

Test for an Account Forfeiture Orders – The final test.

Introduction

1. There are two ways for a forfeiture to be ordered, in the same way there are two ways for a cash forfeiture to go ahead. First, a notice of forfeiture can be served and not challenged. This is the administrative method is set out in section 303Z9 of POCA. I will deal with that in a later article.
2. The second method is for there to be a contested hearing. At that hearing the court will have to consider whether or not the money is recoverable property or if it is intended for use in unlawful conduct under section 303Z14. In this article I will discuss the case law around this. This case law comes from cash forfeiture cases but the test is the same.

Law

3. These are civil proceedings, though they are not governed by the CPR. The Respondent is not on trial, the proceedings are *in rem*, and hearsay evidence is admissible. The burden is on the Applicant (to prove the criteria asset out in s.303Z14 as confirmed in *Muneka v Customs and Excise Commissioners* [2005] EWHC 495 (Admin). The standard of proof to be applied is the balance of probabilities. This is not a sliding scale; there is no gloss to be put on the statute as set out in *Re: He and Chen* (Admin).
4. In *Angus v UKBA* [2011] EWHC 461 (Admin), the High Court considered how what a court needed to find if they were to find that the property was recoverable. At paragraph 29 the Court stated that:

“Applying the provisions of section 242 (2) (b) of the Act... in a case of cash forfeiture, a customs officer does have to show that the property seized was obtained through conduct of one of a number of kinds each of which would have been unlawful conduct.”

5. The effect of this decision is that in order to prove its case the Applicant must prove on the balance of probabilities that the money is subject to the order was obtained through conduct of one of a number of kinds. It is not necessary to link the money to any specific instance of unlawful conduct. Thus, the court must enquire into the origin of the cash and its intended purpose.
6. Inferences may be drawn to prove the kind or kinds of unlawful conduct from which the cash has been obtained. In the court gave guidance as to the significant of lies and inferences. *Muneka* was a case that concerned an appellant who was stopped at Heathrow with £22,760 in cash in his possession while on his way to Albania via Hungary.

7. Lies may well establish that the source of the cash is criminal activity. Moses J stated at paragraph 12 that:

“Lies in the context of issues may well establish that the course of the money is criminal activity. Nowhere was that better put, if I may say so, than in the short judgement of Sedley J in Nevin [unreported 3/11/95], where he said:

While the prescribed civil standards of proof would not, of course, allow the Justice to act without satisfactory evidence on the intended use of the money, they are not required to direct a jury in a criminal trial. That is not to say that they should overlook the possibility that lies may have the purpose of concealing something other than the misconduct presently alleged. But a suspect who gives an account of his reasons for carrying the money which the justices reject as untruthful cannot complain in the justices go on to infer from other relevant evidence that by itself might not have been enough to satisfy them that the true reason was for the use of drug trafficking.

Those comments apply with added force in the context of a case where it is not necessary to identify any criminal activity such as drug trafficking: all that has to be identified is that the source was criminal activity or the indented destination was for criminal activity. A lie in that context may well entitle the fact-finding body to infer what the source was criminal activity of the indented designation was for criminal activity. A lie in that context may well entitle the fact-finding body to infer what the source or intention for which the cash was to be used was in reality on the balance of probabilities.”

8. Later in the Judgement, Moses J dealt with inferences in the following part of the Judgement, where he stated:

“In my Judgment, in this context the fact that there was no explanation for the source of that money, no reasonable explanation as to why he was taking that cash to Albania, the fact that there were discrepancies in this explanations as to the source of the money and as to its final designation, taken together, did establish, both source and intention. On the balance of probabilities.

9. This case followed the precedence set in *Butt v Customs and Excise* [2001] EWHC 1066 (Admin), a case decided under section 43 of the Drug Trafficking Act 1994, where the court found that there was no need for direct evidence of a connection to drugs for the purposes of discharging the burden of proof.
10. In *Weise v UKBA* [2012] EWHC 2019 (Admin), the High Court confirmed that it was permissible to argue that cash had been obtained by or in return for money laundering and it was necessary to identify a predicated offence. Underhill J stated that where money laundering was advanced as the type of kind of crime from which the cash has

been obtained, a court making such a finding should spell out their decision in the following manner:

“54. I would only say that I can envisage a case in which his finding [money laundering] could have been, if spelt out, that the appellant had “obtained the cash if question”, that is these particular used notes, “in order to conceal, disguise, convert, transfer or remove”, those being the key verbs, “property representing his or some other person’s benefit from criminal conduct”, and that that would be so even if the benefit was his own so that this was a case of laundering his own money. In those circumstances I would see no real difficulty in saying that he would obtain the cash “by the act of money laundering.”

11. In *NCA v Namil* [2014] EWCA Civ 411, Males J summarised the case laws in respect of how the Court should approach inferences in the context of money laundering and concluded that if a transaction looks like money laundering and a respondent should be in a position to explain it, but does not do so, then it probably is money laundering:

“49 Putting this in crude terms, and not forgetting SOCA’s burden of proof, if a transaction looks like money laundering and has not been satisfactorily explained by a defendant who ought to be in a position to explain it if there is an innocent explanation, that is probably what it is.

12. As Civil Recovery cases are also Part 5 cases, the above reasoning is of general application to Account Forfeiture Orders (‘AFO’s’), Cash Forfeitures, Asset Seizures and Civil Recoveries. Thus, if the transactions looks like money laundering but has not been satisfactorily explained, the case law suggest it probably is money laundering.
13. A cash forfeiture may also be successful where the Court is satisfied that someone intended to use the cash for unlawful conduct in circumstances where the Court cannot be satisfied that the origins of the cash was particular type of kind of crime but can be satisfied that it was not from some undefinable unlawful conduct as set out in *Fletcher v Chief Constable of Leicester Constabulary* [2013] EWHC 3357.

Effect of this law on AFO

14. The above case law will frame the arguments over AFO’s. The majority of AFO’s will be linked to either money laundering regulation or money laundering. This means that *Namil* will have to be examined in details. What is a satisfactory explanation will have to be particularly examined, as will the type level that money laundering needs to be identified under *Angus*.
15. It might also be argued that there should be a distinction between cash and money held in an account. Money held in an account is under much more scrutiny, subject to clear regulation, and is the normal way that money is held in contrast to cash, which as highlighted by J Sullivan in *Green*, is not normally held in large quantities by innocent people. How the courts deal with this distinction will be interesting.