominate a qualified receiver¹. The receiver's role is to establish whether or not the property listed in the order is recoverable or associated property (see paragraphs 23.89 and 23.99), and whether any other property is recoverable in relation to the same unlawful conduct².

1. Proceeds of Crime Act 2002 section 246(7)

2. Proceeds of Crime Act 2002 section 247(2)

23.109 Interim receiver's powers

The interim receiver is an officer of the court and powers held are derived from the order of appointment – which may be as broad or as narrow as the court considers appropriate^{1,2}. The order will usually include the power to seize property, to manage property, to search premises, and to require the provision of information or surrender of property.

Where an interim receiver inadvertently deals with property not covered by the interim receiving order, then they are not liable to anyone for the loss or damage to that property, unless they have been negligent³.

1. Proceeds of Crime Act 2002 section 247(1)

2. Proceeds of Crime Act 2002 schedule 6

3. Proceeds of Crime Act 2002 section 247(3)

23.110 Effect of freezing order or interim receiving order made prior to date of insolvency proceedings

A freezing order or interim receiving order obtained prior to an insolvency order will not grant any proprietary rights to the person obtaining the order, nor will it prevent assets vesting in the insolvency estate. However, both of these orders will prevent the official receiver as liquidator or trustee from dealing with those assets^{1,2}.

Where a freezing order or interim receiving order has been made before the date of the winding-up or bankruptcy order the official receiver will need to liaise with the relevant enforcement authority (and interim receiver where applicable). Where evidence is available indicating that the assets subject to the freezing order or interim receiving order are the proceeds of unlawful conduct the official receiver should not make claim to the assets. It is unlikely that the official receiver would consider claiming the assets subject to the order as the court will have been satisfied prior to the making of a freezing or interim receiving order that there was a good

arguable case that the assets are the proceeds of unlawful conduct (see paragraphs 23.104 and 23.107).

The official receiver should ask for their interest in assets subject to the order be noted in the event that any application for a civil recovery order is unsuccessful.

1. Proceeds of Crime Act 2002 section 252(1)

2. Proceeds of Crime Act 2002 section 245A(2)(b)

23.111 Effect of freezing order or interim receiving order made after the date of insolvency proceedings

It is possible for a freezing order or an interim receiving order to be obtained after an insolvency order has been made. This will effectively prevent the official receiver as liquidator or trustee from dealing with the assets as a consequence of the terms of the order. If the official receiver were to deal with the assets it is likely they would be acting in breach of the court order. The official receiver should therefore take no steps to realise the assets but should obtain a copy of the freezing order or interim receiving order to verify the assets subject to the order.

The official receiver should liaise with the relevant enforcement authority (and interim receiver where applicable) carefully to determine whether there is compelling evidence that the property represents the proceeds of unlawful conduct. Where the enforcement authority intend to make a subsequent application for a civil recovery order (for which they will need leave of the court, see paragraph 23.120), then the official receiver should not object where convincing evidence is held. In the absence of such evidence, the official receiver may consider making representations to the court at the application for hearing where it is considered that the assets should more appropriately be dealt with within the insolvency proceedings.

23.112 Insolvency – release of property subject to freezing order or interim receiving order

Where the property subject to a freezing order or interim receiving order is found to belong to a third party (e.g. the property of a victim of theft, see paragraph 23.113 below) or the proceeds of unlawful conduct, then the official receiver, as liquidator or trustee, should confirm in writing to the enforcement authority (and interim receiver) that they will not be claiming the property for the benefit of the insolvent estate. It is

likely that the official receiver will have been liaising with the relevant enforcement authority prior to reaching this decision.

The enforcement authority that obtained the freezing order or interim receiving order will need leave of the court to continue with the civil recovery proceedings in order to realise those assets (see paragraph 23.120), and the official receiver should confirm to the court that they has no objection to the continuance of the proceedings.

23.113 Insolvency – freezing orders over bank accounts

The official receiver may encounter an insolvent's bank account which is subject to a freezing order. It is possible that the bank account may hold monies that are mixed from various sources. Where the proceeds of unlawful conduct held in a bank account have become mixed with funds from another source, for example, company income or the bankrupt's wages, the official receiver should investigate the source of those funds before deciding whether to attempt to have the freezing order lifted and to claim the funds. Only the portion of the mixed money which is obtained through unlawful conduct would be recoverable property¹, see paragraphs 23.87 to 23.89. The official receiver should obtain copies of bank statements, cheque book stubs, etc. to identify the source of funds (see paragraph 23.90).

