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A Tale of Two Orders

Rupert Bowers QC and Daniel Godden writing on the recent case of *NCA v. Simkus and Ghulam and Jardine*

The recent judgment of the High Court in *The National Crime Agency v. Simkus and Ghulam and Jardine* [2016] EWHC 255 (Admin) will be of interest to lawyers who deal with restraint orders, disclosure orders, and in the civil regime of recovery of the proceeds of crime.

Part 5 of the Proceeds of Crime Act 2002 ("POCA") relates to civil recovery and enables the relevant agency to recover property obtained as a result of unlawful conduct.

A Property Freezing Order ("PFO") can be obtained both before and after the commencement of civil recovery proceedings.

An application for a PFO may be made *ex parte*. A factor which justifies the application for a PFO is that there is a risk that recoverable property will be dissipated prior to the conclusion of any recovery proceedings. The same may be said in relation to restraint orders in the criminal regime. If an application is made *ex parte* the applicant owes a duty of candour to the court, and must disclose anything which militates against the making of the order.

Mr Simkus had been through the criminal process and had pleaded guilty to a conspiracy to defraud. However, whilst the indictment alleged that the conspiracy spanned a period over six months, Mr Simkus' involvement was for a period of just a few weeks. The Crown failed at a Newton hearing to prove a longer period of involvement and agreed a basis for sentence.

The consequence of the fact that conspiracy to defraud is not an offence listed in sch.2 of POCA, and that Mr Simkus' participation in the conspiracy was for less than six months, meant that the statutory assumptions in s.10 of POCA could not be made.

It was for this reason that the Crown did not pursue confiscation proceedings, not even for the amount that Mr Simkus admitted was his particular benefit from the crime he had admitted. Instead, the Crown reported the matter to the National Crime Agency (NCA) so that it could pursue civil recovery proceedings.

Whilst Mr Simkus was still restrained in the criminal proceedings the NCA applied for and obtained a PFO *ex parte* on the papers. However, the NCA failed to make proper disclosure to the Court, leaving it open to Jay J who made the PFO to believe that the *Newton* hearing went in favour of the Crown.

Mr Simkus put forward two arguments in support of his application to discharge the PFO:

(i) The PFO should be discharged on the basis that it amounted to re-litigation of matters determined in the Crown Court and therefore, was an abuse.

(ii) That there had been material non-disclosure by the NCA in respect of the failure to mention the fact that the *Newton* hearing had been resolved in Mr Simkus' favour.

The first argument was ultimately rejected, but it is important to note that the NCA's submission that the Pt.2 regime for confiscation in the criminal courts and the Pt.5 regime were so different that an abuse of process could never exist in this situation. In particular, Edis J left open whether there could be an abuse of process if confiscation proceedings under Pt.2 were initiated and concluded, and then civil recovery proceedings under Pt.5 were then instituted concerning exactly the same assets.

In relation to the second argument, Edis J held that the NCA had failed in its duty of candour. This was clearly material non-disclosure and something of which Mr Simkus would have informed the Court had he been present at the application.

The second part of the case in relation to Mr Ghulam and Mr Jardine and others concerned Disclosure Orders ("DO"). A DO is an order which may be made if the Judge is satisfied that the requirements under s.358 of POCA 2002 are met, namely:

(2) There must be reasonable grounds for suspecting that:

a. in the case of a confiscation investigation, the person specified in the application for the order has benefited from his criminal conduct;
b. in the case of a civil recovery investigation, the property specified in the application for the order is recoverable property or associated property.

(3) There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.

(4) There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

Section 357 provides that:
(4) A disclosure order is an order authorising the Director to give to any person the Director considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following:

a. answer questions, either at a time specified in the notice or at once, at a place so specified;
b. provide information specified in the notice, by a time and in a manner so specified;
c. produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

(5) Relevant information is information (whether or not contained in a document) which the Director considers to be relevant to the investigation.

(6) A person is not bound to comply with a requirement imposed by a notice given under a disclosure order unless evidence of authority to give the notice is produced to him.

Messrs Ghulam and Jardine advanced two arguments. The first was that an applicant for a DO should submit evidence in support of the application yet commonly, it did not serve the evidence on the person affected by the order. Instead it had become common practice that the NCA would seek an order from the court which permitted them not to serve the evidence that was put before the Judge which resulted in the DO being granted on the basis of operational sensitivity (effectively PII).

Edis J held that it is inappropriate for such provisions to be routinely placed within a DO application and that the "fundamental rule is that a party is entitled to know the evidence against them". Edis J maintained that it would be a "wholly exceptional" course of action for a Judge to permit the evidence which had been served in *ex parte* proceedings which had led to the granting of the order not to be served on the person affected.

The second argument was that the DO was invalid in relation to its breadth in that it allowed the NCA to question the target to determine what recoverable property they may currently hold, or may have held, rather than being limited to simply investigating the whereabouts of ascertained property which was the purpose of the statutory section. This interpretation was rejected by Edis J.

The final argument which affected all of the applicants, and for which the case is noteworthy, related to the procedure that had been adopted in relation to the applications for the orders.

The argument was that whilst it was not inappropriate for applications to be made on an *ex parte* basis it should be the position that a hearing should always be held so the application could be properly scrutinised. It was also submitted that reasons should always be given for granting an order.

Edis J rejected the submission that a hearing should always be required, stating that he anticipated that most applications for both PFOs and DOs would continue to be dealt with *ex parte* on the papers but that both the applicant and the Judge should give careful consideration, particularly in a case where there is complex documentation, about requesting a hearing. Reasons should always be given for granting an order, but a failure to do so did not, without more, justify setting the order aside.

Summary

1. In applications for both PFOs and DOs both the applicant and the Judge should give careful consideration to whether a hearing should be held. Whilst many applications will continue to be dealt with ex parte on the papers it should not be assumed that this was always, particularly in complex cases.
2. There was a duty on the Judge to give reasons, but a failure to give reasons would not itself justify the order being set aside.
3. Regarding PFOs, if confiscation proceedings under Part 2 of POCA had been instituted in respect of certain assets, and that application had failed, then in certain limited cases it may be an abuse of process for the enforcement authority to issue civil recovery proceedings in relation to those same assets.
4. A failure to abide by the duty of candour would not necessarily lead to a discharge of the PFO or the DO.
5. In relation to DOs, the enforcement authority was entitled to apply for such an order to find out what recoverable property the person affected may currently hold, or may have held, and was not limited to investigating the whereabouts of ascertained recoverable property.
6. The subject of a DO was entitled to be served with the evidence which was relied upon by the applicant. It would be a "wholly exceptional" course for an applicant to be able to seek an order which would allow it not to serve the evidence upon which it had relied.

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