

Restraint and Confiscation
Proceeds of Criminal Conduct Act 1997 (as
amended)





Restraint

A restraint order freezes a defendant's assets so that they may be used to satisfy a confiscation order and prohibits specified person(s) from dealing with any realisable property held by them. (section 17(1))

When is a Restraint Order required?



A restraint order will not always be appropriate. Decisions about whether or not to apply for an order, or the timing of an application, are of strategic importance to a case and should only be taken after careful consideration of the potential effect at both the investigation and prosecution stages.

The power to obtain a restraint order is an intrusive power and should not be used lightly. The underlying principle is that, before applying for an order, there must be a real risk that, without a restraint order, property may be dissipated.



Effect of a Restraint Order

A restraint order may apply to all realisable property held by the defendant. This includes cash and any realisable property transferred to the defendant after the order is made and any other property which the defendant may hold but which the investigator is unaware of. (section 17 (3))



A restraint order applies to any property held by the person specified in the order, wherever it is in the world. Subject to the precise terms of the restraint order, the defendant may be responsible for returning all property held abroad to the jurisdiction of the court.

Restraint powers may also be used against property held by a third party. Anyone who holds property jointly with the defendant or on their behalf may be specifically prohibited from dealing with such property. (section 17(7))- Receivers

The Corporate Veil



The value of the defendant's shareholding in a legitimate limited company can be included as their property. A limited company is a separate legal entity and any property held in the company name will generally be regarded as belonging to that company, and not to the defendant. In order to ascribe to a defendant property held by a company, it is necessary to "lift the corporate veil". (Refs to BVI Business Companies Act 2004)

Applying for a Restraint Order



A restraint order may be obtained where there are reasonable grounds to suspect that an alleged offender has benefited from their criminal conduct, and at any time after (section 16 (1)(c)(ii):

- Proceedings have been started with regard to an offence;
- proceedings have been started for an offence but not concluded; or



Applications

Applications for a restraint order may be made ex-parte to a High Court judge by a prosecutor. (section 17(4))



A restraint order may not be obtained if the court believes:

(a) there is undue delay in the proceedings; or

(b) the prosecutor does not intend to proceed with either prosecution for an offence or confiscation proceedings.

(section 16 (2))

Article 1 of Protocol No1 ECHR (Protection of Property)

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.



Exceptions to a Restraint Order

May be made under section 17 (2) which allows a restraint order to be subject to exceptions to make provision for:

- ‘reasonable living expenses’;
- ‘reasonable legal expenses’; or



Variations to a Restraint Order

A restraint order may be varied or discharged on application by:

- anyone affected by the order. (section 17 (6))



Serving A Restraint Order

The prosecution is responsible for serving the notice regarding the restraint order on the specified person or defendant (and any other affected parties) as soon as possible after the court grants it. (section 17 (4)(c))



Criminal Confiscation



Benefit – section 6 (2) and (6)

An offender benefits from an offence if they obtain property as a result of, or in connection with, its' commission. The benefit is the value of the property obtained.

It is important to note that the benefit is not the profit from the conduct, but the aggregate value of property obtained (i.e. the benefit is the gross receipt).



Example of benefit

An offender steals a car valued at \$10,000 and then sells it for \$5,000. The offender obtained both the car (value \$10,000) and the money from the sale (\$5,000) so the aggregate benefit is \$15,000

(R v Simons 1993 15 Cr App Rep (S) 126 CA).

Criminal Conduct under section 9(1)



The court can confiscate the value of property obtained as a result of, or in connection with, offences for which the defendant has been convicted and any which have been taken into consideration in the current (confiscation) proceedings.

In these circumstances, should you wish to obtain a restraint order, the order cannot restrain property of greater value than the benefit from the particular criminal conduct.



Relevant Example

An example would be where the court is considering a confiscation order in relation to a defendant who is convicted of a single offence of theft (say, a watch valued at \$800) from a jeweller's and asks the court to take a similar offence (of obtaining a shirt valued at \$50) into consideration. The benefit in this case totals \$850 and the court can make a confiscation order no greater than this amount.



A Course of Criminal Conduct (section 9 (1) and (2))

The defendant **MUST** have benefitted and been convicted.