On receipt of the statements which show monies from a legitimate source and money from unlawful conduct the official receiver should treat the balance of the account, as if first debits from the account extinguish first credits from the account unless there is evidence to contradict this². The official receiver will therefore need to analyse the credits and debits to the account and assume that monies withdrawn are debits from the money first deposited.

1. Proceeds of Crime Act 2002 section 306

2. *Devaynes v Noble* [1816] 35 ER 767

23.114 Application to vary or discharge a freezing order or interim receiving order

Where a freezing order or interim receiving order is in force against property held by a company in liquidation or vesting in the official receiver as trustee of a bankruptcy estate, and the official receiver is of the view that the assets subject to the order should more appropriately be dealt with as part of the insolvent estate, then the official receiver should liaise with the relevant enforcement authority (interim receiver) with a view to having the order set aside or varied. As the court will have formed the view that the property subject to the order has been obtained by unlawful

conduct (see paragraph 23.87), the official receiver would need to have compelling evidence to indicate why the property should more appropriately form part of the insolvent's estate. It is possible that consideration may need to be given to making an application to the High Court to vary or discharge the order¹²³. It is expected that such applications will be rare.

Where an application to court to vary or set aside the order is considered appropriate a copy of the application must be served on every party to the proceedings, and any person affected by the court's decision. When dealing with an interim receiving order, the court must give the interim receiver an opportunity to be heard on the matter⁴.

There is no standard wording for an application, but for a suggested format, see Annex B for a company case or Annex C for a bankruptcy case.

The application should contain a clear and concise chronology of events, with information such as the date of the petition and order, the date of the relevant freezing or interim receiving order and application, details of the assets concerned, cooperation (or lack of), any other known assets, and any known liabilities or relevant court action against the company or bankrupt.

1. Proceeds of Crime Act 2002 section 245B

2. Proceeds of Crime Act 2002 section 251(3)

3. Practice Direction – Civil Recovery Proceedings, paragraph 7.1

4. Proceeds of Crime Act 2002 section 251(4)

23.115 Civil recovery order

A civil recovery order is the end result of civil recovery proceedings which may have previously included a freezing order and/or interim receiving order. The High Court will only make a civil recovery order when it is satisfied that property is recoverable¹, see paragraph 23.89. The civil recovery order provides for the appointment of a trustee to realise the recoverable property, see paragraph 23.116.

1. Proceeds of Crime Act 2002 section 266

23.116 Enforcement of a civil recovery order – trustee for civil recovery

A civil recovery order is enforced by the appointment of a trustee for civil recovery¹, whose duties and powers are similar to that of a trustee in bankruptcy²³. Property listed in the civil recovery order will vest in the trustee for civil recovery to realise and pay over to the enforcement authority⁴. The trustee for civil recovery acts on behalf of

the enforcement authority who applied for the appointment and must comply with its directions⁵.

1. Proceeds of Crime Act 2002 section 267(1)

2. Proceeds of Crime Act 2002 section 267(5)

3. Proceeds of Crime Act 2002 schedule 7

4. Proceeds of Crime Act 2002 section 266(2)

5. Proceeds of Crime Act 2002 section 267(4)

23.117 Payment of pension rights

Where a person has accrued monies in a pension scheme and the money has been obtained unlawfully (whether an occupational or personal pension scheme, or annuity^{1 2}), then those pension rights can be considered as recoverable property. Where the pension rights are considered to be recoverable, then the court may order that the pension trustees or managers pay the value over to the trustee for civil recovery following the making of a pension recovery order. The pension rights are valued by the trustees or managers of the pension scheme³.

1. Proceeds of Crime Act 2002 section 273

2. Proceeds of Crime Act 2002 section 275(4)

3. Proceeds of Crime Act 2002 (Recovery from Pension Schemes) Regulations 2003

23.118 Civil recovery order made prior to date of insolvency order

Where a civil recovery order is made by the court, the recovery order must vest the recoverable property in the trustee for civil recovery¹. Consequently any assets subject to a civil recovery order will not form part of the liquidation estate or vest in the official receiver as trustee in bankruptcy.

1. Proceeds of Crime Act 2002 section 266(2)

23.119 Action where civil recovery order is in force

Where the official receiver is aware, or suspects, that a civil recovery order is in force in relation to the insolvent's property, (typically, this will be where the official receiver has knowledge of previous enforcement proceedings in respect of the insolvent), notification should be sent to the enforcement authority (see paragraph 23.100) of

the making of the winding-up order or bankruptcy order. The official receiver should attempt to establish the current position regarding the recovery order and the appointment, or otherwise, of a trustee or receiver.

