



CRITICAL ANALYSIS OF PART 2 OF THE PROCEEDS OF CRIME ACT 2002 (OF THE UNITED KINGDOM LEGAL SYSTEM)

By *Saman Idris Hussain*

Introduction

Two reasons have been identified for enforcing forfeiture in Proceeds of Crime Act 2002 (POCA)¹ - first, risk of prison was not an effective deterrent,² specially for the drug trafficking dealers.³ Second, it was to serve as a mode of “identifying and removing the proceeds of crime” and to stop from being invested further in other illegal activities.⁴ These reasons laid down the ground work for the UK legislation that ‘crime should not pay’⁵ and people should not make profits from

unlawful undertakings.⁶ Part 2 of POCA deals with confiscation of proceeds of crime. The act sends a strong message to deter such activities.⁷ The objects of the regime are- punishment, deterrence, depriving of profits earned from crime to fund further criminal activities.⁸

Confiscation Order

‘Confiscation Order’ is a post-conviction order of the court which focuses on value based⁹ assessment of a ‘benefit’ earned from a criminal activity by the offender. Significantly, it means that these offenders have to repay a debt to the Government.¹⁰ It does not matter if the defendant passed such benefits to co-conspirators or it has been destroyed.¹¹ The House of Lords in *R v May*¹² clearly set out that the aim of the act is to deprive

¹ UK Legislations - Drug Trafficking Offences Act 1986; Criminal Justice Act 1988; Criminal Justice Act 1993; Drug Trafficking Act 1994; Proceeds of Crime Act 2002; Referring to Roger Bowles, Michael Faure, Nuno Garupa, ‘Forfeiture of Illegal Gain: An Economic Perspective’ (2005) 25 (2) Oxford Journal of Legal Studies 275, 280.

² Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 251.

³ Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom* (June 2007) Home Office Online Report 20/07 page vii

<<http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs07/rdsolr2007.pdf>> accessed 5 April 2017.

⁴ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 2 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

⁵ Comptroller and Auditor General, *Confiscation Orders: Progress Review* (2015-16, HC 886) page 5; Roger Bowles, Michael Faure, Nuno Garupa, ‘Forfeiture of Illegal Gain: An Economic Perspective’ (2005) 25 (2) Oxford Journal of Legal Studies 275, 280.

⁶ Peter Alldridge, ‘The Moral Limits of the Crime of Money Laundering’ (2001) 5 (1) Buffalo Criminal Law Review 279, 284.

⁷ *R v Waya* [2012] UKSC 51.

⁸ Home Affairs Committee, *Proceeds of Crime* (2016-17, HC 25) para 66; *R v Rezvi* [2002] 2 Cr App R (S) 70 para [14]; *R v Benjafield* [2001] 1 AC 1099 HL para [8].

⁹ *Stanford International Bank Ltd (In Receivership) Re*, [2010] EWCA Cave 137; [2011] Ch. 33 para [162].

¹⁰ Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 251.

¹¹ *Ibid*.

¹² [2008] UKHL 28; [2008] 1AC 1028; *Crown Prosecution Service v Jennings* [2008] UKHL 29; [2008] 1 AC 1046.



the defendant¹³ of the ‘*product of his crime or its equivalent and not operate by way of fine*’. This means that it is irrelevant whether the defendant owns the property¹⁴ alone or jointly with a co-defendant or he has transferred it to another person. In *R v Green*¹⁵ court summarized its opinion and the purpose of the act in the following words- ‘*...it does not matter that process sale may have been received by one conspirator who retains his share before passing on the remainder, what matters is the capacity in which he received them.*’

