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## SPOTLIGHT ON.....defending Confiscation Orders

Once your client has been convicted of a financial or drugs related crime, they are highly likely to face a confiscation order to recover the proceeds of crime and confiscate assets funded from criminal activity. If the Defendant is considered to have a criminal lifestyle the Court has an obligation to assume that any income, assets, gifts or spending that cannot be demonstrated to be legitimately funded must have derived from criminal activity. The onus is on the Defendant to provide sufficient evidence to rebut these assumptions. We highlight below some practical guidance for reviewing Prosecutor's s16 Statements, and in particular relating to the review of bank statements, to check that the assessment of the benefit of criminal activity is not overstated by the Prosecution.

### Identification of the Benefit of Criminal Activity from a review of bank accounts

A major part of the assessment of the benefit of criminal activity in a Prosecutor's Statement is often derived from a review of transactions on the Defendant's bank accounts. It is not uncommon for the Prosecutor's Statement to treat all deposits into the Defendant's bank accounts which cannot immediately be traced to a legitimate source as 'Unidentified Income' and, therefore, by assumption, to be the benefit of criminal activity. We set out below some key issues to look for when reviewing the Prosecutor's Statement which, in our experience, commonly result in the Prosecutor's assessment of the benefit derived from criminal activity being overstated.

#### 1. Is it actually income?

Just because a transaction appears on the 'deposits' side of the bank statement does not necessarily mean that it is income. Examples include:

- Refunds of debit card purchases
- Bounced cheques (see 2 below)
- Corrections of bank errors
- Transfers (see 3 below)

#### 2. Bounced cheques received

Where a cheque is received from an unknown source and is deposited into the Defendant's bank this will commonly be treated as 'unidentified income' by the Prosecutor. If the cheque is returned unpaid (i.e. it bounces) and therefore the money is not received by the Defendant, this can often be missed. For example we have seen an instance where a £30,000 cheque was re-presented and returned unpaid three times. The Defendant ultimately received no funds, however the Prosecutor's Statement included all three attempts to bank the cheque and, therefore, included unidentified income of £90,000 that simply did not exist.

### 3. Transfers between accounts

In our experience it is not uncommon for the Prosecutor's Statements to review one bank account at a time and to fail to identify instances where funds have been transferred from one of the Defendant's bank accounts to another. This can particularly be the case where the transfer is by way of a cheque drawn on one account paid into a second account and, therefore, there is no specific cross reference between the accounts on the face of the bank statements. Accounts should be reviewed in parallel with each other to identify such transfers.

### 4. Combined figures in one bank statement transaction

Bank statement narrative can be quite cryptic and is often of little help in identifying the nature of transactions. It is also common for a deposit containing several items (for example a number of cheques plus a cash deposit) to appear as one entry on a bank statement. We see the Prosecution including as 'unidentified income' many such items where the nature of the deposit is not readily apparent on the face of the bank statement. Thorough review of such entries is essential, including obtaining full details of the items received, to establish whether all or part of the deposit can be explained as deriving from a legitimate source. By way of example, one Defendant had rental income from two properties paid to him by cheque from the local Council amounting to £252 and £260 per week respectively. The Prosecutor accepted that the rental was a legitimate source of income but then treated regular weekly deposits of £512 or fortnightly deposits of £1,024 as unidentified income, not recognising that it was the combined banking of the two or more legitimate rental cheques.

### 5. Payments out of a bank account

We have reviewed a number of Prosecutor's Statements that have included some payments out of the Defendant's bank accounts to fund living costs or fund purchase of household goods etc. as being 'expenditure' under the assumption at s10(4) POCA 2002. If, however, the Prosecutor has reviewed all income into the account and identified all unidentified and possibly criminal funds, to also include payments made out of those funds as part of the benefit of criminal activity will represent a double counting of the benefit.

### 6. Indexation and inflation

In calculating a Defendant's benefit of criminal activity it is becoming increasingly common for the Prosecution to inflate the value of unidentified bank deposits to account for the changes in the value of money between the date of receipt and the date of the s16 statement. In our experience these inflation calculations can often contain significant errors and the methodology used can be inappropriate. Careful review of this calculation therefore is always advised. In one case we reviewed, the 'Benefit of Criminal Activity' was overstated by more than £500,000 due to errors in calculating the inflation on bank deposits.

### 7. Overview

In addition to reviewing on a transaction by transaction basis it is often worthwhile taking a step back and checking the overall picture presented by the assessment of the Defendant's 'Benefit of Criminal Activity' by comparing known legitimate sources of income, the 'Benefit' assessed by the Prosecutor and the Defendant's actual lifestyle and expenditure. We have identified a number of instances where, whilst the Defendant has been living somewhat beyond their legitimate means, the lifestyle is not lavish and the level of Benefit assessed by the Prosecutor appears significantly in excess of any assessment of the resources actually available to the Defendant or built up as assets. In such cases a detailed review (as noted at points 1 to 6 above) has often resulted in a reduction in the benefit assessed. Conversely, if such a review identifies that the 'Benefit' assessed does accord with the Defendant's lifestyle, assets and spending, and no alternative legitimate source can be readily identified then this may reduce the need to review or challenge the Prosecutor's Statement on a transaction by transaction basis.

### Conclusion

The assessment of the Benefit of Criminal Activity in Prosecutor's Statements will assume that banking transactions and assets are the benefit of criminal activity unless it is readily apparent that this is not the case. The burden of proof is left on the Defendant to provide evidence of legitimate sources of income and legitimate funding of assets. The above examples serve to highlight the need for careful review of Prosecutor's Statements for errors, misunderstandings and duplications as well as looking at the overall finances of the Defendant.

**If you consider that you might require assistance in any Confiscation Order matter, then please do not hesitate to contact Peter Whittam, Jackie Clifford or Nick Fail, who will be more than happy to discuss matters on a no obligation basis.**

