5 SAH

FIVE ST ANDREW'S HILL

+44 (0) 207 332 5400

The importance of applying the hearsay rules correctly in asset recovery cases in the magistrates' court

31 JULY 2023

James Fletcher & *John McNamara*

James Fletcher & *John McNamara* *discuss the importance of applying the hearsay rules correctly in asset recovery cases in the magistrates' court*

Account Freezing and Forfeiture Orders (AFFOs) are civil applications restraining account holders from dealing with the balances of accounts. The applications are heard in the magistrates' court. But don't let the summary jurisdiction fool you, such cases can be factually and legally complicated.

As law enforcement continues to bring AFFOs with increasingly complex allegations at their heart, it is important for practitioners to ensure that the correct rules of evidence are followed.

AFFO proceedings are dealt with in the magistrates' court as a hearing on complaint.[1] They are civil proceedings, and as such the Civil Evidence Act 1995 (CEA) applies in so far as the admissibility of hearsay evidence.[2] However, as allowed by section 12 CEA there are specific rules in relation to hearsay evidence for these proceedings, namely the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999.

Those rules provide that a party who wishes to give hearsay evidence should serve a notice not less that 21 days prior to the hearing, such a notice should explain who gives the evidence, what is said to be hearsay and why that person will not be called (rule 3).

The court may, on application, allow another party to call and cross-examine the person who made the statement. That application must be served on all parties not less than 7 days after the date of service of the hearsay notice, and provide reasons why the statement maker should be cross-examined (rule 4).

On a strict application of the law, that rule does not require the party who sought the hearsay evidence to call the witness. It is for the other party to call that witness for the purposes of cross-examination. While it may be that practical arrangements would be made by the party for whom that individual was a witness, there is no legal requirement for that to occur.

This issue has been considered in *Dyson Limited v Qualtex (UK) Limited* 2004 EWHC 1508 (Pat). In that case the rules in question were Civil Procedure Rules, which mirror almost exactly the Magistrates Rules on hearsay evidence. At paragraph 9 Mann J held:

> *"… Prima facie, (the Claimant) is entitled to make hearsay evidence part of his case. That is s1 of the 1995 Act. It cannot be a ground for objection to the admission of (the witness') statement that it is hearsay … it is open to (the defendant) to make his application [for] an order giving (the defendant) liberty to call the maker of the statement (i.e. the witness) himself so that the witness can be cross-examined on the contents of the statement. In other words, it gives (the defendant) a liberty or permission or opportunity. It leaves open the question of how that is to be brought about. If the witness is ready, willing and available, then of course there is no problem. He or she will attend and will be cross-examined. If that party is not ready and willing but is in the jurisdiction, then it seems to me that it must be the case that the party seeking to cross-examine (i.e. the party who did not originally intend to call that witness) can serve a witness summons on that witness to compel his or her attendance. …… but that witness summons is, of course, addressed to the witness and not to the other party."*

Mann J went on at §10 to confirm that:

> *"There is no obligation on the original party serving the statement to produce the witness. That is not imposed, as I see it, by any of the rules."*

For this reason, practitioners who get permission to call witnesses to be cross-examined should ensure that they obtain relevant contact details of the witness from the other party so that they can inform the witnesses to attend court and apply for a summons if necessary. Alternatively, they should reach an understanding with the other party that it will ensure their witnesses attend to be cross-examined.

Fairness

Clearly the court will be concerned with the issue of fairness. At first blush, it may seem unfair to a respondent in proceedings which allege some type of criminality to be prevented from cross-examining those making such allegations. However, the right to cross-examination is not absolute.

The fairness derives from the opportunity to call the statement maker, and seek a witness summons if necessary.

An additional consideration of fairness may arise in circumstances where hearsay evidence is served so late in proceedings that no hearsay notice can be provided within the time limit required by the rules. In that scenario the serving party may ask the court to substitute a different period of time for service[3].

Practitioners should be aware that even where there has been non-compliance with the rules, under the CEA the evidence would still be admissible, but the court may hear representations as to the weight, if any, that can be attached to such evidence.[4]

Parties wishing to prevent the last-minute service of evidence would be wise to seek early directions from the court which prevent further evidence from being admitted without leave of the court pursuant to the court's case management powers.[5]

James Fletcher practises in both civil and criminal law. He is a specialist in Asset Recovery money laundering and Proceeds of Crime work. He has significant expertise in dealing with Account Freezing, Listed Assets and Forfeiture applications in the Magistrates Court and Civil Recovery in the High Court. He is instructed on behalf of businesses, by individual members of the public and by Government departments, such as the NCA, HMRC, FCA and DPP. James also has extensive expertise in applications and judicial reviews relating to law enforcement investigations such as search warrants, restraint, disclosure orders, receiverships and moratorium extensions.

John McNamara specialises in all aspects of financial crime, proceeds of crime and related areas. John is an experienced proceeds of crime practitioner. He is sought out by defence solicitors and law enforcement agencies for complex and high value POCA cases and is often specifically instructed for the POCA aspects of a broader criminal case. He has dealt with cases concerning international and mutual recognition issues, and has a growing practice in civil recovery encompassing all chapters of Part 5 of POCA.

References

[1] Section 52 Magistrates' Court Act 1980

[2] Section 11 Civil Evidence Act 1995

[3] Rule 3(2) of the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999

[4] Section 4 Civil Evidence Act 1995

[5] Rule 5(5) The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017