European Convention on Human Rights

UK is a signatory to many treaties by either signing or ratifying them under the United Nations and Council of Europe which have taken significant steps in controlling crimes.¹⁶ In *R v Waya*,¹⁷ the defendant had raised an issue that the operation of confiscation regime in some situations may infringe Article 1 of the First Protocol to the European Convention on Human Right. Basically, the requirement is that a reasonable relationship of proportionality must exist

between the resources employed by the state in the confiscation and deprivation of the property which is the legitimate aim of the act. The notorious fact is that the criminals take measures to hide their proceeds of crime. Therefore, it is essential to implement effective legislation which have fair powers.¹⁸ Similarly, by the virtue of section 6 of Human Rights Act 1998 the prosecutors are under a duty to act in the way which is compatible with Convention Rights, therefore, as a result of which the Crown has an essential duty to make sure that only a proportionate order is sought.¹⁹ As a result of which confiscation regime has been consistent in dealing with crime and in no circumstance, has infringed Article 1 of the First Protocol of the European Convention on Human Rights.²⁰

Making of a Confiscation Order

Under section 6, the confiscation orders can only be made by the Crown Court. Nonetheless it can also be made under a Magistrate’s Court but only where the defendant is committed to the Crown Court for an order under section 70.²¹

¹³ Report by the Comptroller and Auditor General, ‘Confiscation Orders: Progress Review’ Ordered by House of Common, 11 March 2016, HC 886, Session 2015-16 page 5.

¹⁴ Section 84 (1) (a), (b), (c) of the Proceeds of Crime Act 2002.

¹⁵ [2008] UKHL 30 paras [45] [46].

¹⁶ The UM Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1998); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Strasbourg, 8 November 1990.

¹⁷ *R v Waya*[2012] UKSC 51.

¹⁸ *R v Benjafield*[2001] 1 AC 1099 HL; *R v Rezni*[2001] 1 AC 1099 HL.

¹⁹ *R v Morgan* [2009] 1 Cr App Rep (S) 60. [2002] UKHL 1, [2003] 1 AC 1099.

²⁰ *Phillips v United Kingdom* (2001) 11 BHRC 280; *R v Rezni* [2002] 2 Cr App R (S) 70 [17].

²¹ Section 70 Proceeds of Crime Act 2002; (Recommended in *The Report of Commission on Profits of Crime and their Recovery*, Chaired by Sir Derek Hodgson (1984) Cambridge Studies in Criminology; Trevor Millington, Mark Sutherland Williams, ‘*The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture*’ (OUP 2003) para 14.07.



Key Requirements Under Section 6 of POCA 2002

Section 6 of POCA lays down key features of confiscation order. These features are mandatory²² in nature -

1. The defendant must be convicted of an offence before the Crown Court for offences under Section 3,4 or 6 of the Sentencing Act or under Section 70.²³
2. Either the prosecution or director must request the court to initiate the proceedings or the court must believe that it is appropriate to do so.²⁴
3. The court must decide whether the defendant has a criminal lifestyle.²⁵ If it decides that the defendant has a criminal lifestyle, then they must calculate the benefit the person has received from the general criminal conduct.²⁶ For this purpose, the court will apply section 10 which specifies certain 'assumptions'. I will deal with this part later in the essay. On the other hand, if the court decides that the defendant does not have a criminal lifestyle then the court must determine

the benefit from the particular criminal conduct.²⁷

4. The Court must then decide on the recoverable amount that is to be taken from the defendant which has to be in equal proportion to the profits he made from the criminal activity.
5. A proportionate order will be passed by the court²⁸ for the recoverable amount unless it has a reason to believe that the defendant is able to prove a lesser amount or the victim initiates civil proceedings.

Criminal Lifestyle Under Section 75

To establish the benefit under general criminal conduct, the court must first decide whether the defendant has a criminal lifestyle or not.²⁹ The level of implications for the order sought are wide-reaching if it is proved by Section 75 and can include even the first time offenders which is not the object of the Act.³⁰ The affirmative answer in a case gives the "right to a court" to include "all" income and expenditure of the offender from the past six years and his current

²²R v May [2008] UKHL 28; [2008] 1AC 1028 [8]; Crown Prosecution Service v Jennings [2008] UKHL 29; [2008] 1 AC 1046; Trevor Millington, Mark Sutherland Williams, 'The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture' (OUP 2003) para 15.03.

²³ Section 6 (2) Proceeds of Crime Act 2002.

