

## Procedure

### Transitional Provisions

1. In the case of *R v Ewierhowa* [2011] EWCA Crim 572 the Court of Appeal provided a reminder as to the proper application of the transitional provisions that paved the way for the Proceeds of Crime Act 2002 (“POCA”) to replace the “old law” (Criminal Justice Act 1988 and Drug Trafficking Act 1995).
2. For details of the transitional provisions see the Proceeds of Crime Act 2002 (Commencement No. 5, Transitional Provisions, Savings and Amendment) Order 2003 (SI 203 333).
3. The defendant had been convicted of an offence of conspiracy that straddled the 24th March, 2003, which is the date upon which POCA took effect for the purposes of all offences that took place *on or after* that date.
4. Notwithstanding the fact that no act was done in pursuance of the conspiracy until October, 2003, the CJA and *not* POCA was the appropriate regime because the conspiracy itself had commenced in January, 2003 (i.e. before the 24<sup>th</sup> March, 2003).

### Hearsay Evidence

5. An important judgment for the purposes of the admissibility of hearsay evidence in confiscation proceedings was delivered on the 4th March, 2011 in the case of *R v Clipston* [2011] EWCA Crim 446.
6. The appellant had been made the subject of a large hidden assets confiscation order in the sum of £500,000 of which only £21,383.83 was made up of known assets.
7. The Judge had justified her finding of hidden assets in this sum partly upon the hearsay evidence given by or on behalf of a co-defendant in the proceedings, admitted pursuant to section 114(1)(d) of the Criminal Justice Act 2003 (“CJA 2003”).

8. The appeal was made on two grounds:-
  - a. That the Criminal Justice Act 2003 provisions did not apply and that the applicable provisions were contained in the Civil Evidence Act 1995 (“CEA”) and that, because the application had been considered under the wrong regime, the evidence was wrongly admitted;
  - b. That, but for that wrongly admitted evidence, there was no evidence before the Judge that would have justified a finding of hidden assets and the confiscation order ought to have been restricted to the value of the known assets.
9. The circumstances in which the hearsay application was made were these. The co-defendant, whose evidence was ultimately admitted, was called to give evidence by the prosecution at the confiscation hearing for the appellant. He was reluctant to attend Court but ultimately he did and he was brought into Court to give evidence.
10. Once in Court he refused to give evidence against the appellant. He said that what he had said to the authorities had nothing to do with the appellant and that it was all to do with him, and him alone. In response to the co-defendant’s refusal to cooperate the prosecution sought to adduce his out of Court statements (in his interview) as to the appellant’s role via section 114 CJA 2003.
11. At this stage no point was taken by the appellant as to whether CJA 2003 was the appropriate regime. Instead, the thrust of the objections were directed towards the lack of credibility of the statements and the fact that the appellant would not have the opportunity to challenge his evidence through cross-examination. The Judge ruled in favour of the prosecution and the evidence was admitted.
12. The Court of Appeal found that there was nothing within the provisions of POCA to suggest that confiscation proceedings were anything other than *criminal* in nature, and that they were, in reality, an extension of the sentencing hearing.
13. For those reasons, the contention that the CEA was the applicable regime was immediately dismissed.<sup>4</sup> It was then acknowledged that if confiscation proceedings are criminal in nature then the relevant regime to consider was the CJA 2003.
14. However, it was acknowledged that a strict application of the hearsay provisions contained in the CJA 2003 would produce *formidable difficulties*.<sup>5</sup> Further, the provisions of the CJA 2003 related only to *criminal proceedings in relation to which*

*the strict rules of evidence apply.*<sup>6</sup> Confiscation proceedings were not such proceedings, for two reasons:-

