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Prove It or Lose It! Part III: A Step Too Far? Account Freezing Orders & Account Forfeiture Orders

Part III of our series on asset recovery powers available to UK law enforcement authorities focuses on new powers under the Criminal Finances Act 2017 to obtain orders to freeze bank accounts and apply for forfeiture orders, permanently depriving the account holder of the funds contained in the account.

These draconian new powers have received little publicity and contain fewer safeguards than unexplained wealth orders and the civil recovery process under the Proceeds of Crime Act 2002 (POCA), discussed in Parts I and II of this series. The powers are controversial and, unlike other asset recovery powers available to UK enforcement authorities, applications are made in the magistrates' court rather than the High Court.

How Do Account Freezing Orders Work?

In summary, an account freezing order is an order, obtained from a magistrates' court in the UK by a UK enforcement officer (for example, a police constable), restricting the use of a specific bank account.

The magistrates' court is a lower, mostly criminal, court. Magistrates are volunteers without legal qualifications. They usually deal with minor offences in hearings without juries. There are around 330 magistrates' courts and just over 21,000 magistrates in the UK.

In contrast, Part 5 recovery orders must be obtained through a High Court judge, the third highest level of judge in the courts of England and Wales.

These new powers, which were incorporated into Part 5 of POCA, allow an enforcement officer to apply, without notice, to the magistrates' court for an Account Freezing Order (AFO) if the officer has reasonable grounds for suspecting that money held in the account:

a) Is recoverable property (defined in POCA Section 304 as "property obtained through unlawful conduct"), or

b) Is intended by any person for use in unlawful conduct

If successful, the AFO will prohibit the account holder (or any person for whom the account is operated) from making withdrawals or payments from the account.

As with other Part 5 POCA powers, the burden of proof is the civil standard of balance of probabilities, and the application will normally be made without notice. If convinced that there are reasonable grounds for suspecting that money held (whether wholly or partly) in the account is recoverable property or is intended by any person for use in unlawful conduct, the magistrates' court may make the order for a period of up to two years.

When making the order, the magistrates' court may apply certain exclusions to allow the account holder to meet their reasonable living expenses or for any funds the account holder may need to carry on a trade, business, profession, or occupation. Provision may also be made for reasonable legal expenses, subject to a set total. If these exceptions are not applied at the time of making the order, or are not considered sufficient to meet the reasonable living expenses of the person(s) affected, the person(s) can make an application to vary the order. They can also apply to have the order set aside.

Once an enforcement officer has obtained an AFO, they may give notice for the purpose of forfeiting the money held in the frozen account. Notice can be given at any time during the period that the freezing order is in force and will usually follow a period of investigation. The Notice must be served on the affected parties, who then have a minimum of 30 days to object (this can be extended if there is good reason). If there is no objection to the notice, then the Act stipulates that the amount of money stated in the notice is forfeited, without further reference to the Court although an "aggrieved" person can apply to have the Notice set aside.

If there is an objection, which can be made by anyone (whether a recipient of the notice or not), then the enforcement authority must, within 48 hours, formally apply to the court either to extend the original AFO or for a forfeiture order.If the latter, they will need to satisfy the magistrates that the money in question is recoverable property or is intended for use in unlawful conduct. Where there is joint ownership, and one of the owners is not a target of the proceedings, no order the magistrate makes may impact the amount the magistrate has determined is attributable to the joint owner who is not the target.

Should the enforcement authority fail to make either application within the 48-hour period, the original AFO will cease to have effect.

Any "aggrieved" party has a right to appeal the decision of the magistrates to grant (or not grant) a forfeiture order. The appealing party has 30 days to make the appeal, which will be heard by the Crown Court.

Where an account has been the subject of an AFO, but ultimately no funds are forfeited (e.g. where an appeal against a forfeiture order is successful), an application for compensation can be made where the applicant can satisfy the Crown Court not only that they have suffered a loss but also that there are exceptional circumstances. The amount of compensation awarded will be what the court considers reasonable given the loss suffered and any other relevant circumstances.