The relevant enforcement authority should be asked to note the official receiver's interest in any property subject to the recovery order.

23.120 Effect of insolvency on action for civil recovery order

Proceedings for a civil recovery order may not be taken or continued in respect of property which is an asset of a company in a voluntary liquidation or a voluntary arrangement¹, or an asset in a bankruptcy², unless the relevant court gives leave to do so³.

PoCA02 is silent with respect to a company which has been wound up by the court or where a provisional liquidator has been appointed, but protection to company assets forming part of the insolvency estate is provided from civil action under the insolvency legislation. When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with against the company or its property except by leave of the court and subject to such terms as the court may impose⁴. Additional protection is provided by insolvency legislation between the presentation of the petition and the winding-up order⁵.

An application for leave may be made without notice to prevent a potential respondent from having an opportunity to put property out of reach⁶, though notice must still be given, where required, to the official receiver and insolvency practitioner⁷.

Where there is adequate evidence to support the fact that the asset subject to the recovery order was obtained via unlawful conduct, the official receiver should consider not opposing the application for leave to take action against the asset.

1. Proceeds of Crime Act 2002 section 311(3)(a)

2. Proceeds of Crime Act 2002 section 311(3)(d)

3. Proceeds of Crime Act 2002 section 311(1)

4. Insolvency Act 1986 section 130(2)

5. Insolvency Act 1986 section 126

6. Proceeds of Crime Act 2002 section 311(4)

7. Proceeds of Crime Act 2002 section 311(5)

23.121 Effect on property of discharge of civil recovery order

If a civil recovery order is subsequently discharged the official receiver should take action to claim/realise the assets for the benefit of the insolvent estate.

In the case of a company, any company property will continue to belong to the company, and the official receiver as liquidator should take the necessary steps to protect and realise the assets upon discharge of the order.

In a bankruptcy case, any assets subject to a civil recovery order would not have vested in the official receiver, as trustee, from the date of the bankruptcy order. The official receiver should therefore claim the assets as after-acquired property within the usual 42 day period ^{1 2}

1. Insolvency Act 1986 section 307

2. Insolvency Act 1986 section 309

23.122 Civil recovery order – not provable

There is no provision under PoCA02 for the claimant in a civil recovery to prove a civil recovery judgment as a debt in bankruptcy proceedings. A civil recovery order vests property in the trustee for civil recovery. It does not create a personal debt¹.

1. Proceeds of Crime Act 2002 section 266(2)

Cash seizure and forfeiture

23.123 Introduction

Under PoCA02, application to a magistrates' court can be made for the seizure, detention, and forfeiture of cash. Cash may be seized on reasonable suspicion that the cash represents the benefit from unlawful conduct or is intended for use in unlawful conduct (see paragraph 23.125). The cash would then be held pending application for it to be forfeited (see paragraph 23.127 and 23.129). Where no forfeiture order is made, an application for compensation can be made by the person to whom the cash belongs or from whom it was seized¹, although this is rarely done.

1. Proceeds of Crime Act 2002 section 302

23.124 Definition of cash

For the purposes of the provision relating to the seizure (see paragraph 23.125) and detention (see paragraph 23.127) of cash, cash means:

- notes and coins in any currency,
- postal orders,
- cheques of any kind, including travellers' cheques,
- bankers' drafts,
- bearer bonds and bearer shares,
- gaming vouchers,
- fixed-value casino tokens,
- betting receipts,

found at any place in the UK¹.

1. Proceeds of Crime Act 2002 section 289(6)

23.125 Seizure of cash

A police officer, customs officer, an SFO officer or accredited financial investigator has the power to seize cash (see paragraph 23.124) if there are reasonable grounds for suspecting the cash is recoverable property (see paragraph 23.89) in respect of a recovery order (see paragraphs 23.85 to 23.122). or is intended to be used in unlawful conduct¹ (see paragraph 23.87). The whole of a cash amount may be seized if it is not practicable to separate it from the suspected cash.

The minimum of amount of cash that can be seized is £1000².

1. Proceeds of Crime Act 2002 section 294

2. Recovery of Cash in Summary Proceedings Minimum Amount Order 2006

23.126 Contact enforcement authority for information

Where the official receiver is aware that an insolvent's cash has been seized contact should be made with the enforcement authority as soon as practical (see paragraph 23.125), providing a copy of the winding-up order or bankruptcy order and request:

- That the authority notes the official receiver's interest in the cash.
- Information on the circumstances leading up to the seizure of cash.
- Any explanation offered by the insolvent to the authority.
- Details of any third party claims on the cash.