Under section 9(2) following notice to the court from the prosecutor to the effect that the provisions of this section should apply and the defendant has been either

- (i) Convicted in these proceedings of at least 2 qualifying offences including the offence in question; or
- (ii) He/she has been convicted of qualifying offence on at least one occasion in relevant period (period of 6 years ending when proceedings were instituted, section 9(7))



Example – section 9 (2)(c)(i)

An example of the first of these sub-tests is a person convicted in current proceedings of four offences of burglary where the values of the property stolen was \$1,500, \$2,750, \$800, and \$20 in respect of each offence, a total benefit of \$5,070.



Example – section 9 (2)(c)(ii)

An example of the second is a person convicted where proceedings were started in May 2020 of the theft of \$10,000 from their employer. They had previous convictions for obtaining property to the value of \$2,000 by deception (January 2017) and theft (shoplifting) of property to the value of \$50 (March 2015). In other words, they have three convictions for similar offences within six years (relevant period) of the commencement of the instant proceedings, and have obtained a total benefit (in this case) of \$12,050.



Assumptions (section 9(4))

If the court decides that a defendant has a criminal lifestyle it must make four mandatory assumptions in deciding the extent to which the defendant has benefited from their criminal conduct.



Property held by the defendant (section 9(4)(a)(i))

Any property held by the defendant **at the date of conviction** or at any time in the period between that date and the determination was received by them at the **earliest time** they appear to have held it and as a result of the commission of the qualifying offences

(The date of conviction is the date on which the defendant was convicted of the offence concerned or, if there are two or more offences, the date of the latest. Section 9 (7))



Example

At the time of Alan's conviction (1 May 2020) he owned a house valued at \$1.5 million, two cars and a boat valued at \$250,000. The court would make the assumption that all of that property came from his general criminal conduct.



Property transferred to the defendant (section 9(4) (a)(2))

It is assumed that any property transferred to the defendant at any time **since the beginning of the relevant period** was obtained as a result of or in connection with the commission of offences to which this Act applies, and was obtained at the **earliest time** they appear to have held it.



Example

Alan is charged with qualifying offences on 1 April 2020. Between 31 May 2015 and the date of charge, cash lodgements of £670,000 were made into his bank accounts. As the transfers were made after the relevant period the court will assume that the money came from Alan's criminal conduct.

Expenditure by the defendant (section 9(4)(b))



Any expenditure incurred since the beginning of the relevant period was met from property obtained as a result of or in connection with the commission of offences to which the Act applies



Example

If Alan had spent money on expensive holidays, meals, and fine wines since 31 May 2015 (i.e. within six years before he was charged), then the court will assume that the money for these things came from his criminal conduct.



Property free of other interests (section 9(4)(c))

For the purpose of valuing any benefit which the defendant had or assumed to have had at any time, this was received free of any other interests in it.

The act does not define “other interests” but clearly a legally enforceable debt such as a charge against a property, or a hire purchase lien on goods would constitute such.



Example

Alan's house is valued at \$1.5 million. There is an outstanding mortgage of \$250,000, leaving Alan with equity of \$1.25 million. The equity is free of other interests.



Rebuttal of the assumptions (section 9(5))

The Court must not make these assumptions if:

- the assumption is shown to be incorrect, or
- there would be a serious risk of injustice if the assumption were made.



Example

As previously, there is a legal charge against Alan's house, therefore if the assumption were to be applied to the market value it would be shown to be incorrect.

The serious risk of injustice means double counting has taken place. This is where the same amount of money has either been counted twice in the same assumption or appears in more than one assumption.



Amount of Confiscation Order – section 6(8)

When the court makes a confiscation order it has to make one of two determinations in respect of the confiscation order that the defendant has to pay;

- (a) The benefit in respect of which the CO is made; or
- (b) The amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less



Enforcement of the Order –

This is the sum of money due to be paid immediately and comprises:

- the total value of all the defendant's free property at the time the confiscation order is made (i.e. the total value of all their property minus any priority obligations); plus
- the value of any 'tainted gifts'.

If the defendant fails or refuses to pay they are liable to be imprisoned for a term consecutive to that being served, if applicable, and determined by the court.

Any Questions?



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