²⁴ Section 6 (3) (a), (b) Proceeds of Crime Act 2002.

²⁵ Section 75 Proceeds of Crime Act 2002.

²⁶ Section 75, Schedule 2 of Proceeds of Crime Act 2002; Nicholas Cribb, 'Tracing and Confiscating the Proceeds of Crime' (2003) 11(2) Journal of Financial Crime 168.

²⁷ Section 76(3) Proceeds of Crime Act 2002; Nicholas Cribb, 'Tracing and Confiscating the Proceeds of Crime' (2003) 11(2) Journal of Financial Crime 168; Trevor Millington, Mark Sutherland Williams, 'The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture' (OUP 2003) para 14.13.

²⁸ In confirmation with Article 1, Protocol 1, ECHR.

²⁹Section 6 (4)(a) Proceeds of Crime Act 2002.

³⁰ Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 LQR 251, 271.



assets in the confiscation order even though they had no link with the offence.³¹ More importantly, the burden of proof shifts to the defendant to prove his income is the result of legitimate business. This can be problematic if the accounts are insufficient because the courts may then assess the entire income as criminal benefit.³² To speak the truth these broad “assumptions”³³ are the primary reasons which have caused massive implementation problems at enforcement phase.³⁴ It is not at the discretion of the court to decide whether a defendant has lived a criminal lifestyle but a box-ticking criteria under Section 75(2).³⁵ A defendant will be deemed to have a criminal lifestyle if he is convicted of an offence under Schedule 2 of POCA (drug trafficking, money laundering, terrorism and other ‘serious’ crimes).³⁶ Second, defendant has been convicted of multiple offences over a course or obtains the benefit of 5,000 pounds or more. Third, the offender has earned the benefit of 5,000 pounds and has been convicted

of an offence over a period of six months.³⁷ These assumptions were seen as oppressive but the defense of the legislature was that it was necessary to deal with criminals strictly.³⁸ This reflects strong approach of the provisions but how fair is to have such wide-reaching implications is debatable.

Assumptions in Cases of Criminal Lifestyle Under Section 10

Section 10³⁹ creates a single scheme for mandatory rules or assumptions.⁴⁰ The court will make four assumptions to settle the ‘question of benefit and amount of proceeds of general criminal conduct’. If the defendant falls under any of it, he will be declared to have a criminal lifestyle.

This will include – a property transferred to the defendant in a period of six years before his arrest.⁴¹ Second, property which is held by him after his conviction which was a result of a criminal conduct.⁴² Third, expenditure incurred by him which was the benefit derived from

³¹ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page v <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

³² Ivan Lawrence, ‘Draconian and Manifestly Unjust: How the Confiscation Regime Has Developed’ 76 *Amicus Curiae* 22, 23.

³³ Assumptions are made by virtue of Section 10 Proceeds of Crime Act 2002.

³⁴ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 5 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

³⁵ Proceeds of Crime Act 2002.

³⁶ Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 5 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

³⁷ Section 75 (2)(c) Proceeds of Crime Act 2002.

³⁸ Janet Ulph, ‘*Commercial Fraud: Civil Liability, Human Rights and Money Laundering*’ (OUP 2006) para 4.09.

³⁹ Proceeds of Crime Act 2002.

⁴⁰ Trevor Millington, Mark Sutherland Williams, ‘*The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture*’ (OUP 2003) para 15.34.

⁴¹ Section 10 (2) Proceeds of Crime Act 2002.

⁴² Section 10 (3) Proceeds of Crime Act 2002.



this criminal conduct.⁴³ Fourth, value of the property obtained by the offender was free of interest in it.⁴⁴ But this section provides “two exceptions” to these assumptions, where the court decides, it will be - *incorrect to apply* these assumption and it would cause a *serious risk of injustice*.⁴⁵ Since the enactment of POCA, the defense for exemptions⁴⁶ has been sought by defendants many times but the courts have been reluctant to grant it. The following cases will help shine a light on the referred point.