23.127 Detention of seized cash

Cash seized may be held for a period of 48 hours (not including weekends or public holidays). Thereafter, it may only be held with an order of court, up to a period of two years, if the court is satisfied that there are reasonable grounds for suspecting that the cash is recoverable property (see paragraph 23.89), and that there are reasonable grounds for suspecting that the cash is to be used in unlawful conduct (see paragraph 23.87), and that either;

- continued detention is justified while the source of the monies is investigated or consideration is given to bringing proceedings, or,
- proceedings have started and have not been concluded¹.

It has been held that to satisfy the first part of the test, the police need do no more than demonstrate their reasonable suspicion that the cash either is derived from unlawful conduct or that it will be used in unlawful conduct².

1. Proceeds of Crime Act 2002 section 295

2. R (on the application of the Chief Constable of Greater Manchester) v. City of Salford Magistrates; Court and Sarwar & Sons (Knitwear Ltd) [2008] EWHC 1651

23.128 Cash to be held in interest-bearing account

Where cash is detained in excess of 48 hours, it must be paid into an interest-bearing account and the accrued interest added to the sum to be forfeited or released¹.

1. Proceeds of Crime Act 2002 section 296

23.129 Forfeiture of cash seized

Cash forfeiture is the term used to describe the loss of cash seized without compensation. An application for forfeiture may be made to the magistrates' court by the holder of the seized cash. The court may make an order that the whole or part of the cash is forfeited if it is satisfied that the cash or part of the cash is:

- recoverable property (in respect of a recovery order – see paragraph 23.89)¹, or
- intended by any person for use in unlawful conduct (see paragraph 23.87)².

The cash is to be detained until these proceedings (including any appeal – which must be made within 30 days of the order for the forfeiture of the cash) are concluded³.

Where the official receiver considers that the cash has been obtained as a consequence of unlawful conduct e.g. it is cash obtained through theft, then no objection should be made to the making of a forfeiture order. The official receiver

should ensure that all parties are aware that any funds due to be returned to the insolvent at the conclusion of any proceedings are remitted for the benefit of the insolvency estate (see paragraph 23.135).

1. Proceeds of Crime Act 2002 section 298(2)(a)

2. Proceeds of Crime Act 2002 section 298(2)(b)

3. Proceeds of Crime Act 2002 section 298(4)

23.130 Forfeiture of cash seized – jointly held

Where cash is seized and it can be shown it is jointly owned, the share which the court considers is attributable to the excepted joint owner will not be forfeited¹, e.g. in the case of a joint bank account into which drug trafficking proceeds have been paid by one signatory and clean money, such as wages, by the other. If the drug trafficker withdraws all the cash and it is subsequently seized, the court must distinguish between the clean and the dirty money and return the innocent share of the cash.

1. Proceeds of Crime Act 2002 section 298(3)

23.131 Determining if cash is an insolvency asset – company

The first action the official receiver as liquidator should take, is to determine whether cash seized by an enforcement authority is a company asset. Unless the cash was forfeited prior to the appointment of a provisional liquidator or winding-up order, or it can be shown to belong to a third party it will form part of the company property.

23.132 Determining if cash is an insolvency asset – bankruptcy

Where cash has been seized the official receiver should seek to determine whether the cash is an asset in the bankruptcy estate. If the cash was seized but not forfeited prior to the making of the bankruptcy order, and it does not belong to a third party (see paragraph 23.143), then it will vest in the official receiver when they are appointed trustee¹ (see paragraph 23.135). Similarly, if the cash was seized after the making of the bankruptcy order, but it was owned or held by the bankrupt at the date of the bankruptcy order, then it will also be a vesting asset (see paragraph 23.136). Evidence should be sought that the cash was held or owned by the bankrupt at the

date of the bankruptcy, such as bank statements, a completion statement on the sale of property or a letter from the company involved in relation to compensation paid.

Where the cash has only come into the bankrupt's possession after the making of the bankruptcy order (but prior to discharge), or where there is uncertainty as to whether they held it at the date of the bankruptcy order, then the official receiver should consider claiming it as after-acquired property within the 42 day period (see paragraph 23.137).

