

Financial remedies v confiscation proceedings: what takes priority?

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Sarah Wood is an experienced and highly accomplished practitioner who specialises in criminal and family matters involving high-value assets and complex financial arrangements. She is one of a handful of counsel at the Bar

with experience of dealing with cases where there are contemporaneous proceedings in the criminal and family courts in relation to the same assets.

As LJ Judge observed in *Re MCA; HM Customs and Excise Commissioners and Long v A and A; A v A (Long Intervening)* [2002] EWCA Civ 1309, [2003] 1 FLR 164 (*'Customs and Excise v A'*), all marriages are subject to the provisions of the Matrimonial Causes Act 1973 (*'MCA'*). The marriages of criminals and drug dealers are not excluded. Consequently, the question of who should benefit from any assets acquired during the marriage as a result of such criminality is one that has troubled the courts for a number of years. Should the MCA 1973 take priority so as to make provision for the innocent spouse or does the Proceeds of Crime Act 2002 (*'POCA'*) enable the state to intervene to the extent that any confiscation order will then take precedence? Increasingly the question is a relevant one. At a time when victims of crime are a government priority, should it not be automatically entitled to an order for confiscation to ensure that the proceeds of crime are at least being used to compensate those victims of financial crime who may have lost their life-savings, rather than being distributed to the immediate family of the criminal?

The theme that has emerged from the body of case law on this subject makes it clear that neither claim should automatically be regarded as having a priority over the other. Upholding the judge at first instance the Court of Appeal in *Customs and Excise v A* held that there was nothing in the Drug Trafficking Act (*'DTA'*) 1994, public policy or the authorities that demonstrated that the MCA's jurisdiction to make a property transfer order from a defendant was suspended or ousted by the DTA. This was confirmed in *Crown Prosecution Service v Richards* [2006] EWCA Civ 849, [2006] 2 FLR 1220 and *Stodgell v Stodgell* [2009] EWCA Civ 243, [2009] 2 FLR 244 in respect of the confiscation regimes of the DTA 1994 and Criminal Justice Act 1988 (*'CJA'*).

Webber v Webber [2006] EWHC 2893, [2007] 2 FLR 116 dealt with the position under POCA 2002. In this case a wife was seeking an outright transfer of the matrimonial home in financial remedies proceedings. The position of the Crown was that the asset was untainted and it was therefore conceded that she was entitled to 50% of the equity in the property but that the rest should be preserved for confiscation. Having reviewed the case law under the previous confiscation regimes, Sir Mark Potter at para [42] stated:

'By use of the phrase "with a view to", the language of section 69 of POCA retains the same terminology as that which appeared in section 31 DTA 1994 and there is nothing in the wording of POCA to suggest that the meaning of those words is different, or should be applied any differently, from the interpretation of the Administrative Court in *Customs and Excise v A*. The phrase retains such "elasticity" as to permit a diminution in the available

amount and it contemplates striking an appropriate balance between the same competing public policy considerations between confiscating the proceeds of crime and making proper financial provision for a wife’.

However, when faced with competing claims between the state and a spouse it is clear that one, and arguably the most important, consideration for a court will be the question of the innocent spouse’s knowledge and complicity in the criminality that is said to have produced the assets available for distribution. As part of his review of the previous legislative case law, Sir Mark Potter in *Webber v Webber* quoted LJ Schiemann in *Customs and Excise v A*:

‘In short, in deciding whether to exercise its powers to make a property adjustment order under section 24 MCA 1973, the court would be bound fully to take into account any order made under DTA 1994 and to decide whether or not, in all the circumstances of the case it was appropriate to exercise the discretion to make a property adjustment order under section 24 MCA, or whether it was appropriate to decline to make such an order and to allow the DTA Order to be enforced. It is not difficult to envisage cases in which the latter would be the correct course – an obvious example being where the matrimonial assets were the fruits of drug dealing in which both parties were engaged or complicit . . .’