- a. POCA provides that confiscation proceedings proceed upon *information* not *evidence*,<sup>7</sup> which is a deliberate choice of language made for good reason, as it is in relation to the issue of dangerousness under CJA 2003. Without the availability to the Court of *information* other than that which comes through *evidence*, the system would *grind to a halt*;
  - b. As the confiscation proceedings in reality form part of the *sentencing* process, the same latitude that is enjoyed by prosecutors and defence advocates, for the purposes of opening cases and mitigating alike, also applies to confiscation proceedings.
15. Having dealt with earlier authority on the subject of hearsay in confiscation proceedings, it was noted that to find that the strict hearsay regime imposed by CJA 2003 applied would lead to *unexpected* and *unfortunate* consequences, such as the obligation to serve hearsay notices in every case.
16. The Court concluded that hearsay evidence was admissible in confiscation proceedings but that neither the CEA or CJA 2003 were strictly applicable. Instead, at para. 64 the Court set down its own approach to be adhered to in confiscation cases involving hearsay, without seeking to be *unduly prescriptive*, as follows:-
- i) *In many instances, there will or should be no realistic issue as to the admissibility of the evidence, not least given the focus of POCA on "information".*
  - ii) *There will, however, be occasions where a hearsay statement is of importance and seriously in dispute so that admissibility is, quite properly, a live issue. If so, as it seems to us, the CJA 2003 regime, applied by analogy, will furnish the most appropriate framework for adjudicating on such issues. The vital need is for the Judge in such a situation to understand the potential for unfairness and to "borrow", as appropriate, from the available guidance in s.114(2) (together with the matters contained in s.116 of the CJA). However, when applying this regime – and especially the "interests of justice" test in s.114(1)(d) – it will be of the first importance to keep the post-conviction context in mind. There may well be room for more flexibility than in the trial context.*
  - iii) *In many more cases, the real issue will be the weight rather than the admissibility of the evidence or information in question. If so, the "checklist" contained in s.114(2) (and the matters set out in s.116) of the CJA 2003, suitably adapted to address*

*weight rather than admissibility, will here too provide a valuable (if not exhaustive) framework of reference. In any event and in every case, a Judge must of course proceed judicially, having regard to the limitations of the evidence or information under consideration (including, by way of examples, the reliability of the maker, the circumstances in which it came to be made, the reason why oral evidence cannot be given and the absence of cross-examination). Furthermore, care must invariably be taken to ensure that the defendant has a proper opportunity to be heard.*

*iv) Here, as elsewhere in the sentencing process, the Judge will need to exercise judgment. In the present context, such judgment must be exercised consistently with both the legislative intent underpinning POCA and (it goes without saying) the need for fairness to all concerned.*

## Postponement

17. On the 3rd February, 2010 the Court of Appeal gave a definitive answer to an important question of jurisdiction in the case of *R v Iqbal [2010] EWCA Crim 376*.
18. The question posed was this. Does a court have jurisdiction to make a confiscation order after the expiry of the maximum 2-year period provided for in section 14(5) of the Act, where the prosecution do not apply for a postponement beyond those two years prior to its expiry?
19. The simple answer is “no”.
20. RCPO had appealed a terminating ruling by the judge at the Bradford Crown Court who found that he had no jurisdiction to make a confiscation order in Mr. Iqbal’s case.
21. Mr. Iqbal, with three others, had pleaded guilty to a drugs conspiracy offence in January, 2006. A fifth conspirator had a trial, and was convicted. All the defendants were sentenced in June, 2006 and, at that hearing, a POCA timetable was set down for the service of the various documents pursuant to sections 16 to 18 of the Act.
22. The matter came before a Recorder (not the trial judge) in May, 2007 for a contested confiscation hearing. The learned Recorder accepted the contention, put forward on behalf of Mr. Iqbal, that the judge who had heard the fifth defendant’s trial ought to deal with his confiscation proceedings and, consequently, he adjourned the case. Orders were made in relation to each of the other defendants.

23. When the matter finally came before the trial judge, in July, 2009, he noted that the 2-year period for the purposes of section 14(5) of the Act had expired in January, 2008 and ruled that, consequently, he had no power to make a confiscation order.
24. The Court of Appeal had no hesitation in dismissing the prosecution's appeal against this ruling and stated as follows, at para. 26:-

*“26. In our view the wording of section 14 (and in particular of subsections (3) and (8)) makes it quite clear that Parliament intended to give prosecutors a longer period than the six months under the earlier legislation, but at the same time intended to make it clear that any application to extend a period of postponement had to be made before the permitted period expired.”*
25. The potential significance of this case for both prosecution and defence practitioners alike is obvious: prosecution advocates must seek to avoid the situation that arose in *Iqbal*, whilst defence practitioners must be aware of the position in law where such a situation *does* arise.

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**ONE PAPER BUILDINGS**