1. Insolvency Act 1986 section 306

23.133 Effect of an insolvency order on the detention of cash seized

Cash that has been seized but not forfeited (see paragraph 23.129), and which would otherwise be an asset in an insolvency estate cannot be subject to further detention (after the initial or extended period for detention has expired – see paragraph 23.129) without leave of the court^{1 2}.

Where it appears on available evidence that the cash has been obtained as the consequence of unlawful conduct then the official receiver should not object to such an extension being sought and obtained, but should ensure that all parties (including the court) are aware of their interest in the monies (see paragraphs 23.135 to 23.139).

1. Proceeds of Crime Act 2002 section 311(2)

2. Insolvency Act 1986 section 130(2)

23.134 Effect of an insolvency order on forfeited cash

Where a forfeiture order is made by the court (see paragraph 23.129) prior to the making of an insolvency order, then the cash subject to forfeiture will not form part of the insolvent estate and any appeal must be brought within 30 days of the forfeiture order (see paragraph 23.129).

23.135 Action to be taken by official receiver where cash seized

Where cash has been seized prior to, or after, the making of the winding-up order or bankruptcy order, provided the cash was owned by the insolvent prior to the making of the insolvency order, the official receiver should take steps to ensure that their

interest in the cash is noted by the authority that has seized it. This is pending any further enquires that the official receiver needs to make to establish ownership (see paragraphs 23.131 to 23.132 and 23.138).

Unless on available evidence it is clear that the official receiver has no claim to the cash seized as it was obtained through unlawful conduct, a letter should be sent to the magistrates' court requesting that a copy of the winding-up order or bankruptcy order is placed on the court file. This is to ensure that court is aware of the official receiver's interest in the cash seized.

23.136 Action to be taken where cash seized after making of bankruptcy order and date of acquisition is unknown – or is known to be post-bankruptcy

Where cash has been seized after the making of the bankruptcy order and the date that the bankrupt obtained the monies is unknown, or is known to be post-bankruptcy, the official receiver should follow guidance in paragraph 23.135, and additionally, they should claim the monies as after-acquired property¹. Claiming the detained cash as after-acquired property will not prevent the authority holding the cash from continuing with forfeiture proceedings, it will merely ensure that where a forfeiture order is not subsequently made and the money is not forfeited, that the money will vest in the bankruptcy estate rather than the bankrupt.

1. Insolvency Act 1986 section 307

23.137 Claiming detained cash as after-acquired property

The official receiver as trustee should serve written notice on the bankrupt that the cash is claimed as after-acquired property and notify the enforcement authority in writing¹. Other interested parties to be served should include any third party with an interest in the money (see paragraph 23.143) and the magistrates' court (see paragraphs 23.138 to 23.143). This claim must be made within 42-days of the official receiver, as trustee, becoming aware of the existence of the monies².

It is possible that the enforcement authority may request that the official receiver makes no contact with the bankrupt about the investigation or monies seized, if this is the case, the official receiver may need to consider making application to the court for an extension of the 42-day period.

1. Insolvency Act 1986 section 307

23.138 Official receiver to seek direction of the court where the ownership of the cash seized is in doubt

Where the official receiver has insufficient evidence or any doubt that the cash belongs to the insolvent estate, (this is particularly likely where there is a third party also claiming an interest in the detained funds) then the official receiver should consider seeking the directions of the insolvency court^{1 2} on how to proceed.

Where the ownership of the monies is in dispute, the official receiver should request that the court order made provides for the monies to be held by the enforcement authority/court pending further enquiries (by the official receiver) to establish ownership. A copy of the application should be sent immediately to the magistrates' court requesting that it be placed on the file pending an outcome of the insolvency directions hearing. This is to ensure that the magistrates' court is aware of the proceedings in the insolvency court and the official receiver's interest in the funds seized.

If the insolvency court finds that the cash is an insolvency asset, then an application to the magistrates' court should be made (enclosing a copy of the order made in the insolvency court), to request release of the cash to the official receiver, see paragraph 23.140 to 23.142.

1. Insolvency Act 1986 section 303(2)

2. Insolvency Rules (England and Wales) 2016 rule 13.4

23.139 Application to magistrates' court where forfeiture/further detention is disputed

Where the official receiver as liquidator or trustee, is satisfied on available evidence that the cash is an asset of an insolvent, an application should be made to the magistrates' court for the release of the cash (see paragraph 23.143). The application should outline why forfeiture or further detention is not appropriate, and request that the cash be remitted to the official receiver as liquidator or trustee for the benefit of the insolvent estate¹, see paragraphs 23.140 to 23.142.

