



An expanding toolbox for proceeds of crime

Andrew Katzen & Olivia Dwan analyse what the growing dominance of civil proceedings in proceeds of crime means for practitioners

IN BRIEF

- ▶ Once dominated by criminal proceedings, proceeds of crime cases are now primarily enforced using civil remedies.
- ▶ Account freezing and forfeiture orders (AFOs) have recently come to play a particularly significant role in enforcement's proceeds of crime efforts.
- ▶ Despite the relative ease with which enforcement can obtain AFOs, there is much that the holders of targeted accounts and affected third parties can do to defend their positions.

The past 25 years have seen significant changes to the way proceeds of crime law operates in England and Wales. Once dominated by criminal proceedings, this area of law is now primarily enforced using civil remedies.

The main drivers of this change are the Proceeds of Crime Act 2002 (POCA 2002) and the Criminal Finances Act 2017 (CFA 2017), both of which introduced different tools to enable enforcement agencies to make use of civil powers in these matters.

Of these two Acts, it is CFA 2017 which has most profoundly influenced the criminal-to-civil shift. Of the tools in this Act, account freezing and forfeiture orders have had a particularly strong impact.

To best represent clients in proceeds of crime matters, legal practitioners must recognise the changing nature of proceeds of crime enforcement, and ensure they are adept in the relevant aspects of both codes, with a particular focus on account freezing and forfeiture orders.

Civil powers in POCA 2002

Civil enforcement first gained prominence in proceeds of crime recovery with POCA 2002, which introduced both civil recovery orders (CROs) and cash detention orders (CDOs).

CROs enable law enforcement agencies to confiscate criminal property (including real as well as personal property) without

first achieving a criminal conviction. Enforcement need only show the relevant property is—on the balance of probabilities—'recoverable' (meaning obtained through unlawful conduct).

Here, in a nutshell, is the attraction of civil proceedings for law enforcement agencies: in order to effect recovery, they need only prove their case to the civil standard of proof, rather than the higher criminal one.

However, a major drawback with CROs is that they are exercisable only in the High Court, which has complicated procedural requirements and a sophisticated judiciary. These factors could explain the relative dearth of CROs.

CDOs allow law enforcement to seize cash it suspects was obtained through unlawful conduct or intended for use in unlawful conduct, and apply for an order detaining it for up to two years while it is investigated. The cash could ultimately be forfeited.

In contrast to CROs, CDO proceedings are to the balance of probabilities and are heard in the magistrates' court.

How did POCA 2002 impact asset recovery?

POCA 2002's impact was measured in 'The Asset Recovery Statistical Bulletin 2011–12 to 2016–17', which provides a snapshot of asset recovery activity over the five financial years from 2011–12.

The Home Office document shows how, over the five years in question, roughly 20% of recovered cash was done so using civil powers. This compares to the 80% of cash recovered using criminal proceedings (that is confiscation orders made following a criminal conviction).

The bulletin also shows how, over the five years in question, there had been a slight (and relatively steady) increase in amount of proceeds of crime recovered (from £170m recovered in 2011–12 to £201m in 2016–17).

Then came CFA 2017

15 years after POCA 2002 came CFA 2017, which introduced a range of new civil enforcement measures, the most significant of which are unexplained wealth orders (UWOs) and account freezing orders (AFOs).

UWOs require targeted individuals to explain the nature and extent of their interest in property above the value of £50,000. If no satisfactory explanation is provided, the enforcing agency can apply for a CRO in respect of the relevant property.

UWOs can only be granted by the High Court. To obtain one, the agency must show it has reasonable grounds for suspecting property was obtained through unlawful conduct. UWOs are usually preceded by interim freezing orders, to ensure that the relevant property cannot be disposed of before a final order is made.

AFOs stop withdrawals or payments from a specific bank account. They are designed to enable the authorities to investigate an account before ultimately applying for an account forfeiture order to seize suspect money.

To obtain an AFO, the enforcing agency must show a magistrates' court that it has reasonable grounds to suspect that the funds in an account were obtained through unlawful conduct or are intended for use in unlawful conduct. The court can grant an order for up to two years.

AFOs may be obtained without notice, meaning the first time an account holder realises their account has been targeted may be when their bank card stops working.