In *R v Lunnon*,⁴⁷ the court held that if a concession was withdrawn, the defendant shall be notified of such a change so *he can have the option of proving on the balance of probabilities that he was, after all, a first-time offender, or of inviting the court to be satisfied that there would be a serious risk of injustice, for some other reason, if the statutory assumptions were to be applied.* The injustice must relate to the operation of these assumptions and not the consequences of the order.⁴⁸ These assumptions are rebuttable if a defendant can establish that his income is not the result of criminal conduct⁴⁹

although in practice it may prove to be difficult if one cannot remember the facts or it had happened years ago.⁵⁰ The assumptions are rebuttable only if made within the time limit frame. Facts of *R v Lazarus*,⁵¹ were that the defendant was found guilty of possessing and supplying cocaine. The court ruled that defendant was aware, the Crown was going to rely on the statutory assumption and he had enough to time to rebut on the balance of probabilities⁵² if the money was not earned out of dealing with drugs.

In *R v Benjafield and R v Rezni*,⁵³ the court decided the assumptions are rebuttable and as a consequence may not be applied at all, therefore, the right to the fair trial and right to be presumed innocent until proven guilty under Human Rights Act 1998 (Section 6) did not contravene these rights. In *McIntosh v Lord Advocate*⁵⁴ Lord Bingham observed- ‘... *I do not for my part think it unreasonable or oppressive to call on the accused to proffer an explanation. He must show the source of his assets and what he has been living on*’.

⁴³ Section 10 (4) Proceeds of Crime Act 2002.

⁴⁴ Section 10 (5) Proceeds of Crime Act 2002.

⁴⁵ Section 10 (6)(a), (b) Proceeds of Crime Act 2002; Janet Ulph, ‘Commercial Fraud: Civil Liability, Human Rights and Money Laundering’ (OUP 2006) para 4.10.

⁴⁶ Section 10 (6)(a), (b) Proceeds of Crime Act 2002.

⁴⁷ [2004] Crim LR 678 CA para [17].

⁴⁸ Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 271.

⁴⁹ Section 4 (6) of Proceeds of Crime Act 2002.

⁵⁰ *R v Agombar* [2009] EWCA Crim 903; Janet Ulph, ‘Confiscation Orders, Human Rights and Penal Measures’ (2010) 126 LQR 251, 271.

⁵¹ [2004] Cr App R (S) 98 CA; [2004] EWCA Crim 2297 para [21].

⁵² Section 10 Proceeds of Crime Act 2002.

⁵³ [2001] 1 AC 1099, HL; See: *Grayson and Barham v UK* (2009) 48 EHRR 30; [2009] Crim LR 200 para [45] [46].

⁵⁴ [2001] 3 WLR 107, 121 [35].



Assessing Criminal Benefit

After the assessment of the criminal lifestyle, the court will then pass a judgement as to decide the criminal benefit calculation.⁵⁵ The decision is based on the assessment of the prosecutor and financial investigator. The meaning of a criminal benefit is the property that is obtained by the offender in connection with the criminal conduct.⁵⁶ The court laid down a three-question test in *R v May*⁵⁷ to calculate the benefit. These questions are- first, has the defendant benefitted from the relevant criminal conduct? Second, the benefit obtained is general or particular? Third, the amount of sum recoverable from the defendant? The court also explained how the concept of 'benefit' is not to be confused with 'criminal profit'. The court held- '*The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or amounts of payable to co-conspirators.*'

It is indeed important to punish the guilty but result of such confiscation order will put the defendant in a worse economic status than he would be if he did not commit the crime.⁵⁸ This particular rule is unjust and draconian.⁵⁹

