



The Bar Council

## Law Reform Essay Competition 2023: Runner-up

### **'Frozen Assets, Thawed Reforms: An argument to have AFrOs and AFOs transferred to the High Court in complex cases' by Nathan Thompson**

In March 2021, City of London Police (COLP) were successful in recovering €34 million from Du Toit & Co LLP and Xiperias Ltd.<sup>1</sup> Unlike a standard criminal investigation undertaken by a police force this case did not include a protracted criminal trial, neither were confiscation proceedings undertaken at the Crown Court. Instead, COLP utilised civil Account Freezing Orders (AFrOs) and Account Forfeiture Orders (AFOs) at Westminster Magistrates' Court.

This is not an isolated incident, the use of AFrOs and subsequent AFOs have been steadily utilised by law enforcement and in 2022-2023, represented £97.2 million in recovered assets compared to £179 million in criminal confiscation. Indeed, in 2021-2022, use of AFOs in the recovery of criminal assets accumulated to £191 million in recovered assets, in stark contrast to £151 million in criminal confiscation, outpacing the latter for the first time.<sup>2</sup> They denote an easier (and cheaper) method of recovering criminal assets and the majority of cases will be uncomplicated and proceed unhindered.<sup>3</sup>

However, for those applications which involve complex questions of law, including third-party rights and international enforcement, the Proceeds of Crime Act 2002 (POCA) unfairly expects the Magistrates' Court (MC) to adjudicate on matters outside their realm of speciality. POCA has not developed this area of civil law to parallel with the established Civil Procedure Rules (CPR) adequately, creating issue for the transfer of complex civil cases to the High Court (HC). Consequently, there

---

<sup>1</sup> City of London Police, 'International city businesses hand over €34m proceeds of crime in the UK's largest account forfeiture' (*CityofLondon.police.uk*, 22 October 2021), <[International city businesses hand over €34m proceeds of crime in the UK's largest account forfeiture | City of London Police](#)> accessed 9 August 2023

<sup>2</sup> Home Office, 'Asset recovery statistical bulletin: financial years ending 2017 to 2022' (*Gov.uk*, 7 September 2023) <[Asset recovery statistical bulletin: financial years ending 2018 to 2023 - GOV.UK \(www.gov.uk\)](#)> accessed 28 September 2023

<sup>3</sup> Andrew Katzen & Olivia Dwan, 'An expanding toolbox for proceeds of crime' [2023] NLJ 13

remains a lacuna in the law where a minority of complex cases are heard in a venue which does not necessarily have the expertise to hear it. This essay will argue that statutory amendment of POCA is required to provide a legislative avenue for AFrO and AFO proceedings to be transferred to the HC when complex issues arise, to allow them to receive an enhanced level of judicial treatment.

## The legal landscape

AFrOs and AFOs represent the latest addition to the plethora of non-conviction based asset recovery instruments ('Civil Regime') contained in Part 5 POCA (as introduced by s.16 Criminal Finances Act 2017) and supplemented by The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017.<sup>4</sup> These instruments were included alongside the Unexplained Wealth Order and aimed to 'make the UK a hostile environment for those seeking to move, hide and use the proceeds of crime and corruption.'<sup>5</sup> They are undoubtedly modelled on the cash seizure and forfeiture provisions in POCA.<sup>6</sup> Unfortunately, the legislation is relatively new and therefore the reported judgements to the appellate courts are few.

Unlike its Part 2 POCA ('Criminal Regime') cousin, confiscation, Part 5 requires does not require a conviction and can be undertaken by an 'enforcement officer', which translates to either His Majesty's Revenue and Customs (HMRC), The Serious Fraud Office (SFO), police constables or accredited financial investigators,<sup>7</sup> under the authorisation of a 'senior officer'.<sup>8</sup> The authorised officer has the power to apply to the MC to freeze a bank or building society account which is believed 'on the balance of probabilities' to either be recoverable property, or used in unlawful conduct for the 'minimum amount' (£1,000).<sup>9</sup> Property is recoverable if it was obtained through 'unlawful conduct',<sup>10</sup> which itself is defined as anything unlawful occurring in the United Kingdom (UK) or if outside the UK unlawful in that jurisdiction; used for unlawful conduct; or a gross human right abuse.<sup>11</sup>