1. Proceeds of Crime Act 2002 section 301

23.140 Application to magistrates' court – where order specifies who to release cash to

At the conclusion of proceedings there is nothing in PoCA02 that requires that the enforcement authority who has seized the cash return it to any particular person.

If no further detention or forfeiture of the cash seized is made by the court, then the cash can be returned to whom it was seized from by the enforcement authority. The magistrates' order may specify the person to whom it should be returned¹.

Where such a specification is made in the order the enforcement authority will not be able to depart from this order, and where the official receiver, as liquidator or trustee, considers the cash forms part of an insolvent's estate an application should be made to the court for the order to be varied to specify that monies are paid for the benefit of the insolvent estate², see paragraphs 23.142 to 23.143. The application should be made in advance of any intention of the enforcement authority to release the monies.

1. Proceeds of Crime Act 2002 section 297

2. Proceeds of Crime Act 2002 section 301

23.141 Application to magistrates' court – order does not specify who to release cash to

Where the order of the magistrates' court does not specify to whom the cash should be returned an informal request for payment of the monies to the official receiver by the enforcement authority will not be sufficient. This is because there is a risk that an interested party may make an application to the magistrates' court for the release of the detained cash without the official receiver's knowledge, resulting in a loss to the estate. The official receiver should therefore make a prompt application to the magistrates' court that the funds are released for the benefit of the insolvent estate (see paragraphs 23.142 to 23.143).

23.142 Making application for the release of detained cash

An application by the official receiver for the release of seized cash must be made in writing¹. An application fee will be payable². If the fee required is over £2,500, see

the guidance in Chapter 1 of the Operational Guidance regarding the requirement to obtain the permission should be followed before committing to any expenditure.

The official receiver should telephone the relevant magistrates' court to discuss the pending application, confirm the fee payable and to ascertain if anything further is required. A date and time should also be agreed with the court for the hearing of the application.

A copy of the application and any evidence that will be presented to the court should be served on the bankrupt, the enforcement authority, and any other interested party³. Seven days notice should be given to the bankrupt⁴.

Example applications are provided at Annex E for a company case and Annex F for a bankruptcy case.

1. Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002 rule 6(1)

2. Magistrates' Courts Fees (Amendment No 2) Order 2010, Schedule 1 paragraph 15

3. Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002 rule 6(3)

4. Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002 rule 6(4)

23. 143 Third parties laying claim to the detained cash – no court application needed

The official receiver should not object to funds being returned to third parties where compelling evidence has been given that the cash belongs to that third party and had, at no time, belonged to the insolvent.

Where the official receiver has previously asked the magistrates' court to note their interest (see paragraph 23.135), they should write to the court confirming that they has no objection to the cash being released to the third party.

Typically, an interested third party may be the person from whom the monies were stolen or otherwise illegally obtained.

23. 144 Compensation following the release of detained funds

Where cash has been seized from someone, and no forfeiture order is made, then the person from whom the cash was seized, or to whom it belongs, may apply to the magistrates' court for compensation¹. The amount awarded would normally represent the interest accrued on the monies in the account it has been deposited, but in

exceptional cases, an additional amount can be awarded where the person has suffered other loss. The award would be made against the agency responsible for seizing the cash, and would not be made where the authority had acted honestly, reasonably and properly. Claims for such compensation are rare.

1. Proceeds of Crime Act 2002 section 302

23.145 Compensation paid to bankrupt

Where compensation is paid to a bankrupt under PoCA02¹ prior to the bankruptcy order, then it would vest in the official receiver as trustee².

1. Proceeds of Crime Act 2002 section 302

2. Insolvency Act 1986 section 306

Where a bankrupt is awarded compensation from an enforcement authority after the date of the bankruptcy order, for cash seized before the date of the order, the official receiver should claim it as after-acquired property within the 42 day period^{1 2}.

1. Insolvency Act 1986 section 307

2. Insolvency Act 1986 section 309

Generally, compensation paid under this provision would be of a financial nature, however if compensation was paid of a personal nature (in exceptional circumstances) relating to the pain and suffering of the bankrupt, then it is possible that the compensation may not be claimable.

23. 146 Compensation in criminal cases

The magistrates' court also has the power to make a compensation order against a defendant convicted of a crime (see paragraph 23.84). However the magistrates' court must refer the matter to the crown court if a confiscation order is also required, see paragraph 23.83₁.