In *R v Smith*,⁶⁰ the defendant had not paid the duty on imported cigarettes by smuggling them. The court held the order of seizing the cigarettes was a subsequent damage to goods and will not affect the confiscation order. In other words, the pecuniary advantage that was obtained before the subsequent seizure did not affect the previous order. The court upheld the decision in *R v Shabir*,⁶¹ where the defendant had previously contended that '*he was legally entitle to all the amount except for a tiny sum which was obtained by deception and that was the extent of his benefit pursuant to sections 76 (4) or (5)*'⁶² and the Crown Court was wrong in passing such an order. Therefore, where there is massive disparity between the confiscation order and defendant's gain through fraud, it will not be oppressive to pass such an order. Companies and individuals who by way of fraud commit bribery can be at the receiving end of the punitive nature of the confiscation regime. This can be proven with these cases. In *R v Innospec*,⁶³ the court held that written notice by the prosecutor to the court to make a confiscation order would give primacy to make one over a fine. If a company is in

⁵⁵Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United Services Institute for Defence and Security Studies page 6 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf> accessed 24 April 2017.

⁵⁶Ibid.

⁵⁷ [2008] UKHL 28 [8].

⁵⁸ Peter Alldridge, 'The Limits of Confiscation' (2011) *Criminal Law Review* 827, 836.

⁵⁹ Janet Ulph, 'Confiscation Orders, Human Rights and Penal Measures' (2010) 126 *LQR* 251,

251; Ivan Lawrence, 'Draconian and Manifestly Unjust: How the Confiscation Regime Has Developed' 76 *Amicus Curiae* 22, 22.

⁶⁰*R v Smith (David Cadman)* [2011] UKHL 28 [28].

⁶¹ [2009] 1 Cr App Rep 84.

⁶² Proceeds of Crime Act 2002.

⁶³[2010] Lloyd's Rep. F.C. 462; [2010] Crim. L.R. 665 para [33].



a position to pay the fine and confiscation order, then there is no problem in paying both. The court concluded that the profits in the present case were not only *'profits derived from the contracts obtained by corruptions but the very contracts themselves.'*⁶⁴ The defendant can be asked to pay the money in full and not just the profit he benefitted from the proceeds of crime when he made it from buying and selling of shares.⁶⁵

In *R v Sale*,⁶⁶ the court relied on *R v Waya* to sort out relevance of proportionality while calculating the benefit of the defendant -

'The costs of production, in wages, equipment and materials supplied were all incurred in an entirely lawful way, albeit in performance of what was an illegally obtained contract. Those costs should properly be brought into account, and the proportionate method of doing that would be to look at the company's gross profit generated from the illegally obtained contracts.'

Abuse of Process

The application by the court to enforce primary legislation where the defendant has the right to appeal will not result into abuse of process of the court.⁶⁷ This policy is reflected in *R v Nelson, R v Pathak, R v Paulet*,⁶⁸ the court concluded that stay of proceedings would be a suitable remedy for confiscation order but when there is an argument of abuse of process then this argument cannot be based on the result of a proceedings which is in confirmation with the provisions set out in the Act to point out that the result is "oppressive". The jurisdiction must only be exercised with due caution and confined to proceedings to avoid true oppression. In other words, the power should not be used simply because the judge disagrees with the decision of the Crown to pursue confiscation,⁶⁹ it should be a well-thought out order.

In *R (On the Application of BERR) v Baden-Lowe*,⁷⁰ the director of the company pleaded guilty for an offence⁷¹ to have transferred the property of the company during its winding up by fraud. The court held that order to recover amount more than the profits of the offender in this case will not lead to abuse of process.⁷² *R v Wilkinson*,⁷³ court held

⁶⁴[2010] Lloyd's Rep. F.C. 462; [2010] Crim. L.R. 665 para [34].

⁶⁵*R (on the application of Uberoi) v City of Westminster Magistrates Court* [2008] EWHC 3191 (Admin).

⁶⁶ [2013] EWCA Crim 1306 paras [31], [57].

⁶⁷*R v Rezvi* [2002] 2 Cr App R (S) 70 para [20].

⁶⁸ [2009] EWCA Crim 1573.

⁶⁹*R v Shabir* [2008] EWCA Crim 1809.

⁷⁰ [2009] 2 Cr App Rep (S) 81.

⁷¹Section 206(1)(b) Insolvency Act 1986.

