

Guidance on the approach to applications under section 10A of POCA 2002—civil rules and the family home (R v Forte)

This analysis was first published on Lexis®PSL on 18 November 2020 and can be found [here](#).

Corporate Crime analysis: This case sets out the key principles and procedure to be followed under applications pursuant to section 10A of the Proceeds of Crime Act 2002 (POCA 2002) where the court has to determine the extent of the interest of a third party in property held by a defendant that is likely to be realised or otherwise used to satisfy a confiscation order. The court held that where the prosecution intends to prove that a defendant has a beneficial interest in property and another holds, or may hold, an interest in that property, the burden and standard to be applied are those of the civil standard. Where matrimonial property is concerned, the court is entitled to look to the evidence and draw such inferences as they see fit to determine whether beneficial interest should follow legal title. Such evidence can include sham divorce proceedings and the use of property for a joint purpose. Written by Joe O’Leary, barrister at 5 St Andrews Hill.

R v Forte and another [\[2020\] EWCA Crim 1455](#), [\[2020\] All ER \(D\) 47 \(Nov\)](#)

What are the practical implications of this case?

In the absence of a prescriptive procedural structure, judges determining the interests of third parties pursuant to [POCA 2002, s 10A](#) will be careful to ensure that the proceedings are fair and in accordance with Article 6 of the European Convention on Human Rights principles. While this case does not deal with criticisms of such a procedure, it sets out guidelines a court is to follow when considering a third party’s interest under [POCA 2002, s 10A](#)—particularly that, in relation to the third party’s case, the procedural rules to apply are those of the civil jurisdiction. This includes a lower standard of proof, and a wider discretion for inferences to be drawn where a party does not give evidence. This is in contrast to the prescribed procedure for inferences under the [Criminal Justice and Public Order Act 1994 \(CJPOA 1994\)](#), (see Practice Note: [Inferences from silence—failure to testify](#))

In addition, the case makes specific reference to the court’s approach to matrimonial homes under [POCA 2002, s 10A](#)—which is likely to be a common feature of such proceedings. The court stated that where property is matrimonial, it is right to infer that beneficial interest is not the same as legal title where the evidence supports such a finding.

While the Supreme Court has described [POCA 2002, s 10A](#) as combining confiscation and enforcement proceedings in simple cases where there could be no sensible debate about how the confiscation order should be enforced, this described the effect but not the purpose of the provisions. Accordingly, where (as here) the ‘real issue’ in the confiscation proceedings concern the interests of a third party, even where that third party is a significant factor (as it was here), [POCA 2002, s 10A](#) is appropriate to deal with all contested issues in one hearing, and judges should not feel inhibited from taking such a course.

What was the background?

Following a conviction for conspiracy to defraud in December 2015, the first appellant was sentenced to a term of eight years’ imprisonment. Confiscation proceedings were held in July and August 2018. These confiscation proceedings concluded with a finding that his benefit from his

offending was £2,067,224. The available amount was found to be £615,000, and a confiscation order was made in this sum.

The sum of £615,000 comprised two assets:

- 50% beneficial interest in the matrimonial home of the first appellant and his ex-wife, the second appellant, (valued at £1m) which was held solely in her name
- £115,000 cash held in an account in the name of his ex-wife's mother

It was the prosecution's case that divorce proceedings finalised in 2008 between the first and second appellants were a sham designed to protect his assets. Importantly, neither of the appellants gave evidence at the confiscation proceedings to rebut such an allegation. However, the first appellant called a forensic accountant to support his case stating that both the home and the £115,000 should not be included in the available amount.

He exercised his right of appeal to challenge whether the confiscation order was either manifestly excessive or wrong in principle.

The second appellant, his ex-wife, put forward seven grounds of appeal. The first and second were that the judge had erred in finding that her ex-husband had a beneficial interest in the matrimonial home and the money held in the bank account. In addition, it was argued that the judge was wrong to find the divorce was a sham and that he had failed to consider the inter-relationship between marriage, divorce and bankruptcy within confiscation in drawing adverse inferences against the ex-wife. Other grounds were raised regarding failings of counsel and wrongful rejection of expert evidence by the judge, accompanied with an application to adduce fresh evidence.

What did the court decide?

The procedure under POCA 2002, s 10A

The court set out various principles that should apply when the court embarks on the procedure under [POCA 2002, s 10A](#). It was held that:

- a litigant under [POCA 2002, s 10A](#), having been convicted of nothing, should not be exposed to penal consequences. Further, under [POCA 2002, s 10A\(2\)](#) the third party must be given reasonable opportunity to make representations
- the court referred to *R v Hilton (Northern Ireland)* [\[2020\] UKSC 29](#), [\[2020\] All ER \(D\) 02 \(Jul\)](#) in which the Supreme Court had considered [POCA 2002, s 160A](#) (the equivalent provision to [POCA 2002, s 10A](#) for Northern Ireland) and had held that the purpose of [POCA 2002, s 160A](#) was to combine the enforcement and confiscation stages in simple cases. However, the Court of Appeal stated that this did not constrain the role of [POCA 2002, s 10A](#) as applying only to simple cases, but (at para [11]): 'The effect of the new provisions [s 10A] is to give the court the power to make a determination of a defendant's interest in jointly owned or contested property either at the confiscation or enforcement stage'. Where the real issue in confiscation, as it was here, is the position of the third party, it will be convenient to deal with it under [POCA 2002, s 10A](#) even if the dispute is significant. The decision in *R v Hilton* should not be read as the Supreme Court intending to give case management guidance to judges of the Crown Court
- the procedure under [POCA 2002, s 10A](#) should follow the rules as they are in civil proceedings. As such, the prosecution as the party making the assertion must prove its case, but only to the civil standard

- similarly, in deciding whether to draw an adverse inference against the third party asserting a position but failing to give evidence on their own account, following the civil procedure in *Prest v Prest* [2012] EWCA Civ 1395, [2012] All ER (D) 293 (Oct), there is no free-standing adverse inference in certain circumstances, contrary to the usual [CJPOA 1994, s 35](#) inference in criminal proceedings. When considering [POCA 2002, s 10A](#) applications, a judge is required to decide the case on the evidence and there must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. The court is however entitled to have regard to the fact that a party who could have contradicted the opposing case has chosen not to do so
- where [POCA 2002, s 10A](#) proceedings concern a family home, the court is entitled under *Prest v Prest* to infer on the facts that a matrimonial property can be held on trust for a spouse. The Crown Court's reliance on *Stack v Dowden* [2007] UKHL 17, [2007] All ER (D) 208 (Apr) was neither criticised nor endorsed; however, an inference that the beneficial interest was not held in the same way as the legal title was proper on the facts in this case, particularly given the finding that the divorce was a sham

The second appellant's appeal

The court accepted that the fact the property concerned was a matrimonial home was highly relevant, as was the finding that the divorce was a sham.

The Court of Appeal upheld the Crown Court's decision that the divorce was a sham, but of more importance was how the couple continued to cohabit within the property from when it was acquired. The judge was right to draw an inference from the fact neither party chose to contradict the prosecution's case during confiscation proceedings.

Case details:

- Court: Court of Appeal, Criminal Division
- Judge: Lady Justice Simler, Mr Justice Edis, and His Honour Judge Edmunds QC sitting as a judge of the Court of Appeal
- Date of judgment: 4 November 2020

Joe O'Leary is a barrister at 5 St Andrews Hill. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

Want to read more? Sign up for a free trial below.

FREE TRIAL