This approach was adopted in *Crown Prosecution Service v Richards* where it was held that where assets were tainted with the proceeds of crime and subject to confiscation they should not ordinarily, as a matter of public justice and public policy, be distributed. At para [26] of LJ Thorpe’s judgment he stated:

‘Where assets are tainted and subject to confiscation they should ordinarily, as a matter of justice and public policy, not be distributed. That is not to say that the court is deprived of jurisdiction under the 1973 Act nor to say that no circumstances could exist in which an

order would be justified; an example of a seriously disabled child living in specially adapted accommodation was mooted in argument. It is to say that, in most cases, and certainly in this one, the fact that the assets are tainted is the decisive factor in any balance . . .’

Order of proceedings – which goes first?

Under the previous confiscation legislative regime when matters of enforcement in confiscation proceedings were dealt with by the High Court, arrangements were usually made for a single High Court Judge, with appropriate expertise, to deal with both sets of proceedings. With the exception of recovery orders sought under s 243 of POCA, the Crown Court now retains jurisdiction to deal with all matters of restraint, confiscation and enforcement. Consequently there will now usually be two distinct sets of proceedings running alongside each other, one in the Crown Court and one in the Family Courts.

The very real and obvious question of which should go first can often be made more complex as a result of the fact that clients may have instructed both family and criminal solicitors, along with different Counsel, who may not be fully aware of the status of the other proceedings.

Having in mind the themes that have emerged from the body of case law looked at above, what transpires from these authorities is that each case is to be determined on its own facts. However, as a general rule, where it is absolutely clear that the assets available for distribution in the family proceedings are not derived from criminality then there is an argument to say that the family proceedings ought to take priority. The assets can then be distributed in accordance with MCA 1973, s 25 principles, and those assets that remain with or are transferred to the spouse who is also facing confiscation proceedings will be regarded in due course as available to satisfy the confiscation order.

At the other end of the spectrum where there is no dispute that the marital assets

comprise criminally obtained property and that the wife was aware of their source, then the confiscation proceedings ought to take priority and the assets confiscated in accordance with POCA principles.

The more problematic cases are those where the issue is not so clear-cut. Did the wife know? Was the house deposit paid for using clean funds but the mortgage funded by the proceeds of crime? In that situation it is likely that each party will seek to make representations as to jurisdiction with the CPS seeking to argue that the Crown Court confiscation proceedings ought to take priority, whilst the innocent spouse will try to argue that the family proceedings should go first. It will be a matter for the respective Court's judgment as to where they think the interests of justice are best served.

In any event, assuming that the CPS are aware of the family proceedings it is inevitable that in cases involving this grey factual matrix they will make an application to intervene in the proceedings pursuant to Family Procedure Rules, r 9.26B in order to ensure that any assets that are said to be derived from criminal conduct are not distributed in the family proceedings and, instead, remain available for confiscation. At a practical level this will usually mean that in cases where it has been decided that the family proceedings ought to go first but where the extent of the innocent spouse's complicity and knowledge in the criminal activity is disputed or unclear, the Family Court seized of the MCA proceedings may need to consider undertaking an initial fact finding hearing to establish the extent of the non-tainted assets. As a party to the proceedings the CPS would be entitled to rely upon such evidence as the Court directed was appropriate and would be entitled to cross-examine either of the parties. Having undertaken that initial fact-finding it could move on to distribute the non-tainted assets in accordance with MCA, s 25 factors. Arguably there are potential shortcomings with this approach in that neither the Family Court nor any family solicitors instructed will be fully seized of the full background to the underlying criminal offence or know of the details of the confiscation proceedings.

An application to intervene on behalf of the CPS can only be made where the CPS are on notice that there are concurrent family proceedings. It is not hard to envisage circumstances where the parties to the marriage take the view that it is in their interests to resolve the family proceedings quickly without reference to the CPS. However, where the culpable spouse is already the subject of a Crown Court Restraint Order then the Family Court is obliged to hear representations from the CPS before making an order in the Family Proceedings in connection with any property that is the subject of the restraint order (POCA 2002, s 58). If that opportunity is not provided then it is inevitable that the CPS will become aware of that when the application to vary the restraint order to reflect the findings of the Family Court is made. At that stage the CPS would be entitled to ask that the Family Court order be re-visited on the basis that it was not provided with an opportunity to make representations.