⁷²*R v Mahmood and Shahin* [2006] 1 Cr App (S) 96 CA (Crim Div); [2009] EWCA Crim 1573; Michael Stockdale, Rebecca Mitchell, 'Confiscation Orders and Abuse of Process; Discretion to Prevent "Double Whammy" under the Proceeds of Crime Act 2002' 31(2) Company Law 39, 40.

⁷³ [2009] EWCA Crim 2733 para 24; *DPP v Humphrys* [1977] AC 1.



that abuse of process has to be based on traditional principles. Hughes LJ stated-

‘This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the Judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic. A specific example of that principle is that it is clearly not sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a Defendant a sum greater than his net profit from his crime(s).’

The Court of appeal in *R. v Nield*⁷⁴ confirmed that confiscation proceedings that will result in the recovery of more than the sum embezzled are not automatically abusive.

The bottom-line is that only in exceptional cases, the courts will hold a confiscation proceedings to be as an abuse of process but courts have also identified that there is no “closed category of cases”.⁷⁵ Therefore, where

the defendant restored the amount he had benefitted from the crime to the loser, he should not be subjected to a confiscation order.⁷⁶ Otherwise, it would mean an additional financial punishment which would be disproportionate and oppressive.⁷⁷ Moreover, section 6(6)⁷⁸ converts the power of making an order into a discretionary one where the defendant’s benefit would be recovered in civil proceedings.

Effectiveness of the Act - Results in the Recent Years

Current statistics show that 5,924 confiscation orders were made (in 2014-15) as compared to 640,000 offenders who were convicted in UK.⁷⁹ The cost of administering confiscation orders in the same year was more than £100 million whereas the collection by enforcement agencies was around £155 million.⁸⁰ To make the matters worse, National Audit Office declared that there was a sum of £1.6 billion debt outstanding from confiscation orders.⁸¹ Therefore, the poor operation of the confiscation order has severely affected its effectiveness.⁸² The number above expose that not enough confiscation orders are enforced, an ideal balance would be to apply a common set

⁷⁴ EWCA Crim 993; Michael Stockdale, Rebecca Mitchell, ‘Confiscation Orders and Abuse of Process; Discretion to Prevent “Double Whammy” under the Proceeds of Crime Act 2002’ 31(2) Company Law 39, 41.

⁷⁵ *R v Didier Paulet* [2009] EWCA Crim 288.

⁷⁶ Michael Stockdale, Rebecca Mitchell, ‘Confiscation Orders and Abuse of Process; Discretion to Prevent “Double Whammy” under the Proceeds of Crime Act 2002’ 31(2) Company Law 39, 45.

⁷⁷ *R v Morgan* [2009] 1 Cr App Rep (S) 60.

⁷⁸ Proceeds of Crime 2002.

⁷⁹ National Audit Office, Confiscation Orders: Progress Review, HC 886, March 2016, page 14.

⁸⁰ National Audit Office, Confiscation Orders: Progress Review, HC 886, March 2016, page 21.

⁸¹ House of Commons, House Affairs Committee: Proceeds of Crime Fifth Report of Sessions 2016-17 HC 25 paras 74,77; National Audit Office, Confiscation Orders: Progress Review, HC 886, March 2016, page 10.

⁸² Committee of Accounts, *Confiscation Orders* (HC 2013-14, 49) HC 942 para 2.



of criteria to ensure enforcement.⁸³ Other tools that can be used - to develop a better range of cost and performance, more confiscation orders, leadership⁸⁴ and training in financial investigations.⁸⁵ Truth be told, the law is wide and strict enough to not only deter fraud but to also implicate the ones committing it. Indeed, the implementation of the provisions is an issue that needs to be dealt with but otherwise, the Act is good law in wiping out defrauds. The case of Edward Davenport is a fine example of it. Mr Davenport was declared to have a criminal lifestyle after he was convicted of fraud. The court successfully passed an order against him and recovered the confiscation amount.⁸⁶

The real question though is how correct it is to do so? To remove the convicts, these provisions are set so wide that they include almost every offender in the definition of 'criminal lifestyle'. My concern is that even the assets which are not earned through illegal means are also covered under it and such an action is not seen as abuse of process as declared in the cases mentioned above.

