

Follow the money—law firms and the pursuit of criminal assets

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Corporate Crime analysis: With fraud prevalent and state resources stretched thin, a new pilot scheme will allow private law firms the opportunity to pursue assets acquired through criminal activity using civil rather than criminal powers. Eleanor Davison of Fountain Court Chambers weighs up the merits of the idea, reviews the powers already available and also offers cautionary warning of a downgrade in the protections afforded to individuals who may be the subject of civil enforcement actions.

What is the background to this story?

Fraud is currently estimated to be the largest source of crime in the UK and the police force is simply unable to tackle its magnitude. It is estimated to cost some £193bn a year. With the criminal justice system under strain, the City of London Police is turning to the private sector to take on some cases that it cannot, using civil rather than criminal powers. The civil powers of forfeiture and civil recovery are not new but are perhaps under used by enforcement agencies in the criminal system. This pilot project aims to increase the use of civil recovery powers by the instruction of private law firms who will seek to seize the assets of suspects. In a further development, those law firms will be recompensed by being given a share of the seized assets, perhaps moving these cases closer to a no win, no fee arrangement and introducing a profit incentive into the pursuit of assets obtained through unlawful conduct.

How is the pilot project intended to work and how long will it likely run?

The pilot project will be run by the City of London Police. The intention is that City of London Police will provide details of suspects and cases to private law firms who will then pursue the assets of relevant individuals through the civil rather than criminal court system. Two potential legal routes the firms instructed may follow are set out below.

Civil recovery order

The law firms could apply for a civil recovery order (POCA 2002, ss 243 and 244 (Scotland)) to pursue the proceeds of unlawful conduct (in some instances, criminal conduct) through the civil courts. To succeed, the evidence presented will have to prove on the balance of probabilities (the lower, civil standard of proof) that there has been unlawful conduct and that the property to which the application relates is, or includes, recoverable property which is the product of that conduct. Proceedings are brought in the High Court against any person whom the authority thinks holds the recoverable property. Property can be traced overseas where it is possible to identify a 'connection' with the UK. As part of any civil recovery proceedings, a freezing order may be sought to prohibit any person to whom the order applies from dealing with any property specified or described within the order (POCA 2002, s 245A).

Cash seizure and forfeiture

Under POCA 2002, s 294, currency to the value of £1,000 or more may be seized if an officer has reasonable grounds for suspecting that it is, or represents, recoverable property obtained through unlawful conduct, or it is intended to be used in unlawful conduct. Currency includes bankers' drafts and cheques. Cash seized can be detained for an initial period of 48 hours (POCA 2002, s 295), during which time an application for forfeiture can be made (POCA 2002, s 298). This period can be extended by up to six months on application to a magistrates' court. Repeated applications to detain can be made up to a maximum period of two years.

What are the problems with the current system and if successful what benefits could this new system have?

The current criminal system is cumbersome and it takes a protracted period of investigation and conviction before assets are finally seized. POCA 2002 provides for the restraint and confiscation of the proceeds of criminal conduct from offenders. CPS guidance states that:

'[...] prosecutors should consider asset recovery in every case in which a defendant has benefitted from criminal conduct and should instigate confiscation proceedings in appropriate cases. When confiscation is not appropriate, and/or cost effective, consideration should be given to alternative asset recovery outcomes.'

Under POCA 2002, Pt 2 (England and Wales), POCA 2002, Pt 3 (Scotland) and POCA 2002, Pt 4 (Northern Ireland), the courts can restrain property once certain conditions are satisfied. A restraint order temporarily prohibits a specified person from dealing with any realisable property held by him. It is part of the powers available to an investigator prior to charge and is used extensively in allegations involving fraud. The purpose of a restraint order is to prevent the dissipation of assets that may ultimately be subject to a confiscation order. Due to its intrusive consequences, a balance must be drawn between the need to prevent dissipation and the ongoing reasonable expenditure of the subject.

In order to obtain a restraint order a criminal investigation must have been commenced and the court must be satisfied that there is reasonable cause to suspect that the alleged offender has benefitted from his criminal conduct. The test in POCA 2002, which sets out the conditions for exercise of powers in restraint, was amended by the Serious Crime Act 2015, and reduced the from reasonable cause to believe to reasonable cause to suspect. This change took effect from 1 June 2015 and the reduction in threshold brings the test in line with that needed to effect an arrest.

In order to permanently confiscate the proceeds of crime, however, the authorities first require a conviction in the Crown Court in relation to a qualifying offence as specified in Schedule 2 of POCA. The court must be satisfied that the defendant has benefitted from his criminal conduct to at least the sum £5,000. The need for a conviction to the criminal standard and the associated hurdles this poses in terms of protracted periods of investigation and delays in bringing cases to trial can mean considerable delays for victims hoping to have assets returned to them.

As a consequence of these hurdles, those who have been the subject of fraud may look to pursue a private prosecution in order to secure a conviction, which can then be used as a foundation for confiscation proceedings. In a successful private prosecution, the costs of the case may be recoverable from central funds. In the new pilot project it remains to be seen how the costs of bringing the case will be borne, whether by some form of insurance to cushion the costs of legal action or by the victim having to pay the costs from the sums recovered.

If successful, the new pilot project could increase the speed and agility with which assets can be seized, frozen and confiscated as it does not require a criminal conviction before action is taken. Assets could be permanently captured earlier in the process, however the rules by which private companies pursue these assets are as yet unclear. A private firm pursuing these assets in the civil arena would not be subject to the requirements of the Police and Criminal Evidence Act 1984 (PACE 1984) unlike an enforcement body such as the City of London Police or the National Crime Agency. Where the law firm is conducting an investigation to prove unlawful conduct has taken place, careful thought will need to be given to the appropriate framework for that investigation to take place so that targets have proper protections and evidence is gathered in a lawful manner.

Could there be any problems or unintended consequences?

If the pilot is successful there may be a risk that civil enforcement becomes preferable to criminal prosecution. While the civil route may permit the capture of assets/of the traceable proceeds of unlawful conduct more swiftly it does not deal with all the consequences of fraud or penalise the offender other than by removing assets. There could be an unintended down grading of the seriousness of fraud if civil rather than criminal powers become prevalent as the evidence needed to obtain a civil remedy need only be persuasive to the civil standard of proof.

What are the risks for the law firms involved? What should firms consider before participating?

Perhaps the most difficult area for law firms involved in this area will be the interplay between the criminal and civil regimes. It remains unclear what the extent of the material which will be passed by the City of London Police to the law firm is. Will the firms gather further evidence if required? Will the firm be subject to the same requirements as the police (PACE codes etc) in how they conduct that exercise given that the case they are eventually seeking to bring will be in the civil arena with proof required to the civil standard of proof? What will be the impact on law firms if a civil order is successfully appealed or a subsequent criminal trial results in an acquittal for an individual whose assets have been

seized through the civil route? Law firms will doubtless want to document their decisions carefully lest they become subject to scrutiny in due course.

What are the trends in this area?

This pilot is part of an increasing trend to use the private sector in criminal justice matters such as the prison service.

Interviewed Julian Sayarer.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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