FITTING A PURPOSE, OR FIT FOR PURPOSE? *With the increasing burden and complexity of account freezing and forfeiture proceedings in the Magistrates' Court, has the legislation bitten off more than it can chew?*

In *Director of ARA v Creaven* [2006] 1 W.L.R. 622, the High Court classified civil recovery proceedings, which are analogous to account forfeiture proceedings, as being neither in personam nor in rem but sui generis, "*a statutory creation of a special kind*". In light of this, as the statutory creation evolves and expert evidence is increasingly required, the nature of the beast – and the procedural rules governing it – are increasingly amorphous.

Background

Part 5 of the Proceeds of Crime Act 2002 ['the PCA'] creates two distinct schemes. Chapter 2 of Part 5 concerns Civil Recovery proceedings in the High Court; these are governed by the Civil Procedure Rules ['CivPR'] as are their appeals. Chapter 3 (including 3A-3E) of Part 5 of the PCA concerns summary proceedings.

Chapter 3B of Part 5 of the PCA increased the power of the Magistrates' Court to forfeit cash, and cash equivalents; since 31 January 2018 this has included freezing and forfeiture of balances held in bank accounts exceeding the "*minimum amount*" of just £1,000. These are civil proceedings that are actions concerning the funds, not the respondent, as an individual or an entity. In essence, relevant enforcement officers may apply to a Magistrates' Court for an account freezing order ['AFO'] over some or all of the credit balance in the account where there are reasonable grounds to suspect that all or part of the money in it is recoverable property or is intended by any person for use in unlawful conduct. The AFO can be made without notice if notice of the application would prejudice the taking of any steps to later forfeit monies. Thereafter, the Magistrates' Court may order forfeiture if it is satisfied that the money is recoverable property, or it is intended for use in unlawful conduct.

An account forfeiture order will not create a criminal record (although the forum may cause clients to fear otherwise), and the burden and standard of proof is the civil standard. Nevertheless, the CivPR do not apply to these proceedings because of the venues for determining them (being the Magistrates' Court, and the Crown Court in the event of an appeal).

One of the features of the original cash forfeiture scheme under the Drug Trafficking Act 1994 was that only cash seized at borders valued at £10,000 or more and which was shown to be connected to drug trafficking could be forfeited. £10,000 is also the threshold for civil recovery in the High Court. Parliamentary debate prior to the expansion of the PCA to include the balances held in bank accounts emphasised the need for quick and effective action against funds held in bank accounts because of the use made by criminals of the banking system.

The reality is that the summary scheme is not being used for the forfeiture of money held in a bank or building society account in excess of £1,000 and below £10,000, but instead often very substantial sums. Increasingly, in circumstances where the money can be detained for up to two years pending a forfeiture application, the already over-stretched and over-burdened Magistrates' Court examines investigations spanning years, and contested litigation over multiple days with significant administrative and time burdens. In an example which is by no means unique, *SFO v Miranda* (Case No. 012001321955, 17th March 2023) was heard at Westminster Magistrates' Court by a District Judge over five days, and resulted in a 50 page decision being handed down. It concerned in excess of $8,000,000. The initial freezing applications were made approximately 30 months before the forfeiture hearing. This is not the 'quick' process Parliament intended, nor are the rules for evidence clear-cut.

Applicable Procedural Rules

For the purposes of efficient disposal of account freezing and forfeiture applications, it is disappointing that neither the CivPR nor the Criminal Procedure Rules ['CrPR'] apply to them. Although The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017 ['the 2017 Rules'] essentially mirror the similar Rules for cash detention and forfeiture under Chapter 3 of Part 5 of the PCA, in our experience they are not fit to deal with the increasingly complex aspects of litigating the freezing and recovery of often very substantial credit balances.

By CrPR 3.1, it is made clear that it is the CrPR which apply to "*the management of each case in a magistrates' court and in the Crown Court (including an appeal to the Crown Court) until the conclusion of that case*". CrPR 3.2 notes that the court must further the overriding objective by actively managing the case, and under 3.2(2)(e) this includes "*ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way*".

Under the CivPR, pre-action protocols mean that much of a party's case is known before the matter is pleaded, enabling simultaneous exchange of evidence. That is not so in this type of summary proceedings: in reality it is necessary for one party's case to be served, with the other party responding – and in our experience the Magistrates' Courts have generally moved away from fixed directions, predicated on simultaneous exchange, on the misguided notion that civil in nature was the same as civil in operation.

Interestingly, in *R. (on the application of Mileage Reclaim Ltd (t/a Taxbuddi)) v North Somerset Magistrates Court* [2024] EWHC 1531 (Admin) the Administrative Court accepted a submission that so far as reasonably practicable, the listing guidance of Rule 5.12.14 of Criminal Practice Direction 2023 in relation to restraint orders in the Crown Court should be applied by analogy so that applications for the variation and discharge of AFOs should similarly be treated as urgent and listed expeditiously in order to avoid potential prejudice. This may indicate a sensible direction of travel to import aspects of the CivPR and CrPR into AFOs and forfeiture orders.

Where does this leave experts?

In a scheme designed to capture credit balances of relatively small sums, it is unsurprising that there were no specific rules for expert evidence at its inception.

Practitioners should remember that the provisions of s.305 (tracing property, etc), s.306 (mixing property) and s.307 (recoverable property: accruing profits) all apply to applications for account freezing and forfeiture orders. Accordingly, each of these sections may have an impact on whether a court or enforcement officer can properly consider that money is or may be recoverable property within the meaning of the statutory criteria for account freezing in s.303Z3 and for forfeiture in s.303Z9 and 303Z14, as well as having specific and particular relevance in terms of expert accounting evidence. Other expert evidence is increasingly necessary given sophisticated systems of laundering, the global nature of banking, and the modern business reasons for moving money speedily.

The 2017 Rules, however, contain no provision for expert evidence. The Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 do not apply as they are clear that they only apply "*where a magistrates' court proceeds to summary trial in respect of an alleged offence*" and clearly that is not the case with these recovery proceedings. Expert evidence would, of course, be admissible under s.3 of the Civil Evidence Act 1972, but practitioners are faced with a lacuna procedurally. Pragmatically, and functionally, the CrPR provides the more complete solution, although there is a logical tension between following the CrPR in relation to evidence admissible under the Civil Evidence Act.

As law enforcement continues to seek to disrupt rather than prosecute suspected money laundering, consideration of more robust procedural rules in this area would ensure that the scheme is fit for the purpose it now serves.