If it is determined that the confiscation proceedings will take priority, then what ability does an innocent spouse have to make representations in those proceedings about their interest in assets? Section 10A of POCA (as inserted by the Serious Crime Act 2015) may provide the answer. Section 10A enables the Crown Court to make a determination of a defendant's interest in an asset where a third party may hold an interest in the same asset. An obvious and straightforward use of s 10A is where a couple hold a property as joint tenants and there is no question that it has been purchased or funded using tainted funds. In that situation the Crown Court may be persuaded to find that the innocent spouse has a 50% interest in the property that is, effectively, ring-fenced and kept out of the confiscation determination. What it is unlikely to do is make any finding by reference to either MCA or trust principles that would mean that the innocent spouse was found to have a share greater than 50%. This is because Explanatory Note 21 to the Serious Crime Act 2015 makes it clear that the Crown Court should only make determinations as to the extent of

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third-party interests in ‘relatively straightforward cases’ and ‘without too much difficulty’.

It is worth highlighting that s 10A cannot be utilised in cases where the prosecution seek to assert that the defendant spouse has made a tainted gift to the innocent spouse of his share in property. This may arise if, for example, a property was initially held in the sole name of one spouse before 50% of the legal and beneficial interest was transferred to the other spouse for, seemingly, no consideration. Under the provisions of POCA, when calculating the amount available for confiscation the value of any tainted gifts is to be included. If the prosecution seek to argue that a transfer of property from the defendant spouse to another is a tainted gift then s 10A cannot apply because in that situation the defendant does not hold an interest in the property that has been transferred and s 10A specifically states that its purpose is to enable a Court to make a conclusive determination of a defendant’s interest in property where a third party may hold an interest in the property.

Assuming the stage is reached whereby both the Crown and Family Courts have made their respective orders, it may be that there will need to be Enforcement Proceedings within the POCA regime in the event that the defendant spouse does not pay the confiscation order. As part of that regime the CPS may apply to the Crown Court to appoint an Enforcement Receiver (POCA, s 50). By virtue of POCA, s 51 the Court may order that the Receiver realise any realisable property in order to satisfy the confiscation order. However, before making that order the Court must provide a reasonable opportunity for any third parties holding an interest in the property to make representations (s 51[8]). Any spouse who was not able to make representations pursuant to s 10A will therefore have the opportunity at this stage to make representations regarding their interest in any property. Section 51[8] may be of particular benefit in those cases where the family proceedings have taken place in between the original granting of the

confiscation order and the application for an enforcement receiver where a spouse’s interest in a particular asset has been crystallised as a result of, for example, a property adjustment order being made in the family proceedings. In that situation it may be that the innocent spouse will be able to persuade the Crown Court that the receiver ought not to realise property that has been transferred to them in consequence of the family proceedings. Similarly, in that situation it would be open to the Receiver or the defendant spouse to return to the Crown Court and make an application pursuant to POCA s 23 on the grounds that the available amount is now inadequate to satisfy the confiscation order and ought to be varied in order to reflect the reduced available amount.

Other practical consideration – obtaining and use of documentation

An often overlooked aspect of these cases is the extent to which material obtained in one set of proceedings can be used in the other. The answer to that question lies within both the Family and Criminal Procedure Rules. If, for example, the CPS wish to rely upon the content of the Form E of the defendant spouse in the confiscation proceedings then it would need to make an application pursuant to FPR, r 4.1(3)(b) for disclosure of all documents served in the Family Proceedings and seek a specific direction by way of order that any documents obtained could be used in the confiscation proceedings.

Similarly, if any party to the confiscation proceedings wishes to obtain and use statements obtained in those proceedings within the family proceedings, the consent of the author of the statement or the consent of the Judge needs to be obtained in accordance with CPR, r 33.8. However, those parts of any witness statement that derive from Letter of Request material cannot be relied upon in the family proceedings in accordance with the principles established in *Crown Prosecution Service and Another v Gobil* [2012] EWCA Civ 1550, [2013] 1 FLR 1095.

Conclusion

These cases are, inevitably, fraught with tension. The innocent party to the marriage wants certainty regarding the distribution of assets within a reasonable time frame, which almost certainly won't happen if the confiscation proceedings take priority. Sadly, there is no easy or straightforward answer

in these cases unless it is apparent (and agreed) that the marital assets did not derive from criminality. The best that can be hoped for is that those representing the parties are able to adopt a co-ordinated approach to both sets of proceedings with a view to securing a fair result for all concerned without incurring excessive costs.