Once an AFrO has been obtained, the officer may issue an 'account forfeiture notice' giving 30 days to the respondent to prepare to make representations to the

---

<sup>4</sup> 2017/1297

<sup>5</sup> Hansard HC vol 621 col 975 (21 February 2017), Rt Hon. Ben Wallace MP

<sup>6</sup> POCA, s.248, s.297A, s.298

<sup>7</sup> POCA, s.303Z1(6)

<sup>8</sup> POCA, s.303Z2(2)

<sup>9</sup> POCA, s. 303Z1(1), s.303Z8(1)

<sup>10</sup> POCA, s.304(1)

<sup>11</sup> POCA, s.241, 241A

MC.<sup>12</sup> Though, if there is an implication that the matter will be contested, then a notice will not likely be sent and a hearing would be listed. If the court is satisfied on the balance of probabilities that the account represents ‘recoverable property;’ used for unlawful conduct; or a gross human rights abuse, then the amount may be forfeited to the enforcement authority making the AFO within two years.<sup>13</sup>

### **The issues/risks**

Bank accounts have become a necessity for today’s society, from the payment of wages to the retention of multi-million pound client accounts. However, a problem lies in their versatility. It is not uncommon for accounts to have third-parties associated with it, such as in a trust with the potential to possess thousands of beneficial owners, and possibly only one legal owner. If the legal owner is suspected of ‘unlawful conduct’ and AFrOs and AFO are applied to their accounts, this undoubtably will affect the beneficiaries, leading the MC to potentially have to determine an application facing multiple trust issues which would generally be reserved for a court of higher jurisdiction. *R (on the application of NCA) v Westminster Magistrate’s Court* represents the levels of complexity faced by such applications. The case concerned a Russian businessman with beneficial interests in companies which were frozen under an AFrO; it was found by the HC that the District Judge (DJ) deciding a variation application had erred in the law and not applied the correct test upon the application put before them.<sup>14</sup>

There is a limited right in respect of an AFrO which allows for an interested party to make representations when affected by the order. Nevertheless, this right is narrow.<sup>15</sup> There is also a right to compensation only awarded to an applicant when ‘the circumstances are exceptional;’<sup>16</sup> what is exceptional is unknown and tends to suggest compensation is rarely awarded. Again, an equitable interest is not recognised by an AFO, merely giving other legal owners a right to be heard and for the court to make its own determination.<sup>17</sup> Third-party rights can be protected hypothetically though s.308 POCA which protects a party who receives goods for value, without notice and in good faith, akin to ‘equity’s darling.’ In contrast, under the Criminal Regime third-parties who hold an interest in any form of property can be adjoined to confiscation proceedings to make representations.<sup>18</sup> One must ask what the position will be in the future when an AFrO or AFO undoubtedly affects the rights of those holding a third-party interest on a large scale. In the case of Du

---

<sup>12</sup> POCA, s.303Z9

<sup>13</sup> POCA, s.303Z14, s.303Z3(4)

<sup>14</sup> EWHC 2631 (Admin) [72]

<sup>15</sup> POCA, s.303Z4

<sup>16</sup> POCA, s.303Z18(3)

<sup>17</sup> POCA, s.303Z14(5)

