

Variation

Relationship Between Hidden Assets and Applications to Vary

1. Perhaps the most significant change of direction in recent years to the law relating to Certificates of Inadequacy (and, therefore, by analogy applications pursuant to section 23 of POCA) came with *Glaves v CPS* [2011] EWCA Civ 69.
2. What was previously accepted as a bar to an application for a Certificate of Inadequacy, namely the finding of hidden assets as part of the realisable property that the defendant was not prepared to identify for the purposes of such an application, has now been lifted.
3. The respondent had been made subject to a confiscation order, under the CJA 1988, in the sum of £145,000. In making that order the Court at first instance had found that the respondent had hidden assets to the value of £22,634.50, in addition to a number of defined assets. The order was to be paid within 12 months and he faced 30 months imprisonment in default.
4. Whilst the respondent had made a number of significant payments towards the order (£94,400 in total), he claimed that he was not in a position to pay the balance. The respondent applied for a Certificate of Inadequacy with a view to obtaining a reduction in the confiscation order.
5. Before the Administrative Court the appellant prosecuting authority sought to argue that the respondent's application was bound to fail, on account of the finding of hidden assets in his case. In order to support this assertion a line of supportive case law was relied upon.
6. Collins J rejected this argument, finding that there was no rule of law to the effect that a finding of hidden assets would debar an application for a Certificate of Inadequacy.
7. The appellant appealed against this ruling and invited the Court of Appeal to close the door to future applications by those whose confiscation orders were based in whole or part on a finding of hidden assets.
8. Having provided a helpful summary of the relevant principles, the Court of Appeal dismissed the appeal. Whilst the logic of the appellant's argument was

acknowledged, it was found that *the lifeblood of the law is not logic, although logic is a valuable tool, but justice*. It was acknowledged that the *inflexibility* of the rule that the appellant sought had the potential to cause *injustice*.

9. The Court did not provide any positive *encouragement* for defendants against whom there had been a finding of hidden assets. Indeed, it was stated that such a defendant *is unlikely to succeed unless the Court is satisfied that he is being candid, and an application for a certificate of inadequacy is not intended to be a means of the defendant having a second bite at the same cherry*.

10. In dismissing the appeal Toulson J seemed to sum up the prevailing attitude of the Court of Appeal, at para. 56:-

“It has been said many times that the statutory scheme for confiscating the proceeds of crime is intended to be draconian. So it is, but in administering the scheme it is right that the Courts should keep a sense of justice and proportion, bearing in mind the essential purpose of the scheme, which is not to punish a defendant a second time for conduct for which he will have been sentenced but to deprive him of the benefit of criminal conduct.”

Applications for the Reduction of the Confiscation Order - Section 23 POCA

11. On the 15th July, 2010 the Court of Appeal handed down an important judgment in the case of *R v Ward [2010] EWCA Crim 1932*. This case is of significance with respect to applications to vary confiscation orders in the Crown Court pursuant to section 23 of POCA.

12. Where a defendant or a receiver apply to the Crown Court for a variation of a confiscation order the court must calculate the “available amount” as defined in section 9 of POCA. However, in doing so the court must calculate that sum for the date on which the application is heard,² and *not* look retrospectively to the date on which the order was made (for that would represent an appeal).

13. If, as a result of that calculation the court finds that the available amount is inadequate for the payment of any sum due under the confiscation order then the court *may* vary the order by substituting for the amount required to be paid such smaller amount *as the court believes is just*.

14. In coming to a decision as to whether to vary the order the court *must disregard* any inadequacy which it believes is attributable (wholly or partly) to anything done by the

defendant for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation.

15. In *Ward* the defendant had been made the subject of a confiscation order in the sum of £287,398.42 at Leeds Crown Court on the 16th October 2007, as a result of his conviction for money laundering offences. The defendant sought to appeal that confiscation order and this appeal was dismissed on the 11th December, 2008.
16. The defendant then made an application to vary the order pursuant to section 23 of the Act. This was heard on the 26th June, 2009, on which date the same judge that had heard the confiscation proceedings dismissed the defendant's application.
17. As a result of feeling aggrieved at that decision the defendant sought leave to appeal it. The Full Court had first to consider the question of leave and, as a preliminary point, whether the court in fact had jurisdiction to hear the appeal.
18. Their Lordships looked to the statute books and found as follows, at para. 9:-

"9. The defence rights of appeal are contained in the Criminal Appeal Act 1968. By section 9 of that Act, a defendant may appeal to this court against any sentence, whether passed on his conviction or in subsequent proceedings. By section 50 of the 1968 Act, it is provided that "sentence" in relation to an offence includes any order made by the court when dealing with an offender, including in particular:

"... (ca) a confiscation order under Part II of the Proceeds of Crime Act 2002 (cb) an order which varies a confiscation order made under Part II of the Proceeds of Crime Act 2002 if the varying order is made under section 21, 22 or 29 of that Act but not otherwise."