Basis for Application

To make a successful application for an AFO, the enforcement officer must be confident that there are reasonable grounds for suspecting that the funds in the account represent recoverable property or are to be used in unlawful conduct (e.g., money laundering). How they will evidence this suspicion will depend on the facts in each case; however, it is likely that a significant number of applications will be based on information that the enforcement authority has become aware of through a Suspicious Activity Report (SAR) made by a bank to the National Crime Agency (NCA) (of which there were 525,361 in the 18-month period from October 2015 to March 2017).

The trigger for a SAR is likely to be unusual activity on the account, for instance a transaction where the source of funds received into the account or the destination of the funds leaving the account are suspected to have connections with organised crime or terrorism. What amounts to suspicion was determined by the Court of Appeal in the 2006 case of *R v Da Silva*, where the court held that a person "must think that there is a possibility, which is **more than fanciful**, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts', or based upon 'reasonable grounds'" (emphasis added). This low threshold accounts, in part, for the high number of SARs made by banks' money laundering-reporting officers (MLROs).

Following the creation in 2016 of the Joint Money Laundering Intelligence Taskforce (JMLIT), a partnership between law enforcement and major UK and international banks, there is a greater ability to identify and report suspect transactions. Reported statistics indicate that between May 2016 and March 2017 the activities of the JMLIT led to the instigation of more than 1,000 bank-led investigations into customers suspected of money laundering and the identification of more than 2,000 accounts previously unknown to law enforcement, resulting in the granting of more than 40 proceeds-of-crime-related orders. Following the Anti-Corruption Summit hosted by the UK in May 2016 and as confirmed in the UK's 2016 action plan for anti-money laundering and counter-terrorist finance and the 2017-2022 Anti-Corruption Strategy, UK enforcement authorities are working with their counterparts in other jurisdictions, including the United States, to establish similar partnerships.

Often, in addition to reporting a suspicion, SARs will request consent to proceed with a transaction that is likely to have raised the suspicion. These requests for consent are referred to by the NCA as defence against money laundering (DAML) or defence against terrorist financing (DATF) requests. The Criminal Finances Act 2017 introduced a longer period, known as the moratorium period, in which the NCA had to deal with such consent requests, from a maximum of 31 days to up to over six months in certain circumstances. In that period the bank is prevented from proceeding with the transaction and is prohibited from informing the customer of the reasons it cannot proceed (as this would be a tipping off offence under POCA); the AFO would take the pressure off banks in these circumstances. However, it is more likely (as indicated by the NCA in their 2017 annual report on SARs) that enforcement authorities will use the extended moratorium period to conduct an investigation to supplement the information in the SAR to make an application for an AFO.

Daylight Robbery?

The new account freezing and forfeiture scheme copies similar schemes, for example in relation to the recovery of cash seized following the execution of a search warrant at a premises where the enforcement officer may also have found a substantial amount of illicit drugs, credit cards in various names, or other material of an apparent nefarious nature. Such applications are also dealt with in the magistrates' court. However, money in a bank account is a far cry from bundles of cash in a drug dealer's home.

Different considerations apply to identifying the source of money contained in a bank account, which will often involve extensive and complex financial information and tracing exercises resulting in lengthy and often contested hearings.

In a country where the criminal justice system is at breaking point with falling resources, including the closure of court buildings, it is hard to imagine how magistrates will fit these applications into their already full lists. In addition, magistrates' courts are rarely, if ever, a forum for the consideration of extensive and complex financial information, and there is likely to be concern about whether magistrates have the necessary experience and support to deal with such applications.

Other types of freezing orders, such as those made on an interim basis under the Unexplained Wealth Order provisions, or Property Freezing Orders made in connection with Part 5 recovery orders, can be obtained only on application to the High Court where it will be heard by experienced judges, well-equipped to deal with the complex issues that arise in such cases.

With these summary proceedings lacking in such a safeguard, there is a real risk that unusual yet legitimate banking transactions could lead to individuals as well as businesses of all kinds being deprived of access to their own money.

Resistance to and active engagement with such applications will be crucial in their early stages through to appeal in the Crown Court and the challenges beyond.

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