

A Guide to Confiscation and the Proceeds of Crime Act 2002

HEALTH & SAFETY

Confiscating the financial benefits of crime from individuals and organisations convicted of certain types of criminal offences is an increasingly used strategy by regulatory authorities, particular the Environment Agency and Trading Standards.

The purpose of confiscation proceedings is to deprive those who have benefitted financially from their criminal conduct. Confiscation Orders made will ordinarily require a specified sum of money to be repaid, a sum which is referred to as the "criminal benefit" figure, which can be up to the total value of the individual or organisation's fixed and liquid assets, a value which is defined as the "available amount".

In the past, confiscation was reserved for those involved in money laundering, fraud and drug-related offences. However, confiscation proceedings are routinely commenced against those convicted of committing environmental crimes and breaching consumer protection legislation where the individuals involved have benefitted financially either through the money that they have received, or taxes and fees that have been avoided.

Illegal waste operators and those selling counterfeit clothing, electrical equipment, fashion accessories, alcohol and cigarettes are examples of those individuals and organisations who, once convicted, are more commonly the subject of confiscation proceedings.

We set out below some answers to common questions about confiscation proceedings and the way in which Courts approach how to value, in financial terms, the benefit from offending that has been made.

What are confiscation proceedings?

Confiscation proceedings is the procedure by which the Court will assess the amount that an individual or organisation has benefitted in financial terms from their unlawful conduct and how much, in fixed and liquid assets, they have - although such assets are not limited to just those assets acquired from the proceeds of crime.

The questions that the Court asks itself are;

- Has the Defendant (individual or organisation) benefitted from their criminal conduct?
- If yes, what is the financial value of the criminal benefit that has been obtained?
- What sum is recoverable from the individual or organisation, taking into account their fixed and liquid assets?

Confiscation proceedings most commonly start immediately following the individual or organisation's conviction. The first step is that the prosecuting authority serves a schedule, accompanied by a Court Order, requiring the individual or organisation to confirm and disclose the location, extent and nature of their assets, including assets held jointly.

This will include money held in bank accounts and other investment type-funds, private and commercially-held property, cash, jewellery, motor vehicles and commercial assets such as vehicles, plant and equipment.

Then, once the individual or organisation has provided details of the nature, location and extent of their assets, which collectively will be defined as the "available amount" that could potentially be confiscated, the prosecuting authority will set out in a document the specific financial gain in monetary terms that the individual or organisation is suspected of benefitting from their criminal conduct, the criminal benefit figure.

In the same document, the prosecuting authority will also set out the total value of the individual or organisation's assets that is available to the Court to confiscate.

Also, if the individual or organisation has been convicted of certain offences or an offence took place over more than six months, it is possible that the provisions known as "criminal lifestyle" provisions will apply. In such circumstances, the presumption is that all of the fixed and liquid assets owned by the individual or organisation are deemed to have arisen as a result of criminal conduct, and the burden is placed on the individual or organisation to prove that one or more particular assets were acquired from funds other than those gained from criminal activity.

The individual or organisation then has the opportunity of disputing the amount of financial gain arising from their criminal conduct and/or the prosecuting authorities' valuation(s) of the various fixed and liquid assets that have been disclosed.

Except in very exceptional circumstances, the Court will look to confiscate the total amount of the criminal benefit figure up to the total value of the available amount. Essentially, all of the assets of an individual or organisation could be confiscated if the criminal benefit figure is equal to or more than the value of such assets.

Once the Court has determined the recoverable amount figure, a Confiscation Order will be made requiring the individual or defendant to pay the recoverable amount figure in full within six months. Whilst the Court has discretion to extend the time for payment by a maximum of six months (i.e. a total of 12 months from the date that the Confiscation Order is made), if the Confiscation Order is not satisfied within the time specified by the Court, an immediate, mandatory, custodial sentence is imposed on the individual.

How is criminal benefit defined?

What is regarded as "benefit" can often be a matter of debate. However, generally speaking, it is the income and revenue generated and those taxes and fees avoided by the unlawful, criminal activity that the individual or organisation have been found guilty of committing.

Overheads, expenses and wages paid to employees are generally not taken into account and deducted by prosecuting authorities. By way of example, if a person convicted of being an illegal waste operator received £100 to dispose of waste in an unlawful manner and incurred expenses or overheads amounting to £50, the Court would usually treat the criminal benefit figure to be £100 not including the amount of any tipping fees and landfill tax that may have been avoided, rather than the £50 net profit equivalent figure.

How is the available amount calculated?

The available amount is calculated by simply adding up the individual or organisation's fixed and liquid assets. In the case of private or commercial property, prosecuting authorities often obtain formal valuations from a surveyor and, in respect of vehicles, plant and equipment, similar valuations are obtained.

What if all of my assets are tied up in property?

The Court can appoint a Receiver to ensure the private or commercial property is sold and sufficient funds are released equal to the individual or organisation's interest in that property.

What if I have sold or given away property or assets prior to conviction?

The Court has the power to set aside any sales or transactions which are proven to have been at an under value where essentially property and assets are sold for less than the market value.

Also, cash and other assets given away can be recovered from the recipient.

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