

Asset Forfeiture in Bermuda



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Definition of Confiscation

- n. a legal seizure without compensation by a government or other public authority usually as a penalty
- Application under
 - Proceeds of Crime Act 1997



Definition of Forfeiture

- n. loss of property due to a violation of law
- Legal Application under
 - Misuse of Drugs Act 1972
 - Proceeds of Crime Act 1997



What Circumstances Permit Section 9 POCA 1997 Confiscation

Drug Trafficking – 9 (1)

Where a defendant appears before the Supreme Court to be sentenced for one or more drug trafficking offences, the court shall proceed under this section

- (a) on the application of the DPP, or
 - (b) of its own motion where it considers it appropriate to do so.
- (2) The court shall first determine whether the defendant has benefited from drug trafficking.
- (3) For the purposes of this Act, a person has benefited from drug trafficking if he has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another person.



What Circumstances Permit Section 9 POCA 1997 Confiscation

- (4) If the court determines that he has so benefited, it shall, before sentencing or otherwise dealing with him in respect of the offence or (as the case may be) any of the offences concerned, make a confiscation order and determine in accordance with section 15 the amount to be recovered in his case under the order.
- (5) The court shall then, in respect of the offence or offences concerned—
 - (a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and
 - (b) take into account the confiscation order before
 - (i) imposing any fine on him;
 - (ii) making any other order involving any payment by him; and
 - (iii) making any order under section 37 of the Misuse of Drugs Act 1972 [*title 11 item 4*] (forfeiture); but
 - (c) subject to paragraph (b), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant.



What Circumstances Permit Section 10 POCA 1997 Confiscation Relevant Offences - 10(1)

Where a defendant appears before the Supreme Court to be sentenced for one or more relevant offences, the court shall proceed under this section

- (a) on the application of the Attorney-General, or
- (b) of its own motion where it considers it appropriate to do so.

(2) The court shall first determine whether the defendant has benefited from

- (a) the offence or offences for which he is to be sentenced ("the principal offence"),
- (b) any other relevant offence of which he was convicted in the same proceedings as the principal offence, and
- (c) any relevant offences which the court will be taking into consideration in determining his sentence for the principal offence.



What Circumstances Permit Section 10 POCA 1997 Confiscation

(3) For the purposes of this Act

(a) a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of any property so obtained; and

(b) if he derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated as if he had obtained instead a sum of money equal to the value of the pecuniary advantage.

(4) If the court determines that the defendant has benefited from the offences mentioned in subsection (2), it shall, before sentencing or otherwise dealing with him in respect of the principal offence, make a confiscation order and determine in accordance with section 15 the amount to be recovered in his case under the order.



What Circumstances Permit Section 10 POCA 1997 Confiscation

- (5) The court shall then in respect of the principal offence—
 - (a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and
 - (b) take into account the confiscation order before
 - (i) imposing any fine on him, or
 - (ii) making any other order involving any payment by him; but
 - (c) subject to paragraph (b), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant.



What Circumstances Permit Section 37 MDA 1972 Forfeiture

- 1) A court may (whether or not any person has been convicted of such offence) order to be forfeited to the Crown
 - (a) any money or thing (other than premises, a ship exceeding two hundred and fifty gross tons or an aircraft) which has been used in the commission of or in connection with an offence under this Act; and
 - (b) any money or other property received or possessed by any person as the result or product of an offence under this Act.



Purpose of Confiscation

- Deprive persons of the financial benefit received as a result of drug trafficking
- Deprive persons of the benefit obtained as a result of serious offences.



Purpose of Forfeiture

- Deprive persons of property they allowed to be used in the trafficking of drugs – known as instrumentalities;
- Deprive persons of property obtained as a result of the commission of drug trafficking offences.



Standard of Proof – Civil Standard (MDA Forfeiture)

- Balance of Probabilities
 - “the burden of proof is on the Crown and ...the test is the balance of probabilities...It is not necessary for me to find a direct connection.”

-Dennis Mitchell
Puisne Judge



Standard of Proof – Civil Standard (POCA Confiscation)

- Statutorily Provided
- Practice Direction has deemed the procedure “quasi – criminal.



Examples of items forfeited

- Section 37(1)(a) MDA
 - Seizure e.g. where a vehicle which drugs are being transported in it must be proved to the standard and it must avoid affecting any third party being affected.



Examples of items forfeited

- Section 37(1)(b) MDA
 - Where money is seized with drugs and the money test positive for traces of drugs on it and a person convicted of possession with intent to supply.



Protection of Third Party Rights

- Section 16 POCA
 - (1) Where an application is made for a confiscation order, a person who asserts an interest in realisable property may apply to the court, before the confiscation order is made, for an order under subsection (2).
 - (2) If a person applies to the court for an order under this subsection in respect of his interest in realisable property and the court is satisfied—
 - (a) that he was not in any way involved in the defendant's criminal conduct; and
 - (b) that he acquired the interest—
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was involved in or was the proceeds of criminal conduct,
- the court shall make an order declaring the nature, extent and value (as at the time the order is made) of his interest.



Protection of Third Party Rights

Third parties contemplated here are innocent as in the Civil concept of “Bona fide purchaser for value” without notice. Best Practice to notify all third parties of proceedings prior to confiscation.



Protection of Third Party Rights

- Section 16 only provides guidance and not detailed provisions;
- Imposes duty on the Courts;
- But is primarily in Applicant's (Crown) interest to ensure correctness of every step up to the grant of the Order.



Mode of Confiscation Application

- Application forms part of Sentence procedure after conviction it must be made in writing and filed as part of submissions i.e.
 - Notice of Application;
 - Supported by Affidavit with summary of relevant evidence if convicted after trial; or
 - Supported by Summary of Evidence tendered to Court where there was a plea of guilty;



What Happens Upon Making of Order?

- Court decision should be written;
- Formal Order signed by the Supreme Court Judge.
- The Defendant is given a period of time to satisfy the order; and a default period of imprisonment is ordered consecutive to any period of imprisonment being served.



Confiscation v. Forfeiture

- Confiscation
 - Pros:
 - Works whether or not property belongs to person convicted but we can establish connection with offence having regard to third party
 - The Assumptions
 - Can confiscate the value of assets for 6 years prior to the date of the offence.



Confiscation v. Forfeiture

- Confiscation
 - Cons:
 - Lengthy hearings
 - Enforcement Difficulties
 - Supreme Court Only
 - timelines



Forfeiture v. Confiscation

- Forfeiture

- Pros:

- Occur in any Court jurisdiction Simpler mode of application
 - No time limit under section 37;
 - Works well for less complicated and lower value property making this cost effective



Forfeiture v. Confiscation

- Works well for trafficking offences of low quantities of drugs
 - i.e. useful for 32 grams of marijuana as not triable in Supreme Court and no indication of long-term dealing
- Can be used where there is no conviction
- Works whether or not property belongs to person convicted but we can establish connection with offence having regard to third party



Questions?