For the sake of completeness we note that section 50(1) goes on to include in its definition of sentence:

"a confiscation order under Drug Trafficking Act 1994 other than one made by the High Court, a confiscation order under Part VI of the Criminal Justice Act 1988 and an order varying a confiscation order made under either of the last two mentioned statutes, as well as an order made by the Crown Court varying the confiscation order made by the High Court by virtue of section 19 of the Act of 1994."

19. Their Lordships consequently dismissed the appeal on the basis that they had no jurisdiction to hear it whilst observing that the appeal had no factual merit in any event.
20. In light of the fact that decisions made at first instance on such applications *could* be appealed under the old law the terms of section 50(1)(cb) of the Act are perplexing.

21. Indeed, there will often be no material difference, insofar as the *impact* upon defendants is concerned, between the of the Crown Court's exercise of the discretion provided in section 22, and that provided in section 23. By way of example consider the following two scenarios:-

Scenario 1

22. A is made subject to an order for £10,000 with a default term of 12 months and 6 months to pay. The available amount, in which sum the order was made, was made up of his equity in a single property.
23. After 8 months A manages to sell the property. However, in light of a downturn in the property market he is left in negative equity. Within that 8 months A has not acquired any other assets and, as such, the available amount is nil.
24. He applies to the Crown Court under section 23 for a variation of the confiscation order. The judge finds that the available amount is, indeed, nil but also finds that because A did not sell the property *immediately* after the making of the order he will only reduce the order to £8,000, an amount which he finds to be *just* for the purposes of section 23.
25. A has no right of appeal.

Scenario B

26. B is made subject to an order for £2,000 with a default term of 6 months and 6 months to pay. The criminal benefit is calculated at £10,000. The available amount, in which sum the order was made, was made up of his equity in a single property.
27. B has not yet sold the house after 8 months and the prosecution lawyer reads an article in the Sun, which suggests that property prices have risen considerably in the last 8 months.
28. The prosecutor makes an application under section 22 of POCA in order to increase the confiscation order up to the value of the criminal benefit. The judge hearing the application finds that the available amount is now in excess of £10,000 and, consequently, that it is *just* to increase the confiscation order to £10,000. He also increases the default term to 12 months.
29. Supposing B's property is not, in fact, worth any more and his equity is still £2,000, A and B are both left in the position that they face a 12-month default term without any

prospect of paying off their orders, as a result of what might be considered a harsh application of the law by the respective judges hearing their applications.

30. As a practitioner the *instinct* would be that you must appeal in both scenarios. However, according to the law as it currently stands there is no right to appeal in A's case but there is in B's case. Can that possibly have been the intention of Parliament?
31. It remains to be seen whether this anomaly will be corrected. However, in the meantime practitioners would be wise to bear *Ward* in mind when negotiating over confiscation orders.
32. When dealing with the valuation of assets Prosecutors and Financial Investigators often use the argument "*you can always come back under section 23 if the asset doesn't realise as much as we expect it to*".
33. Defence practitioners can now legitimately bring the attention of the Crown and the Court to the case of *Ward* and indicate that whilst there is a right to appeal determinations under section 22, there is none in relation to section 23.
34. This *may* in future provide some support, assuming proper defence valuations have been obtained, for erring on the side of the defendant for the purposes of valuing his assets in confiscation proceedings.

Applications for Certificates of Increase Under the DTA

35. On the 10th November, 2010, in *Re: P* (2010) EWHC 3740 (Admin), the High Court dealt with the following question: can a prosecuting authority reapply to the court for a certificate to increase the realisable assets of a defendant to take into account *legitimate* earnings which they had earned after they had served their sentence?
36. The appellant appealed against a certificate increasing the amount of his realisable assets available to pay a confiscation order. The appellant had been convicted of drugs offences and a confiscation order made for the amount of benefit he had received from drug trafficking. His realisable assets were identified as being considerably less, and that sum was paid over. After his release from prison several years later he acquired considerable, legitimate, assets. The Crown obtained a certificate of increase from the High Court, which then enabled it to apply for an increase in the sum to be recovered under the confiscation order in the Crown Court.
37. The issue on appeal was whether under s.16 of the Drug Trafficking Act 1994 the High Court had jurisdiction to grant a certificate of increase in realisable assets by

reference to after-acquired assets. The appellant argued that s.16(2) was unclear and pointed away from after-acquired assets.

38. The court dismissed the appeal, and found that the court was bound by the decision in *R. v Tivnan (Michael)* [1999] 1 Cr. App. R. (S.) 92, which led the court to conclude that s.16 applied to assets lawfully acquired post-conviction. In any event, s.16(2) did not point away from after-acquired assets; it clearly looked to the amount that could be realised at the date of the application under that section.
39. There were no words of limitation in relation to assets that the court could take into account for the purpose of considering whether the amount that might be realised was greater than the amount taken into account when making the confiscation order. The court found that though POCA contained some clearer provisions on the point it did not undermine the conclusion in *Tivnan*.

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