1 Proceeds of Crime Act 2002 section 70

Revenue functions

23. 147 Taxation referrals to NCA

PoCA02 gave powers to NCA (see paragraph 23.8) to collect specific or general taxes where a company or person is suspected of having income, gains or profits from the proceeds of crime¹. SOCA can take over the tax collection function from

HMRC by serving notice on them specifying the company or person, and period for which the revenue function will be carried out². There is no need for an application to court.

1. Proceeds of Crime Act 2002 section 317

2. Proceeds of Crime Act 2002 section 317(2)

NCA may use tax assessments as an alternative to removing property from someone suspected of crime, where they have not been able to remove property through confiscation (see paragraphs 23.53 to 23.84). or civil recovery (see paragraphs 23.85 to 23.122). It allows for the taxation of income with no apparent legitimate source.

23. 148 Types of tax SOCA may serve notice to collect

NCA may serve notice on HMRC for the following revenue functions to be vested in them¹:

1. Proceeds of Crime Act 2002 section 323

- Income tax.
- Capital gains tax.
- Corporation tax.
- National Insurance contributions.
- Statutory sick pay.
- Statutory maternity, paternity, shared parental pay or adoption pay.
- Student loans.

23. 149 Reasonable grounds for suspicion

SOCA must have reasonable grounds to suspect that taxable income, gains or profits are the proceeds of crime. It is irrelevant whether that company or person has been acquitted in a prosecution of the suspected conduct. It is not necessary for NCA to identify the source of the income for a tax assessment to be raised¹.

1. Proceeds of Crime Act 2002 section 319(1)

23. 150 Action to be taken where tax assessment raised prior to making of insolvency order

Where a tax assessment has been raised by NCA prior to an insolvency order, then unless the company or bankrupt has already paid that assessment, it will be a provable debt in the insolvency proceedings.

23.151 Action to be taken where tax assessment raised following the making of an insolvency order

Where a tax assessment is raised by NCA after the making of an insolvency order, then the debt will be a provable debt in the insolvency proceedings where the liability was incurred (i.e. the taxable income was earned or capital gained) prior to the making of the winding-up order or bankruptcy order.

In bankruptcy, if the liability was incurred after the date of the bankruptcy order the debt is not a bankruptcy debt and the bankrupt will remain liable for its payment post discharge from bankruptcy. However, assets vested in the trustee may not be seized in payment of the taxation.

The official receiver should notify NCA of the insolvency order and the position regarding the debt.

Forfeiture and restraint orders under the terrorism legislation

23.152 Scope of this part

The legislation relating to forfeiture and restraint orders is encountered rarely and so has not been dealt with in depth. What follows in this Part is a brief synopsis of the legislation and its implications. If the official receiver has a complex query in relation to this area of law they should contact Technical Section for guidance.

23.153 Terrorism Act 2000 - forfeiture order

Where a person is convicted of a terrorism offence under the Terrorism Act 2000, the court may order the forfeiture of any property that they have in their possession or under their control which might be used for the purposes of terrorism¹²³. The court

may appoint a receiver to take possession of and deal with the assets, make a restraining order prohibiting a person from dealing with the assets or make a charging order over the assets to secure payment to the Crown⁴.

Before making a forfeiture order the court must give an opportunity to be heard to any person, other than the convicted person, who claims to be the owner or otherwise interested in anything which can be forfeited⁵.

1. Terrorism Act 2000 section 23

2. Terrorism Act 2000 section 23A

3. Terrorism Act 2000 schedule 4

4. Terrorism Act 2000 schedule 4 paragraph 2(c)

5. Terrorism Act 2000 section 23B

23.154 Effect of insolvency on the forfeiture order

The money or property subject to a terrorism forfeiture order (see paragraph 23.153) shall not be finally disposed of for a period of six months from the making of the forfeiture order¹. If, during that time, qualifying insolvency proceedings^{2,3} are commenced, the insolvency practitioner (including the official receiver)⁴ may claim that money or property to deal with within the insolvency proceedings⁵. Qualifying insolvency proceedings include a both voluntary and compulsory winding up of a company, a winding up of a partnership, a bankruptcy order and the administration of the insolvent estate of a deceased person⁶.