<sup>18</sup> POCA, s.10A

Toit and Xiperias it was contended that the frozen funds were supplied by third-parties and constituted unlawful conduct; however, what if one customer provided legitimate funds and their money was frozen or forfeited as the proceeds of crime? What if a conveyancing solicitors firm has their account frozen and third-parties face financial penalties for not completing, how will the MC respond? Equitable problems require equitable solutions, would the MC seek to apply a quasi-*Quistclose* trust to protect legitimate funds once paid?<sup>19</sup> Would the police spare the innocent and provide compensation to them, despite having no real legislative provision for this? These questions post a very real problem that the MC will be expected to address, especially as the scope and use of AFrOs and AFOs grow. Alternatively, these cases could be transferred to the HC, which currently has a mechanism to hear and decide upon third-party rights. In *NCA v Robb & Clarke* the court applied s.281 POCA to allow those holding a proprietary interest in property to be compensated.<sup>20</sup> This provides an equitable remedy for those caught up in the actions of others and aims to prevent the MC from becoming overwhelmed. Interestingly, there are provisions in listed asset proceedings to have the matter transferred to the High Court when property exceeds £10,000.<sup>21</sup> This is solely based on value, and while this essay takes value as a consideration for transfer, it does not deem it the sole factor. Nonetheless, listed asset provisions serve as an example as to how the MC could adopt similar provisions for AFrOs and AFOs, as the concept is not completely alien to them.

The complex third-party rights issues faced by AFrOs and AFOs are similar to problems encountered by a POCA predecessor, the Police (Property) Act 1897 (P(P)A), in which assets connected to an investigation could be seized and forfeited by police.<sup>22</sup> In *O'Leary International Ltd v Chief Constable of North Wales*, the HC considered it to be a possibility that a police force could be sued for the Tort of Conversion,<sup>23</sup> (conversion being: 'a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession').<sup>24</sup> It is a prevalent risk in AFrO and AFO proceedings that conversion could occur should a third-party right not be appreciated, something which the current legislation does not allow for. In respects to the P(P)A it was held that the appropriate venue for such claims involving issues over ownership should be the civil courts.<sup>25</sup> It is submitted that in complex AFrO and AFO cases the correct civil court to hear these issues are the HC. In *Raymond Lyons & Co v Commissioner of the Police for the Metropolis*, Lord Widgery CJ cautioned against the use of the P(P)A when there is 'a real issue of law

---

<sup>19</sup> *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567

<sup>20</sup> [2014] EWHC 4384

<sup>21</sup> POCA, s. 303R

<sup>22</sup> P(P)A, s.1

<sup>23</sup> [2012] EWHC 1516 (Admin)

<sup>24</sup> *Fouldes v Willoughby* (1841) 8 M&W 540

<sup>25</sup> *Raymond Lyons & Co v Commissioner of the Police for the Metropolis* [1975] QB 321

or any real difficulty in determining whether a particular person is or is not the owner<sup>26</sup>. Unless statutory amendment of POCA for AFrOs and AFOs occurs, there is a real probability the MC could experience the same difficulties in determining third-party rights as the P(P)A did. In one instance, a claimant who held a beneficial interest in a bank account which was utilised to withdraw funds to solicit murder, was denied a claim to £10,000. On judicial review the order was quashed, and it was noted by Kay J that the jurisdiction of the MC has its limits, and is not always the appropriate venue to hear a claim involving complex civil issues on ownership.<sup>27</sup> The similarities of AFrOs, AFOs and the P(P)A are striking, the only material difference being the assets in question. It is submitted that the common law principles applied to the P(P)A lend credence to the idea that a statutory avenue to reach the HC is adopted by POCA.

Legal complexity is only set to rise in these applications. In *DPP v Briedis* the court determined that ‘cryptocurrency, as cryptoassets’ now form ‘property’ and therefore are recoverable.<sup>28</sup> Indeed, the Economic Crime and Corporate Transparency Bill will now include the freezing and forfeiture of cryptocurrency mirroring almost identical provisions to AFrOs and AFOs.<sup>29</sup> Issues will inevitably arise in legal ownership, which has been aforementioned. Additionally, the incoming crypto legislation will face jurisdictional issues in enforcing orders due to the often unknown and international nature of cryptocurrency; a problem similarly faced by AFrOs and AFOs. This essay shall consider the European position as an example; primarily because the Asset Recovery Statistical Bulletin shows cooperation with Europe on asset recovery was higher than any other region.<sup>30</sup> Currently, there is no provision for an international letter of request (ILOR) in AFrO and AFO proceedings under the Trade and Cooperation Agreement (TACA), or the Council of Europe’s European Convention on Mutual Assistance in Criminal Matters 1959. The latter provides that any form of mutual legal assistance must be conducted from one ‘Ministry of Justice’ to another.<sup>31</sup> As such, police requests are not applicable and therefore, ILORs are unavailable. Many financial institutions such as Bitcoin UK are registered overseas (Bitcoin UK’s registered office is situated in the Netherlands), making any order unenforceable. Additionally, it is interesting to note that the Home Office has released guidance to foreign jurisdictions stating requests for non-conviction based asset recovery cannot be actioned by law enforcement entities.<sup>32</sup> Such a publication would suggest that the situation is mirrored across the globe.