The impact of CFA 2017

In September 2022, the Home Office published an updated analysis of proceeds of crime enforcement: 'The Asset Recovery Statistical Bulletin: financial years ending 2017 to 2022' covers the six years from 2016–17.

Two things stick out in the data. The first is that in 2021–22—the most recent financial year for which data is available—proceeds of crime worth a total of £354m were recovered by law enforcement. This is over £150m more than was recovered five years prior.

The second stark difference between the two bulletins is the dramatic shift in the proportion of monies recovered using civil, as against criminal, powers.

The latest data shows a steady ramping up in the proportion (and amounts) of money recovered using civil powers over the six years in question.

In 2017–18 enforcement recovered a total of £41m using civil powers. By 2021–22 this had quadrupled to £191m.

This exponential increase in the use of civil powers created an ‘inflection point’ in 2020–21, after which (and for the first time since records began) civil powers became the dominant method of recovering the proceeds of crime.

In the financial year 2021–22, a total of £191m was recovered using civil proceedings. This compares to £154m recovered using criminal proceedings.

The former dominance of criminal proceeds in POCA 2002 matters has been overturned. We are now in a proceeds of crime environment in which civil, rather than criminal, proceedings are enforcement’s preferred means of recovery.

The rise of AFOs

When CFA 2017 passed into law, the media focused its attention on UWOs, which gained the soubriquet ‘McMafia Orders’ after a then popular television programme about Russian criminality.

But UWOs have not lived up to their promise. A parliamentary research briefing produced in April 2022 revealed that, by February of that year, only nine UWOs had been issued. These nine orders related to just four cases.

Enforcement’s lack of enthusiasm for UWOs (which is likely connected to the exacting requirements of High Court litigation) stands in stark contrast to its attitude to AFOs.

Home Office data obtained by the authors’ law firm Hickman & Rose under Freedom of Information legislation shows that enforcement issued a total of 783 AFOs in the financial year 2017–18 (the first year they became available), with each order potentially applying to more than one bank or building society account.

This figure has grown since. In 2019–20, enforcement issued a total of 893 AFOs. In 2020–21, it issued 1,215 AFOs. In 2021–22, it issued 1,066 AFOs. This year we predict the figures to be greater still.

However, just because AFOs are popular with enforcement, it does not follow that they are always effective.

The latest asset recovery bulletin shows that, in the most recent year for which data is available, law enforcement froze a total sum of £131m using AFOs. The same year’s data shows them recovering less than this: a total of £115m.

These two figures indicate the existence of a £16m disparity between the total amount of money frozen and the amount seized under account forfeiture orders, in the most recent financial year for which data is available.

It is therefore far from inevitable that someone whose accounts are frozen under an AFO will lose all the money in them.

As practitioners in this area of law, the authors of this article know from experience that it is possible to resist an AFO by challenging either the order and/or defeating any subsequent application for forfeiture.

However, anyone considering such an approach should be aware that the legal costs involved in challenging an AFO may not be recoverable, even in the event of victory. This may mean that, for some

clients, there is a delicate financial equation to consider, with the dilemma being: is it worth resisting?

Sometimes, negotiation with law enforcement may be a better and more cost-effective solution. Negotiation may result in a proportion of the frozen money being released to its owner more swiftly—and more economically—than through litigation. Clearly, these judgments are best made as much on tactical as legal considerations.

What next for proceeds of crime?

Proceeds of crime law is different now to 25 years ago. Not only is more money being recovered; but the field is dominated by civil powers in a way it wasn’t before POCA 2002 came into force.

The attraction of civil powers such as AFOs and CDOs to law enforcement should be obvious: they are an easier (and therefore cheaper) means to effect cash recovery than criminal prosecution. For this reason, we should expect enforcement agencies to make even greater use of their relatively new civil powers.

Of the new civil tools, AFOs (and the forfeiture orders which can follow them) have proved the most popular with law enforcement. We should expect enforcement’s enthusiasm for AFOs to remain undimmed.

But even as large number of AFOs continue to be issued, it is far from inevitable that someone whose account is frozen under an AFO will lose all the money in it.

There is a significant gap in amounts of money frozen, and the amounts that are eventually seized. Individuals targeted with these orders should seek expert legal advice to help them successfully navigate what can be a complex area of law.

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