

Account Freezing Orders: the proceeds of crime enforcement measure making a major impact.

By Ross Dixon

Of all the new enforcement powers introduced by the Criminal Finances Act 2017, there is one which has dominated media coverage.

Although Unexplained Wealth Orders ('UWOs') have been used sparingly to challenge the source of funds used to purchase a dozen or so properties, they have attracted a lot of publicity.

But while UWOs have had the bulk of the coverage, it is another of the Act's new measures - the Account Freezing Order ('AFO') - which is arguably making the greater impact on alleged beneficiaries of economic crime.

In September last year, the Home Office Criminal Finances Team published data covering its work over the five financial years to 2018/2019.¹ The document revealed how, in the two years to April 2019, the courts granted 15 UWOs compared to 670 AFOs.

While it is true that in this period UWOs were concerned with assets of greater value than AFOs (£143m compared to £110m) the difference in the number of orders granted highlights that in practice AFOs are far more likely to be encountered by clients and their legal advisors than UWOs.

History

The Criminal Finances Act 2017 was introduced into law in April 2017 to clamp down on both economic crime and terrorist financing by building on existing powers in the Proceeds of Crime Act 2002 (POCA).

In November 2016 Ben Wallace, then Minister of State for Security and Economic Crime, set out the thinking behind the introduction of AFOs by explaining that while POCA contained provisions for the seizure of cash, "we do not have an equivalent power to take quick and effective action against funds held in bank accounts".

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831394/asset-recovery-financial-years-2014-to-2019-hosb2019.pdf

There is a gap in law enforcement agencies' powers, he told Parliament, that "we need to plug".

AFOs would make it "easier and quicker for law enforcement agencies to seize the illicit funds held by criminals who abuse the banking system to store and transfer the proceeds of their crime".

They would also "make it clear to criminals that we can take immediate and effective action against their abuse of the financial system".²

What happened?

As with most new enforcement measures, to begin with the various law enforcement agencies' adopted a cautious approach. It takes time to adjust to new legislation and there is an understandable desire to identify sure-fire winners, to proceed with caution, and to take care to avoid mishaps with early cases.

However, based on the Home Office data set referred to above (which runs until April 2019) AFOs are now being embraced as an attractive and effective measure to freeze and secure the proceeds of crime.

How do AFOs work?

As you would expect, an AFO freezes a named UK-based bank or building society account preventing any money in the account from being withdrawn. The order freezing an account can be for up to two years.

Forfeiture may follow if either an Account Forfeiture Notice is issued by the enforcement agency and no objection is taken, or the court grants a Forfeiture Order, both of which are addressed below.

AFOs are available to a broad array of enforcement agencies, as you would expect, including the police, the SFO and the NCA. But many other agencies can also apply for an order including Government departments (the Department for Work & Pensions and the Environment Agency); regulators such as the FCA, the PRA and the Food Standards

² https://www.theyworkforyou.com/psc/2016-17/Criminal_Finances_Bill/04-0_2016-11-17a.109.8

Agency; local authorities; and other agencies including the Post Office and Transport for London.

It will be interesting to see how enthusiasm for AFOs grows within this wider range of enforcement bodies, and the extent to which freezing accounts becomes the norm as part of investigations into illicit financial gain.

Application Process

The test for granting an AFO is not a high one. An applicant need only show reasonable grounds for suspecting that money held in the account is either recoverable property (property obtained through unlawful conduct), or is intended for use in unlawful conduct. The account holder does not themselves need to be under suspicion, it is the money in their account which is the focus of the application, nor does any criminal offence have to have been proved.

The application is to the Magistrates' Court – not the High Court as the case with UWOs – and can be ex parte if the court agrees that notice may prejudice the future forfeiture of the funds.

The straightforward nature of the application coupled with the low bar for granting an AFO explains the relatively large number of orders granted so far; there is every likelihood this number will increase.

Forfeiture

Once granted, the enforcement authority making the application has the length of the order to pursue its investigation. At the end of this period (or earlier), it can either accept that the test for forfeiture is not made out and apply to set aside the AFO or seek forfeiture.

Forfeiture happens in one of two ways. The first route is the simplest. The enforcement authority gives at least 30 days' notice to the subject of the AFO (and anyone else identified as being affected by the order) of the intention to enforce forfeiture. If no objection is made, the money in the account is forfeited. If there is an objection, an application can be made to the Magistrates' Court for a Forfeiture Order.

The second route is to apply directly to the Magistrates' Court. To make an order the court must be satisfied to the civil standard, that the money is recoverable property obtained through unlawful conduct, or is intended for use in unlawful conduct.

What are the choices for the recipient of an AFO?

Once served with an AFO there is no requirement on the recipient to explain the source of the funds frozen in the account and they can decide to keep their powder dry until the applicant seeks forfeiture.

Alternatively, it is possible to apply to the court to vary or set aside the AFO.

The legislation does not specify the basis for setting aside an order and we do not yet have the guidance of any domestic appellate court decisions. However, the test for setting aside the detention of cash – whether there are still grounds to suspect the cash is recoverable property or intended for use in unlawful conduct – will probably be applicable. In most cases, it is likely to be difficult to persuade a court to set aside an AFO and it may be wiser to focus resources on preparations to resist any forfeiture application made in due course.

There is a wide discretion for the Court to vary or make exclusions from an AFO, including to enable the carrying on of a trade or business, to meet reasonable living expenses, or to meet legal expenses. The power is discretionary and may be exercised by the Court at any time. However, such an application is likely to require full disclosure of financial circumstances by the applicant.

Another possible course is to negotiate with the enforcement agency for variation of an AFO by agreement.

What about those facing forfeiture?

In most AFO cases the focus of litigation will be on forfeiture and a respondent's main task will be gathering evidence to demonstrate that the monies in question were not obtained through unlawful conduct.

In addition, respondents may want to consider whether to make representations to the applicant in advance of the final determination either to persuade the agency that the application is misguided, or to negotiate an outcome.

In all such cases, respondents should pay close attention to the potential impact of their engagement in AFO litigation on any current or potential parallel criminal investigations.

The future

In September 2019 the Solicitor General Michael Ellis QC spoke of the SFO's success in using AFOs. He went on to say that "The NECC (National Economic Crime Centre) will seek to maximise the use of these powers".³

This is a clear message of intent. AFOs are a powerful new weapon in targeting the benefit of crime and have the strong backing of the government and wider law enforcement agencies.

They have already been taken up with enthusiasm and I expect the number of AFOs to continue to grow as they are increasingly deployed by a wide range of enforcement agencies. Before too long they may even be attracting the media attention that has so far been focused on UWOs.

ENDS

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³ <https://www.gov.uk/government/speeches/solicitor-generals-speech-at-cambridge-symposium-on-economic-crime-2019>