Conclusion

Justice demands that profits should be taken out of crime and that is the very basis of confiscation orders.⁸⁷ Part 2 of the Act does deal with issues of fraud effectively but the recent data reflects stricter appliance of the legal provisions is needed. As far as, the abuse of process is concerned, the idea of law should be to deter the offender and not confiscating all of his incomes, therefore, confiscation orders should not go beyond the benefits received.

Bibliography

Primary Sources

Table of Cases

1. DPP v Humphrys [1977] AC 1
2. Grayson and Barham v UK (2009) 48 EHRR 30; [2009] Crim LR 200
3. McIntosh v Lord Advocate [2001] 3 WLR 107, 121
4. Phillips v United Kingdom (2001) 11 BHRC 280

⁸³ Committee of Accounts, *Confiscation Orders* (HC 2013-14, 49) HC 942 paras 3, 6.

⁸⁴ Anthony Kennedy, 'An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom' (2007) Vol 10 (1) *Journal of Money Laundering Control*, 33, 35.

⁸⁵Ibid.

⁸⁶ Simon Goodley, 'Fraudster Edward Davenport Sells Mansion to Settle £13m Court Orders' *The Guardian* (20 May 2015) <<https://www.theguardian.com/uk-news/2015/may/20/fraudster-edward-davenport-sells-mansion-settle-13m-court-orders>> accessed 20 April 2017; Martin Evans, 'Fraudster Forced

to Sell Off 'Unique' London Mansion to Pay Legal Bills' *The Telegraph* (29 July 2014)

<<http://www.telegraph.co.uk/finance/property/10994001/Fraudster-forced-to-sell-off-unique-London-mansion-to-pay-legal-bills.html>> accessed 20 April 2017.

⁸⁷Secretary of State for the Home Department, *Criminal Justice System: The Way Ahead* (Cm 5074, 2001) para 3.214; Referred: Proceeds of Crime Bill (Bill 31 of 2001/02) House of Commons Library Research Paper 01/79.



- | | |
|---|--|
| <p>5. R v Agombar [2009] EWCA Crim 903</p> <p>6. R (On the Application of BERR) v Baden Lowe [2009] 2 Cr App Rep (S) 81</p> <p>7. R v Benjafield[2001] 1 AC 1099 HL</p> <p>8. R (On the application of Uberoi) v City of Westminster Magistrates Court [2008] EWHC 3191 (Admin)</p> <p>9. R v Didier Paulet [2009] EWCA Crim 288</p> <p>10. R v Green [2008] UKHL 30</p> <p>11. R v Innospec [2010] Lloyd's Rep. F.C. 462; [2010] Crim. L.R. 665</p> <p>12. R v Lazarus [2004] Cr App R (S) 98 CA; [2004] EWCA Crim 2297</p> <p>13. R v Lunnon [2004] Crim LR 678 CA</p> <p>14. R v Mahmood and Shahin [2006] 1 Cr App (S) 96 CA (Crim Div); [2009] EWCA Crim 1573</p> <p>15. R v May [2008] UKHL 28; [2008] 1AC 1028; Crown Prosecution Service v Jennings [2008] UKHL 29; [2008] 1 AC 1046.</p> <p>16. R v Morgan [2009] 1 Cr App Rep (S) 60</p> <p>17. R v Nelson [2009] EWCA Crim 1573</p> <p>18. R. v Nield EWCA Crim 993</p> <p>19. R v Pathak [2009] EWCA Crim 1573</p> <p>20. R v Paulet [2009] EWCA Crim 1573</p> <p>21. R v Rezni[2001] 1 AC 1099, HL</p> <p>22. R v Rezvi [2002] 2 Cr App R (S) 70</p> <p>23. R v Sale [2013] EWCA Crim 1306</p> | <p>24. R v Shabir [2009] 1 Cr App Rep 84</p> <p>25. R v Smith (David Cadman) [2011] UKHL 28</p> <p>26. R v Waya [2012] UKSC 51</p> <p>27. R v Wilkinson [2009] EWCA Crim 2733</p> <p>28. Stanford International Bank Ltd (In Receivership) Re, [2010] EWCA Civ 137; [2011] Ch 33</p> <p><u>Table of Legislation</u></p> <ol style="list-style-type: none"> 1. Criminal Justice Act 1988 2. Criminal Justice Act 1993 3. Drug Trafficking Act 1994 4. Drug Trafficking Offences Act 1986 5. Insolvency Act 1986 – section 206(1)(b) 6. Proceeds of Crime Act 2002 – Sections: 4 (6), 6 (2), 6 (3) (a), (b), 6 (4), (a), 8, 9, 10 (2), (3), (4), (5), (6)(a), (b), 70, 75 (2)(c), 76 (3), 79, 80, Schedule 2 <p><u>EU Legislation</u></p> <ol style="list-style-type: none"> 1. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Strasbourg 1990 2. European Convention on Human Rights 1950 3. Human Rights Act 1998 - Section 6 4. The UN Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1998 <p><u>Secondary Sources</u></p> <p><u>Parliamentary Reports</u></p> |
|---|--|