---

<sup>26</sup> Ibid, [326]

<sup>27</sup> *R v Ipswich Magistrates’ Court ex p. Carter* [2002] EWHC 332, [6]

<sup>28</sup> [2021] EWHC 3155, [10]

<sup>29</sup> Economic Crime and Corporate Transparency Bill, Sch. 7

<sup>30</sup> Home Office, ‘Asset recovery statistical bulletin.’ accessed 28 September 2023

<sup>31</sup> Council of Europe, Council of Europe Convention on Mutual Assistance in Criminal Matters 1959, 20 April 1959, ETS No. 30, Art. 15

<sup>32</sup> Home Office, ‘Request for Mutual Legal Assistance in Criminal Matters’ (*Gov.uk*, March 2022) <[MLA guidelines for foreign authorities - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/request-for-mutual-legal-assistance-in-criminal-matters)> accessed 30 August 2023

S.375A and 375B POCA does allow for requests for evidence to be made for AFRo and AFO investigations; however, the statute remains silent on enforcing such orders. There are also provisions for service of court documents abroad (not for the enforcement of orders).<sup>33</sup> The implication is that only UK accounts can be acted upon by law enforcement. It would suggest Parliament has considered the international element; however, have omitted framework to allow orders to be enforced. Furthermore, the Crime (International Co-operation) Act 2003 would not appear to be available due the civil nature of AFRos and AFOs. The only possible avenue to the Europe is through the TACA which recognises the civil courts position on non-conviction based asset recovery;<sup>34</sup> however, it remains to be seen whether the MC (in civil proceedings) would be categorised as a civil court under TACA, whilst the High Court is an already established civil court. Conversely, s.74 and 282F POCA currently provide the ability for confiscation and civil recovery proceedings to request mutual legal assistance through an ILOR. There exists no such avenue in the MC, and intrinsically such cases would be transferred to the HC to allow an ILOR to be made when necessary.

Practical reasons also play a part in the unsuitability of the MC to hear complex cases. Rachel Barnes and Ryan Dowding have noted that ‘over-listing’ and lack of court time have made it an improper venue to hear complex applications.<sup>35</sup> Indeed, the Criminal Regime established that when a case involves complexity, a specialised judge must preside over a Restraint Order;<sup>36</sup> arguably this should be applied across POCA, and would be remedied by a mechanism to allow the proceedings to be transferred.

## **The solution**

This essay has alluded to a practical solution to the issues which have been raised. Amendment of POCA for the creation of a statutory route to transfer a case from the MC to the HC to receive the reasonable judicial standard of scrutiny when complex issues arise providing ‘important safeguards’ ensuring issues are not diluted.<sup>37</sup> Not only would this serve to provide greater equity in proceedings involving third-party, or beneficial interest complications, it would also assist in resolving the issues of ILORs. There is existing precedent for such applications amongst civil proceedings. The County Court can exercise its power under s.42 County Courts Act 1984 (CCA) when it deems it appropriate, providing a statutory

---

<sup>33</sup> The Magistrates’ Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017/1297, rule 14

<sup>34</sup> Trade and Cooperation Agreement, 30 December 2020, CP 426 UKTS No. 8, Art. 665(6)

