

# Cash Forfeiture

## Relationship between Confiscation and Cash Forfeiture

1. Often cash is seized under section 294 of the Act long before it is apparent whether or not there will be a criminal prosecution, not to mention confiscation proceedings. A question that often arises in proceeds of crime cases is what impact, if any, cash forfeiture proceedings have upon confiscation proceedings.
2. In summary, the court found that cash forfeiture proceedings do not fall within the ambit of section 6(6) of the Act and, consequently, they do *not* affect confiscation proceedings.
3. The Court of Appeal dealt with this issue on the 9th February, 2010 in the case of *R v Crisp and Berry [2010] EWCA Crim 355*. In April, 2004, Customs officers followed a van being driven by Mr. Berry and he was arrested. The van was searched and it was found to contain a large quantity of cigarettes and hand-rolling tobacco. His home was then searched and £21,089 in cash was found and detained under s.294 of the Act.
4. Later in April, 2004, Customs officers followed a car driven by Crisp, a van driven by a co-defendant Burns and a third vehicle. The vehicles drove in convoy along narrow country lanes, but the van drove off while Crisp's car continued to proceed slowly, so stopping Customs officers from keeping up with the van. Later on the same day, the van was found and searched, and Crisp was arrested. That van contained a large quantity of cigarettes. His home was searched and £82,000 in cash was detained under s.294.
5. Cash forfeiture proceedings then followed in respect of the monies seized and the money was forfeited pursuant to section 298 of the Act.
6. Both defendants were charged with, and subsequently pleaded guilty to, offences of fraudulent evasion of excise duty on tobacco. The prosecution sought a confiscation

order against each of the defendants. They alleged particular criminal benefit alone, which represented the value of the duty and VAT evaded by each defendant.

7. In the case of Mr. Berry this was £26,309.18 and in the case of Mr. Crisp this was £53,101.22. In the case of each defendant they had assets that comfortably exceeded the criminal benefit figures alleged by the prosecution.
8. The learned Judge hearing the confiscation proceedings determined that by virtue of section 6(6) of the Act he had a discretion as to whether or not to make a confiscation order in each case and, if he chose to do so, a discretion as to what amount to make it in.
9. Section 6(6) transforms the duty to make a confiscation order in subsection (5) into a power if the court believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.
10. In the case of Mr. Berry the learned Judge went on to make an order for £5,224.18, which represented the criminal benefit figure minus the cash forfeited under section 298. In the case of Mr. Crisp he made no order on the basis that the cash forfeited exceeded the criminal benefit figure alleged. The prosecution appealed the learned Judge's rulings.
11. The Court of Appeal allowed the appeal and found that the forfeiture proceedings were not "proceedings in respect of loss sustained in connection with the conduct". Rather, *the loss sustained by Customs and Excise was the evasion of excise duty and VAT on the contraband cigarettes. By applying to forfeit the cash found at each respondent's home, the Customs and Excise were not seeking to recoup any part of that loss. Either that money had nothing to do with the smuggling offences to which they pleaded guilty, or, if it did, then the money was an additional benefit from that offending.*
12. Whilst this was a clear case in which both forfeiture and confiscation were justified, there will be many cases, where there are fewer assets, in which real injustice could be caused if cash forfeiture proceedings precede the making of a confiscation order.
13. Take this simple example. A steals a car valued at £15,000 and sells it for £10,000. On the way home from the sale he is stopped by the police and they seize the money under section 294 of the Act. They subsequently pursue cash forfeiture and the money is forfeited under section 298.

14. The defendant is then convicted before the Crown Court and confiscation proceedings follow. The criminal benefit *is* (there is no discretion) £15,000. The cash is no longer part of the available amount for the purposes of the Act. However, the defendant has £15,000 equity in his property.
15. The learned Judge makes an order, as he must, in the sum of £15,000 and A is forced to sell his property. The reality is that A has been forced to pay £25,000 when, on any view, his true criminal benefit is £15,000.
16. Practitioners should generally be in a position to seek an adjournment of cash forfeiture proceedings until the end of criminal proceedings and, if applicable, confiscation proceedings in the Crown Court. This will mean that the cash seized is available to be included as part of the defendant's available amount and, it is hoped, will prevent such double-recovery occurring.

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