1. Committee of Accounts, *Confiscation Orders* (HC 2013-14, 49, HC 942)
2. Comptroller and Auditor General, *Confiscation Orders: Progress Review* (2015-16, HC 886)
3. Home Affairs Committee, *Proceeds of Crime* (2016-17, HC 25)
4. National Audit Office, *Confiscation Orders: Progress Review* (March 2016, HC 886)
5. Proceeds of Crime Bill (Bill 31 of 2001/02) House of Commons Library Research Paper 01/79
<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP01-79#fullreport>>
6. Peter Alldridge, 'The Moral Limits of the Crime of Money Laundering' (2001) 5 (1) *Buffalo Criminal Law Review* 279
7. Peter Alldridge, 'The Limits of Confiscation' (2011) *Criminal Law Review* 827
8. Roger Bowles, Michael Faure, Nuno Garupa, 'Forfeiture of Illegal Gain: An Economic Perspective' (2005) 25 (2) *Oxford Journal of Legal Studies* 275

Command Papers

1. Secretary of State for the Home Department, *Criminal Justice System: The Way Ahead* (Cm 5074, 2001)
2. *The Report of Commission on Profits of Crime and their Recovery*, Chaired by Sir Derek Hodgson (1984) Cambridge Studies in Criminology

Journals

1. Anthony Kennedy, 'An Evaluation of the Recovery of Criminal Proceeds in the United Kingdom' (2007) Vol 10 (1) *Journal of Money Laundering Control*, 33
2. Ivan Lawrence, 'Draconian and Manifestly Unjust: How the

Online Reports or Journals

1. Matrix Knowledge Group, *The Illicit Drug Trade in the United Kingdom* (June 2007) Home Office Online Report 20/07
<<http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs07/rdsolr2007.pdf>>
2. Helena Wood, *Enforcing Criminal Confiscation Orders* (February 2016) Royal United



Services Institute for Defence and Security Studies
 <https://rusi.org/sites/default/files/201602_op_enforcing_criminal_confiscation_orders.pdf>

Books

1. Millington T, Mark Sutherland Williams, *The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture* (OUP 2003)
2. Ulph J, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (OUP 2006)

Newspapers

1. Simon Goodley, 'Fraudster Edward Davenport Sells Mansion to Settle £13m Court Orders' *The Guardian* (20 May 2015)
 <<https://www.theguardian.com/uk-news/2015/may/20/fraudster-edward-davenport-sells-mansion-settle-13m-court-orders>>
 accessed 20 April 2017
2. Martin Evans, 'Fraudster Forced to Sell Off 'Unique' London Mansion to Pay Legal Bills' *The Telegraph* (29 July 2014)
 <<http://www.telegraph.co.uk/finance/property/10994001/Fraudster-forced-to-sell-off-unique-London-mansion-to-pay-legal-bills.html>> accessed 20 April 2017