<sup>35</sup> Rachel Barnes & Ryan Dowding, ‘Account freezing orders: Part 1 - an introduction’ (2020), 1, Arch. Rev., 6

<sup>36</sup> *Barnes v Eastenders Cash and Carry* [2015] AC 1, [118]

<sup>37</sup> Colin King & Jennifer Hendry, *Civil Recovery of Criminal Property* (OUP 2023) 197

avenue to allow for the transfer of proceedings to the HC. This is further supplemented by Rule 30 CPR. To enable the court to be satisfied the proceedings are fit for the HC it must consider the nature of the proceedings, its complexity, and the value of the claim.<sup>38</sup> A form of statutory provision to allow the MC when hearing civil AFrO and AFO applications to apply similar considerations under the CCA would provide a greater equitable basis for this emerging law on these applications, when complexity becomes an issue. This would allow the MC to hear the majority of cases where there are no complex issues in play, so not to overwhelm the HC, but to provide a relief to magistrates or DJs who are expected to hear applications outside their expertise. The determination as to whether the MC or HC hears the case would be made by the MC DJ or magistrate, once they are in possession of all the facts and not by request of the parties.

Furthermore, aside from the civil provisions under POCA the MC also hears certain family law cases. Within this field the MC has the authority under The Allocation and Transfer of Proceedings Order 2008 to transfer family proceedings from the MC to the County Court. Much like the CCA, the court can exercise this power when there could be novel or difficult points of law, the MC is unable to enforce an order as it is beyond their powers, or for any other good reason.<sup>39</sup> Therefore, it is evident that the mechanisms for transferring complex cases are currently in place within the MC, specifically for family proceedings, meaning this would not be an alien concept to the court.

As the matter is merely a transfer, the safeguards in *Perinpanathan* still apply protecting the applicant from costs unless they should act unreasonably.<sup>40</sup> With a transfer to the HC, parties would also make benefit from a rigorous civil disclosure system, allowing applications to run concisely without the late addition of documents delaying proceedings.<sup>41</sup>

Practitioners may conclude that if the case is complicated and fitting for the High Court why not pursue Part 5 POCA civil recovery proceedings? Firstly, police forces are not a qualified 'enforcement authority' and are unable to begin civil recovery proceedings.<sup>42</sup> Additionally, referral to an 'enforcement authority' would take time that may not be available in cases where an expeditious AFrO is needed to prevent the dissipation of assets. It must be noted that Parliament has legislated to allow AFrOs and AFOs to be primarily in the realm of police forces; therefore, it would not be reasonable to hamstring police forces and force them to abandon the powers the legislature has conveyed upon them. There are policy concerns which also follow this reasoning. Police forces seeking civil recovery 'to be safe' when any

---

<sup>38</sup> Courts and Legal Services Act 1990, s. 1(3)(a-e)

<sup>39</sup> The Allocation and Transfer of Proceedings Order 2008, 2008/2836, art. 15

<sup>40</sup> *R. (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40

<sup>41</sup> Civil Procedure Rules, rule 31.21

<sup>42</sup> POCA, s. 316(1)

issue arises, discounting the AFrO and AFO route, would undoubtedly overwhelm the HC with applications via the enforcement authority, or in turn would overwhelm the enforcement authority reviewing the applications.

## **Conclusion**

AFrOs and AFOs remain an expeditious and qualified tool to allow law enforcement agencies to confiscate criminal assets. Their use saves time for prosecuting authorities to bring confiscation proceedings; they save time for the Crown Court hearing applications; and ultimately, they save the public purse. However, there remains a minority of cases where complex questions of law, third-party interests, and international enforcement issues arise; in those marginal cases the MC must be free to transfer proceedings to the HC to seek the appropriate judicial oversight to make a qualified determination in the case. It is not equitable for any of the parties involved in these proceedings to have them decided in the current format. This essay has proposed that a statutory mechanism like the CCA for civil proceedings, should be amended within POCA to allow a transfer to the HC when such complex issues arise. This would represent a desirable, practical, and useful change within the law.

Word count: 2,986