

Tainted Gifts: Gifts of Boomerang

Relevant Statutory Provisions

Section 9 of Proceeds of Crime Act 2002 (“POCA”)

- (1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
 - (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
 - (b) the total of the values (at that time) of all tainted gifts.
- (2) An obligation has priority if it is an obligation of the defendant—
 - (a) to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction of an offence and at any time before the time the confiscation order is made, or
 - (b) to pay a sum which would be included among the preferential debts if the defendant's bankruptcy had commenced on the date of the confiscation order or his winding up had been ordered on that date.
- (3) “Preferential debts” has the meaning given by section 386 of the Insolvency Act 1986 (c. 45).

Section 10A

(1) Where it appears to a court making a confiscation order that—

(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b) a person other than the defendant holds, or may hold, an interest in the property,

the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.

(2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

(3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with—

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.

(4) Subsection (3)—

(a) is subject to section 51(8B), and

(b) does not apply in relation to a question that arises in proceedings before the Court of Appeal or the Supreme Court.

(5) In this Part, the “extent” of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself.

Section 69:

(1) This section applies to—

- (a) the powers conferred on a court by sections 41 to 59 and sections 62 to 67D
- (b) the powers of a receiver appointed under section 48 or 50
- (c) the powers conferred on appropriate officers by sections 47C to 47L;
- (d) the powers conferred on senior officers by section 47G.

(2) The powers—

- (a) must be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant;
- (b) must be exercised, in a case where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property;
- (c) must be exercised without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant;
- (d) may be exercised in respect of a debt owed by the Crown.

(3) Subsection (2) has effect subject to the following rules—

- (a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;
- (b) in the case of realisable property held by a recipient of a tainted gift, the powers must be exercised with a view to realising no more than the value for the time being of the gift;
- (c) in a case where a confiscation order has not been made against the defendant, property must not be sold if the court so orders under subsection (4).

(4) If on an application by the defendant, or by the recipient of a tainted gift, the court decides that property cannot be replaced it may order that it must not be sold.

(5) An order under subsection (4) may be revoked or varied.

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- (1) Subsections (2) and (3) apply if—
 - (a) no court has made a decision as to whether the defendant has a criminal lifestyle, or
 - (b) a court has decided that the defendant has a criminal lifestyle.
- (2) A gift is tainted if it was made by the defendant at any time after the relevant day.
- (3) A gift is also tainted if it was made by the defendant at any time and was of property—
 - (a) which was obtained by the defendant as a result of or in connection with his general criminal conduct, or
 - (b) which (in whole or part and whether directly or indirectly) represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct.
- (4) Subsection (5) applies if a court has decided that the defendant does not have a criminal lifestyle.
- (5) A gift is tainted if it was made by the defendant at any time after—
 - (a) the date on which the offence concerned was committed, or
 - (b) if his particular criminal conduct consists of two or more offences and they were committed on different dates, the date of the earliest.
- (6) For the purposes of subsection (5) an offence which is a continuing offence is committed on the first occasion when it is committed.
- (7) For the purposes of subsection (5) the defendant's particular criminal conduct includes any conduct which constitutes offences which the court has taken into consideration in deciding his sentence for the offence or offences concerned.
- (8) A gift may be a tainted gift whether it was made before or after the passing of this Act.
- (9) The relevant day is the first day of the period of six years ending with—
 - (a) the day when proceedings for the offence concerned were started against the defendant, or
 - (b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.

Section 78

- (1) If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift.
- (2) If subsection (1) applies the property given is to be treated as such share in the property transferred as is represented by the fraction—
 - (a) whose numerator is the difference between the two values mentioned in subsection (1), and
 - (b) whose denominator is the value of the property at the time of the transfer.
- (3) References to a recipient of a tainted gift are to a person to whom the defendant has made the gift.

Section 81

(1) The value at any time (the material time) of a tainted gift is the greater of the following—

(a) the value (at the time of the gift) of the property given, adjusted to take account of later changes in the value of money;

(b) the value (at the material time) of the property found under subsection (2).

(2) The property found under this subsection is as follows—

(a) if the recipient holds the property given, the property found under this subsection is that property;

(b) if the recipient holds no part of the property given, the property found under this subsection is any property which directly or indirectly represents it in his hands;

(c) if the recipient holds part of the property given, the property found under this subsection is that part and any property which directly or indirectly represents the other part in his hands.

(3) The references in subsection (1)(a) and (b) to the value are to the value found in accordance with section 79.

Section 83

Realisable property is—

(a) any free property held by the defendant;

(b) any free property held by the recipient of a tainted gift.

Section 84

(1) Property is all property wherever situated and includes—

- (a) money;
- (b) all forms of real or personal property;
- (c) things in action and other intangible or incorporeal property.

(2) The following rules apply in relation to property—

- (a) property is held by a person if he holds an interest in it;
- (b) property is obtained by a person if he obtains an interest in it;
- (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;

(d) references to property held by a person include references to property vested in his trustee in bankruptcy [or liquidator or in the trustee or interim trustee in the sequestration, under the Bankruptcy (Scotland) Act 2016), of his estate;] 1

(e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;

(f) references to an interest, in relation to land in England and Wales or Northern Ireland, are to any legal estate or equitable interest or power;

(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;

(h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).