1. Terrorism Act 2000 schedule 4 paragraph 46

2. Terrorism Act 2000 schedule 4 paragraph 47

3. Terrorism Act 2000 schedule 4 paragraph 53(2)

4. Terrorism Act 2000 schedule 4 paragraph 53(1)

5. Terrorism Act 2000 schedule 4 paragraph 47

6. Terrorism Act 2000 schedule 4 paragraph 47(5)

23.155 Action to take where terrorism forfeiture order is in force – serve notice on court

On becoming aware of a forfeiture order made within the previous six months, the official receiver should try to have the assets dealt with in the insolvency proceedings. To claim assets for the insolvency proceedings, the official receiver should serve written notice on the court in which the forfeiture order was made¹. The notice should²:

- be served within six months of the making of the forfeiture order;
- include details of the date of the insolvency order; and
- include a statement to the effect that in the absence of the making of the forfeiture order, the property would be part of the insolvent's estate available to the creditors.

1. Terrorism Act 2000 schedule 4 paragraph 47

2. Terrorism Act 2000 schedule 4 paragraph 47(1)

23.156 Effect of service of notice on the court

Provided that the notice served by the official receiver (see paragraph 23.154) complies with the above, the forfeiture order and any order made in connection with the forfeiture order (an ancillary order) will cease to have effect in relation to the assets covered by it, which will be dealt with in the insolvency proceedings¹.

The official receiver should ensure that any funds held by the court are passed to him/her or are retained by the court to the order of the liquidator or trustee. In addition, the official receiver should obtain details of any assets not yet realised and of any receiver appointed in relation to the forfeiture order, so that such assets can be protected and recovered for the insolvent's estate.

1. Terrorism Act 2000 schedule 4 paragraph 47(3)

23.157 Expenses of the forfeiture proceedings

Any allowable expenses of the forfeiture proceedings may be deducted from the proceeds of sale of the property, or part of the property may not be released to the official receiver so that such expenses are discharged¹. If allowance was not made for the expenses when the property was delivered up or the value of the property is insufficient to cover such expenses, a claim may be made in the insolvency proceedings. This claim would be treated as if the expenses were expenses of the insolvency proceedings^{2,3}.

1. Terrorism Act 2000 schedule 4 paragraph 50(1)

2. Terrorism Act 2000 schedule 4 paragraph 48

23.158 Secretary of State to be a postponed creditor in the proceedings

In the event of any distribution being made to creditors, the Secretary of State responsible for the forfeiture would be a postponed creditor for the value of the property previously subject to the forfeiture order, the claim being payable only after the other debts have been paid in full with interest¹.

1. Terrorism Act 2000 schedule 4 paragraph 48(1)

23.159 Restraint orders in relation to terrorism offences

The High Court has the power, in relation to terrorism offences, to make a restraint order in relation to property where^{1 2} :

- a forfeiture order has been, or is likely to be, made, or
- where a criminal investigation has been started.

The application for a restraint order may be made without notice³.

1. Terrorism Act 2000 schedule 4 paragraph 5(1)

2. Terrorism Act 2000 schedule 4 paragraph 5(2)

3. Terrorism Act 2000 schedule 4 paragraph 5(4)

23.160 Effect of a restraint order

A restraint order prohibits a specified person to whom notice of it is given, subject to any conditions and exceptions specified in the order, from dealing with specified property in respect of which a forfeiture order has or could be made¹.

In this context, 'dealing with property' includes removing the property from Great Britain².

1. Terrorism Act 2000 schedule 4 paragraph 5(3)

2. Terrorism Act 2000 schedule 4 paragraph 5(5)

23.161 Official receiver to seek discharge of restraint order over insolvent's property

The official receiver will not be able to deal with property subject to a restraint order (see paragraph 23.159). It will be necessary for the official receiver to apply to the High Court for the order to be discharged¹.

1. Terrorism Act 2000 schedule 4 paragraph 6(2)

23.162 Official receiver dealing with property subject to forfeiture or restraint

If, in the absence of a correctly worded notice to the court (see paragraph 23.154) the official receiver reasonably deals with any property which is subject to a restraint or forfeiture order they shall not be liable for any loss caused by their action and they will have a lien on that property for their unpaid expenses and remuneration¹.

1. Terrorism Act 2000 schedule 4 paragraph 51

23.163 Recission of winding-up order or annulment of bankruptcy order

If a bankruptcy order is annulled, any property which was previously forfeited (or its value) will again be the subject of the forfeiture order and the official receiver should inform the court in which the forfeiture order was made of the annulment so that any funds or assets subject to the forfeiture order are returned to the court or to the receiver¹. There are no specific provisions relating to the return of property on the stay of a winding-up order. Where a winding-up order is stayed (or rescinded) the official receiver should inform the court that made the forfeiture order and the police of the stay and that control of the company's property will revert to the company and its directors.

1. Terrorism Act 2000 schedule 4 paragraph 49