

Confiscation contrasts – England v Scotland

By David Winch, October 2008

The approach taken to confiscation in ‘criminal lifestyle’ cases by prosecutors in England and in Scotland is fundamentally different – even where both sets of prosecutors are proceeding under identically worded legislation.

The Proceeds of Crime Act 2002 (PoCA 2002) applies in confiscation cases where all of the relevant offences were committed after 23 March 2003. Part 3 of PoCA 2002 applies in Scotland and Part 2 in England and Wales.

The wording of Parts 2 and 3 of PoCA 2002 are, for the most part, very similar. One might therefore expect that, in similar circumstances, the outcome of confiscation proceedings based on the same facts would be much the same North and South of the Border. Such an expectation would be misplaced!

Differences in legislation

Although Part 2 and Part 3 of PoCA 2002 are very similar in wording there are some significant differences.

In Scotland the court cannot proceed to confiscation without a request from the prosecutor. Not so in England and Wales.

Perhaps more significantly, section 98 PoCA 2002 in Scotland provides some protection for the family home. There is no equivalent protection in England and Wales.

Differences in practice

With regard to the ‘benefit’ to be taken into account in confiscation, identical wording is to be found in sections 76(7), England and Wales, and 143(7), Scotland, “If a person benefits from conduct his benefit is the value of the property obtained”. But the approach to the evaluation of ‘benefit’ in ‘criminal lifestyle’ cases is quite different North and South of the Border.

There may be a historical reason for this. Under earlier legislation and case law Scottish courts were obliged, before making the ‘criminal lifestyle’ assumptions, to consider whether there existed a significant discrepancy “between the property and expenditure of the accused on the one hand and his known sources of [legitimate] income on the other” ***HMA v McIntosh [2001] UKPC D1.***

In England and Wales no such precondition has been recognised in case law. Rather the approach has been to apply the 'criminal lifestyle' assumptions where the defendant has one or more convictions which satisfy the statutory criteria, now found in sections 75 and 142, and to place the burden on the defendant to rebut the assumptions insofar as he is able to do so.

But there has been a very important practical consequence of this difference.

The Scottish schedules

Scottish prosecutors, in order to demonstrate the required significant discrepancy will typically prepare schedules showing, year by year, the legitimate income and known expenditure, assets (at their purchase cost) and liabilities of the accused. That expenditure will include undocumented estimated day to day living expenditure based on national statistics of household expenditure. These schedules may well reveal the existence of expenditures and acquisitions of assets which are incompatible with the legitimate income and borrowings of the accused. In this way the required 'significant discrepancy' can be demonstrated.

It is not surprising that, having carried out a complex accountancy exercise to establish the discrepancy, Scottish prosecutors will use this exercise as a basis for their calculation of 'benefit'. However the focus of the exercise is on the expenditure of the accused, not his receipts, and the cost of the assets he holds, not their current market value.

The English approach

In England and Wales there is a history of case law which militates against the use of complex accountancy exercises to determine 'benefit'. An early example of this case law is to be found in **R v Banks [1996] EWCA Crim 1655**, "It seems to us that the section is deliberately worded so as to avoid the necessity . . . of having to carry out an accountancy exercise".

Consequently English prosecutors do not prepare schedules such as those prepared by a Scottish prosecutor. Instead they will rely upon an examination of the defendant's bankings plus his documented cash expenditures and the current market value of the assets which he holds, in determining his 'benefit' under the 'criminal lifestyle' assumptions. Added to this will be the 'benefit' of the particular offence(s) of which the defendant has been convicted (often not explicitly recognised in a Scottish computation). This approach closely follows the wording of the statutory 'criminal lifestyle' assumptions in sections 10 and 96. The English approach places very little emphasis on the defendant's expenditure.

In consequence, the 'benefit' asserted by an English prosecutor in a 'criminal lifestyle' case may be different from, and often very much greater than, that found by his Scottish counterpart.

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